DOCKET

No. 08-205
Title: Citizens United, Appellant
v.
Federal Election Commission
Docketed: August 18, 2008
Lower Ct.: United States District Court for the District of Columbia
Case Nos.: (07-2240)
Decision Date: July 18, 2008
Questions Presented

Date	Proceedings and Orders
Aug 14 2008	Statement as to jurisdiction filed. (Response due September 17, 2008)
Sep 10 2008	Order extending time to file response to petition to and including October 17, 2008.
Sep 17 2008	Brief amicus curiae of American Civil Rights Union filed.
Oct 17 2008	Motion to dismiss or affirm filed by appellee Federal Election Commission.
Oct 24 2008	Reply of appellant Citizens United filed. (Distributed)
Oct 29 2008	DISTRIBUTED for Conference of November 14, 2008.
Nov 14 2008	PROBABLE JURISDICTION NOTED.
Dec 5 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Dec 11 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 8, 2009.
Dec 11 2008	The time within which to file respondent's brief on the merits is extended to and including February 17, 2009.
Jan 8 2009	Joint appendix filed. Statement of costs received.
Jan 8 2009	Brief of appellant Citizens United filed.
Jan 12 2009	Brief amicus curiae of Foundation for Free Expression filed.
Jan 14 2009	Brief amicus curiae of Cato Institute filed.
Jan 15 2009	Brief amicus curiae of Committee for Truth in Politics, Inc. filed.
Jan 15 2009	Brief amicus curiae of Reporters Committee for Freedom of the Press filed.
Jan 15 2009	Brief amicus curiae of Institute for Justice filed.
Jan 15 2009	Brief amicus curiae of National Rifle Association filed.
Jan 15 2009	Brief amici curiae of Wyoming Liberty Group, et al. filed.
Jan 15 2009	Brief amicus curiae of Alliance Defense Fund filed.
Jan 15 2009	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Jan 15 2009	Brief amicus curiae of American Civil Rights Union filed.
Jan 15 2009	Brief amicus curiae of Center for Competitive Politics filed.
Jan 26 2009	SET FOR ARGUMENT ON Tuesday, March 24, 2009.
Jan 27 2009	Record from the U.S.D.C. for the District of Columbia is electronically filed.
Jan 29 2009	CIRCULATED
Feb 3 2009	Exhibits and dvds received from U.S.D.C. for the District of Columbia.
Feb 17 2009	Brief of appellee Federal Election Commission filed. (Distributed)
Feb 23 2009	Brief amici curiae of Center for Political Accountability, et al. filed. (Distributed)

Feb 24 2009 Brief amici curiae of Senator John McCain, et al. filed. (Distributed)
Mar 17 2009 Reply of appellant Citizens United, Appellant filed. (Distributed)
Mar 24 2009 Argued. For petitioner: Theodore B. Olson, Washington, D.C. For respondent: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D.C.

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JURISDICTIONAL STATEMENT

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In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Jurisdictional Statement

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Questions Presented

1. Whether all as-applied challenges to the disclosure requirements (reporting and disclaimers) imposed on "electioneering communications" by the Bipartisan Campaign Reform Act of 2002 ("BCRA") were resolved by *McConnell*'s statement that it was upholding the disclosure requirements against facial challenge "'for the entire range of electioneering communications' set forth in the statute." Mem. Op. 1, App. 15a (*quoting McConnell v. FEC*, 540 U.S. 93, 196 (2003)).

2. Whether BCRA's disclosure requirements impose an unconstitutional burden when applied to electioneering communications protected from prohibition by the appeal-to-vote test, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), because such communications are protected "political speech," not regulable "campaign speech," *id.* at 2659, in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), or because the disclosure requirements fail strict scrutiny when so applied.

3. Whether *WRTL II*'s appeal-to-vote test requires a clear plea for action to vote for or against a candidate, so that a communication lacking such a clear plea for action is not subject to the electioneering communication prohibition. 2 U.S.C. § 441b.

4. Whether a broadcast feature-length documentary movie that is sold on DVD, shown in theaters, and accompanied by a compendium book is to be treated as the broadcast "ads" at issue in *McConnell*, 540 U.S. at 126, or whether the movie is not subject to regulation as an electioneering communication.

Parties to the Proceedings

The names of all parties to the proceeding in the court below whose judgment is sought to be reviewed are contained in the caption of this case. Rule 14.1(b).

Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly-held company owns ten percent or more of its stock. Rule 29.6.

Table of Contents

Questions Presented ..... (i)

Parties to the Proceedings ..... (ii)

Corporate Disclosure Statement ..... (ii)

Table of Authorities ..... (v)

Introduction 1

Opinions Below 4

Jurisdiction 4

Constitutional & Statutory Provisions 4

Statement of the Case 5

The Questions Presented Are Substantial 15

I. *McConnell*'s Facial Upholding of the Disclosure Requirements Did Not Resolve This As-Applied Challenge. 15

II. Disclosure Requirements Impose an Unconstitutional Burden When Mandated for Non-"Campaign Speech." 16

A. Disclosure Requirements May Only Be Imposed on Communications That Are Unambiguously Related to a Candidate's

Campaign. 16

B. The Disclosure Requirement Is Subject to and Fails Strict Scrutiny. 20

III. *WRTL II*'s Appeal-to-Vote Test Requires a Clear Plea for Action Urging a Vote. 24

IV. A Feature-Length Movie May Not Be Treated as the Broadcast "Ads" at Issue in *McConnell*. 26

Conclusion 29

Appendix

Order 1a

Memorandum Opinion ("Mem. Op. II") 2a

Memorandum Opinion ("Mem. Op. I")* 4a

Ad Script – "Wait" 5a

Ad Script – "Pants" 6a

Ad Script – "Questions" 6a

*Errata** 21a

Notice of Appeal to U.S. Supreme Court 22a

U.S. Constitution, First Amendment 23a

2 U.S.C. § 434(f)(1)-(3) 24a

2 U.S.C. § 441b(a)-(c) 28a

2 U.S.C. § 441d 30a

BCRA § 403 ..... 32a

11 C.F.R. § 100.29 ..... 33a

11 C.F.R. § 110.11(a)-(c) 40a

*The *Memorandum Opinion* (Doc. 39) was amended by the *Errata* (Doc. 40).

Table of Authorities

Cases

AFL-CIO v. FEC, 333 F.3d 168 (D.C. Cir. 2003) ... 20

Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 28

Buckley v. Valeo, 424 U.S. 1 (1976) . (i), 2, 11, 12, 15-22, 26

Davis v. FEC, 128 S. Ct. 2759 (2008) 2, 12, 20, 23

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) 26

FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007) ..... (i)-3, 14, 18, 19, 21-26, 28

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 21

Jenkins v. Georgia, 418 U.S. 153 (1974) 28

McConnell v. FEC, 540 U.S. 93 (2003) .. (i), 3, 14, 15, 19, 20, 26-28

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003) 20

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 21

North Carolina Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008) 16

Wisconsin Right to Life v. FEC, 546 U.S. 410 (2006) 3, 15

Constitution, Statutes, Regulations & Rules

2 U.S.C. § 431 17

2 U.S.C. § 434(f)(1)-(3) 5, 9

2 U.S.C. § 441b(a)-(c) 5

2 U.S.C. § 441d 5

11 C.F.R. § 100.29 ..... 5, 9

11 C.F.R. § 110.11(a)-(c) 5, 12

11 C.F.R. § 114.10 6

11 C.F.R. § 114.15 11

Bipartisan Campaign Reform Act of 2002 .... (i), 1, 4, 5, 21, 26, 27

Supreme Court Rule 14.1(b) ..... (ii)

Supreme Court Rule 29.6 ..... (ii)

U.S. Const. amend. I ..... *passim*

Other Authorities

Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) 20

William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003) 20

Introduction

Citizens United ("Citizens") is a nonprofit, ideological corporation that makes feature-length, documentary movies. Some have won awards. Citizens released *Hillary: The Movie* ("Movie") in January 2008, a time of high public interest in Senator Clinton. Citizens created a website at www.hillarythemovie.com to show the trailer, generate interest, list theater showings, and sell DVDs of the movie. The Movie was sold on DVD by prominent retailers. A compendium book was published. Broadcast ads were prepared. Theaters were booked for screenings. An offer was made to broadcast the Movie on television. Citizens wanted to do a full rollout of its Movie, with broadcast ads ("Ads") to generate the sort of interest that would facilitate the booking and filling of movie theaters, the sale of DVDs, and the communication of information to the public about a prominent public figure.

This was typical activity for Citizens and the release of all such movies. But there was a problem. The Ads would be "electioneering communications," under BCRA, because they mentioned a federal presidential candidate and would be broadcast on national television programs during the 30-day periods before the primaries, caucuses and conventions rolling across the nation in 2008 and during the sixty days before the general election. The Movie would also be an electioneering communication, if broadcast during these periods.

The district court noted, App. 13a, that the Federal Election Commission ("FEC") agreed that the Ads may not be prohibited because they (in *WRTL II*'s words)

"may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2670.[1] But the district court held that the Movie is a prohibited corporate electioneering communication because it does not meet this test. App. 11a-13a.

Both the Ads and Movie (if permitted to be broadcast) would be subject to the electioneering communication disclaimer, reporting, and donor disclosure requirements (collectively "Disclosure Requirements"). Disclosure burdens privacy rights per se, as this Court reaffirmed in *Davis v. FEC*. 128 S. Ct. 2759, 2774-75 (2008). And there are other burdens, too, one of them being that the required disclaimer takes four seconds out of the two 10-second and one 30-second ads, eliminating the ability to use the 10-second ads and substantially burdening the 30-second ad.

These disclosure requirements impose unconstitutional burdens when applied to electioneering communications that are protected by *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667, because such communications are protected "political speech," not regulable "campaign speech," *id.* at 2659, in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley v. Valeo*, 424 U.S. 1, 80 (1976), and because they are subject to and fail strict scrutiny when so applied.

The district court held that the Movie was subject

[1]The principal opinion in *WRTL II* is by Chief Justice Roberts (Justice Alito joining) and states the holding. *Marks v. United States*, 430 U.S. 188, 193 (1977) (holding is position taken by those concurring on narrowest grounds).

to prohibition, even though the Movie contains no clear plea for action that urges a vote for or against a candidate, i.e., no language that could be interpreted only "as an *appeal to vote* for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2667 (emphasis added). Furthermore, this is a movie, not one of the broadcast "ads," *McConnell*, 540 U.S. at 126, that gave rise to BCRA's electioneering communication prohibition and were put in evidence, and were at issue, in *McConnell*. While feature-length movies, and ads promoting them, have traditionally enjoyed the full First-Amendment protection traditionally afforded to books and their promotions, that is not the case here.

And just as happened to Wisconsin Right to Life with its grassroots lobbying ads, *see Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*") (per curiam), the FEC is again arguing, and the district court is again agreeing, App. 17a, that the facial-holding language in *McConnell*, 540 U.S. at 196, has already resolved the present as-applied challenge to the disclosure provisions.

Until December 14, 2007, it seemed possible that the FEC would not impose BCRA's disclosure requirements on electioneering communications that are protected under *WRTL II*'s appeal-to-vote test. The FEC was conducting a rulemaking to implement this Court's *WRTL II* decision, and the rulemaking petition had urged the FEC not to compel disclosure of communications protected by *WRTL II's* appeal-to-vote test.[2] On

[2] *See* James Bopp, Jr. & Richard E. Coleson, *Comments of the James Madison Center for Free Speech on Notice of Proposed Rulemaking 2007-16 (Electioneering Communica-*

December 14, however, the FEC rejected this request and has now boldly asserted that "the government's interest in providing information to the public extends beyond speech about candidate elections and encompasses *activity that attempts to sway public opinion on issues* . . . ." Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 19 (emphasis added); *see also* FEC's SJ Mem. (Doc. 55) at 22.

Probable jurisdiction should be noted, so that this Court can determine the proper application of *WRTL II's* appeal-to-vote test and its impact on BCRA's disclosure requirements. Furthermore, pursuant to BCRA § 403(a)(4), this Court should "advance on the docket and . . . expedite to the greatest possible extent the disposition of the . . . appeal." 116 Stat. at 114.

Opinions Below

The district court's final order and opinion on summary judgment, as well as its memorandum opinion denying Citizens' request for a preliminary injunction to which the summary judgment opinion referred, are reprinted in the Appendix ("App.") at 1a, 2a and 4a, respectively.

Jurisdiction

Summary judgment was granted to the FEC on July 18, 2008. Citizens noticed appeal on July 24, 2008. App. at 22a. This Court has appellate jurisdiction under BCRA § 403(a)(3). Pub. L. No. 107-155, 116 Stat. 81, 113-14.

Constitutional & Statutory Provisions

The following constitutional amendment, statutes,

tions) (Sep. 29, 2007) (available at www.fec.gov).

and regulations are appended (page numbers in brackets): U.S. Constitution, First Amendment [23a]; 2 U.S.C. § 434(f)(1)-(3) [24a]; 2 U.S.C. § 441b(a)-(c) [28a] 2 U.S.C. § 441d [30a]; BCRA § 403 [32a]; 11 C.F.R. § 100.29 [33a]; 11 C.F.R. § 110.11(a)-(c) [40a].

Statement of the Case

This is an as-applied challenge to the constitutionality of **(a)** BCRA **§ 201**, 116 Stat. 88 (titled "Disclosure of Electioneering Communications"), which added a new subsection "(f)" to § 304 of the Federal Election Campaign Act ("FECA") that requires reporting of electioneering communications, **(b)** BCRA **§ 311**, 116 Stat. 105, requiring that electioneering communications contain "disclaimers," *see* 11 C.F.R. § 110.11, and **(c)** BCRA **§ 203**, 116 Stat. 91, prohibiting corporations from funding electioneering communications. BCRA **§ 201** is called herein the "**Reporting Requirement**," BCRA **§ 311** is called the "**Disclaimer Requirement**," and the requirements together are called the "**Disclosure Requirements**" for ease of identification. BCRA **§ 203** is called herein the "**Prohibition**." The Reporting Requirement is codified at 2 U.S.C. § 434(f). App. 24a. The Disclaimer Requirement is codified at 2 U.S.C. § 441d(a). App. 30a. The Prohibition is codified at 2 U.S.C. § 441b. App 28a.

Plaintiff Citizens is a nonstock, nonprofit, membership, Virginia corporation, tax exempt under 26 U.S.C. § 501(c)(4), with its principal office in Washington, District of Columbia. Defendant FEC is the government agency with enforcement authority over FECA.

Citizens was founded in 1988. Its purpose is to promote the social welfare through informing and edu-

cating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. Its current annual budget is about $12 million. Citizens has a related § 501(c)(3) entity called Citizens United Foundation ("CUF").

Citizens is not a "qualified nonprofit corporation" because it receives corporate donations and engages in business activities. *See* 11 C.F.R. § 114.10 (exempting certain ideological, nonstock, nonprofit corporations from the electioneering communication Prohibition).

One of the principal means by which Citizens fulfills its purposes is through the production and distribution of documentary films. Its first major documentary film, in 2004, was titled *Celsius 41.11: The Temperature at Which the Brain Begins to Die*. The film was a conservative response to Michael Moore's documentary *Fahrenheit 9/11* and was shown in over 100 theaters in 2004. It continues to be sold in DVD format. In 2005, Citizens and CUF co-produced *Broken Promises: The United Nations at 60*, which was an exposé on the United Nations narrated by noted actor Ron Silver. This film was released in DVD format. In 2006, Citizens and CUF co-produced two films: *Border War: The Battle Over Illegal Immigration* and *ACLU: At War With America*. *Border War* had a limited theatrical release and was sold on DVD. *ACLU* was released only in DVD format.

Broken Promises and *Border War* have competed for and won a number of awards from the motion picture industry. *Broken Promises* won a Special Jury Remi Award at the 2006 Houston International Film Festi-

val. *Border War* won best feature documentary at the 2006 Liberty Film Festival, a Silver Remi Award at the 2007 Houston International Film Festival, and best feature documentary film honors from the American Film Renaissance in February 2007. *Border War* also qualified for consideration under the Academy of Motion Picture Arts and Sciences' demanding criteria for nomination to the 79th Academy Awards in February 2007.

In 2007, CUF produced *Rediscovering God in America*, which is narrated by Newt and Calista Gingrich. This film premiered in Washington, D.C., and New York City and is now available in DVD format only. As of December 11, 2007, the film was the top selling historical documentary on Amazon.com.

When Citizens produced *Celsius 41.11* in 2004, it ran national broadcast ads promoting the film. The original version of the ads had images and sound bites of President George Bush and Senator John Kerry, but those images and sound bites had to be deleted from the ads due to the electioneering communication Prohibition. Prior to running the ads, Citizens received FEC Advisory Opinion 2004-30, stating that its film ads would qualify as electioneering communications and would not be exempt under the Press Exemption.

In January 2008, Citizens released a feature-length documentary film on Senator Hillary Clinton titled *Hillary: The Movie*. The Movie was shown in theaters and is currently available for sale on DVD. It includes interviews with numerous individuals and many scenes of Senator Clinton at public appearances. It is about 90 minutes in length. It does not expressly advocate Senator Clinton's election or defeat, but it

discusses her Senate record, her White House record during President Bill Clinton's presidency, and her presidential bid. Some interviewees also express opinions on whether she would make a good president. A compendium book was published by Thomas Nelson Publishers, which purchased the book rights to the film and paid Citizens an advance royalty on sales.

Citizens has produced three television ads ("Ads")[3]

[3]The script for "**Wait**" (10 seconds) follows:

[Image(s) of Senator Clinton on screen]
"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."
[Film Title Card]
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com.

"**Pants**" (10 seconds) is as follows:

[Image(s) of Senator Clinton on screen]
"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."
"Now, a movie about everything else."
[Film Title Card]
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com.

"**Questions**" (30-seconds) is as follows:

[Image(s) of Senator Clinton on screen]
"Who is Hillary Clinton?"
[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."
[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."
[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."

to promote the Movie that meet the electioneering communication definition at 2 U.S.C. § 434(f)(3). Citizens has not, and will not, coordinate the production and broadcast of the Ads with any candidate, campaign committee, political committee, or political party. The Ads reference www.hillarythemovie.com, which promotes showings of the Movie in theaters and sales on DVD. The DVD is also available from major national retailers, such as Amazon.com

Citizens planned to broadcast the 30-second ad titled "Questions" on Fox News cable, and on other major television network stations, too. Citizens planned to broadcast the 10-second ads "Wait" and "Pants" on major television network stations, but not on Fox News. The initial media buy by Citizens was intended to be from mid-December 2007 to mid-January 2008. The timing of this rollout advertising blitz with the release of the Movie was thought to be critical to the success of the film.

However, the Ads were electioneering communications, 2 U.S.C. § 434(f)(3); 11 C.F.R. § 100.29, because the Ads (a) would have been broadcast on Fox News cable and major network stations so that they (b) would have be receivable by more than 50,000 persons, *see* http://gullfoss2.fcc.gov/ecd (Federal Communications Commission's Electioneering Communications

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.

[Film Title Card]

[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.

[Visual Only] www.hillarythemovie.com.

Database), (c) clearly references Senator Clinton, a Democratic presidential candidate, and (d) would have been made within the corresponding electioneering communication periods, *see* http://www.fec.gov/info/charts_ec_dates_prez.shtml (electioneering communication periods), and, therefore, the Ads would have been subject to BCRA's electioneering communication Disclosure Requirements.[4]

Furthermore, Citizens received an offer from a company that markets nationwide Video on Demand ("VOD") broadcasting of programs on cable television to broadcast the Movie, for a fee to be paid by Citizens, to cable viewers nationwide. The Movie would have been broadcast under a "Political Movies" component of "Elections '08," a new channel sponsored by the cable industry. The contract offered to broadcast the Movie for four weeks. This broadcasting would have brought the Movie within the electioneering communication definition because the Movie (a) would have been broadcast on cable stations so that it (b) would have been receivable by more than 50,000 persons, in states where caucuses, conventions, or primary elections were being conducted to select a Democratic Party presidential nominee, (c) clearly references Senator Clinton, a Democrat presidential candidate, and (d) would have been broadcast within thirty days before these caucuses, conventions, or primaries where she was on the ballot. As a result, the Movie would have been subject

[4]Furthermore, Citizens verified its intent to do substantially-similar ads in the future and stated that there was a high likelihood that Citizens would broadcast them during electioneering communication blackout periods. Doc. 22 at ¶¶ 20, 25.

to BCRA's electioneering communication Prohibition and Disclosure Requirements.

Citizens filed its *Verified Complaint for Declaratory and Injunctive Relief* on December 13, 2007, and moved for a preliminary injunction (Doc. 5), expedition (Doc. 4), and consolidation of the hearing on the preliminary injunction with the hearing on the merits (Doc. 6). Citizens claimed in its preliminary injunction motion that the Ads and the Movie were protected by *WRTL II's* appeal-to-vote test and thus could not be prohibited. Citizens also claimed that the Ads meet the recently-enacted FEC rule recognizing a commercial-transaction, safe-harbor exception to the electioneering communication Prohibition, because each ad (a) "[p]roposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event," 11 C.F.R. § 114.15(b) (3)(ii); (b) "[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public," *id.* at § 114.15(b)(1); and (c) "[d]oes not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." *Id.* at § 114.15(b)(2).

Finally, Citizens claimed that because the Ads and the Movie met *WRTL II's* appeal-to-vote test, they were protected "political speech," not "campaign speech," 127 S. Ct. at 2659, in that they are not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80, and could not constitutionally be subject to the Disclosure Requirements.

One of Citizens' chief concerns with the Reporting Requirement was the compelled disclosure of donors who may then be subject to various forms of retaliation

by political opponents, a concern that *Buckley* recognized as inherent in compelled disclosure, whether or not it rises to the level of harassment proven by certain historically unpopular groups. 424 U.S. at 64.[5]

In addition, Citizens claimed that the reports would (1) require it to mislead the public by reporting its speech as if it were campaign speech when it is not; (2) deprive Citizens of valuable time and resources in complying with Reporting Requirements; and (3) would substantially reduce the number of donors and amount of donations to Citizens.

Furthermore, the required disclaimer takes about four seconds to narrate,[6] making 10-second ads virtually impossible and 30-second ads difficult to do and have significant time left for substantive communication.[7] In addition, the disclaimer would require Citi-

[5]In *Davis*, this Court reaffirmed that "'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" 128 S. Ct. at 2774-75 (*quoting Buckley*, 424 U.S. at 64).

[6]The disclaimer requires (1) a spoken statement that "Citizens United is responsible for the content of this advertising," and (2) on-screen text providing (a) "the name and . . . address, telephone number or World Wide Web address of the person who paid for the communication," (b) a statement that the communication is "not authorized by any candidate or candidates committee," and (c) a "clearly readable" statement that "Citizens United is responsible for the content of this advertising." 11 C.F.R. § 110.11(a)-(c).

[7]On November 15, 2007, Club for Growth PAC ("CFG-PAC") requested an FEC advisory opinion granting an

zens to mislead the public by identifying its speech as electioneering speech when it is not.

In response, the FEC conceded that the two 10-second ads fit its regulatory commercial-transaction safe harbor, but asserted that the 30-second ad, "Questions," did not fall within that safe harbor. Opp'n to 2d Mot. for Prelim. Inj. (Doc. 33) at 17. However, the FEC did concede that "on balance" the "Questions" ad is protected from prohibition under *WRTL II*'s appeal-to-vote test. *Id.* The FEC argued, however, that passing *WRTL II's* appeal-to-vote test did not relieve Citizens from complying with the Disclosure Requirements that were imposed on the ads as electioneering communications. Furthermore, it argued that the Movie did not meet *WRTL II's* appeal-to-vote test so that its broadcast as an electioneering communication was subject to the Prohibition.

Citizens consolidation motion was denied (Doc. 29) and the preliminary injunction motion was denied on January 15, 2008. App. 4a. The district court held that Citizens was unlikely to succeed on the merits.

exemption from disclaimer requirements for 10- and 15-second televised independent expenditure ads. CFG-PAC stated that the disclaimers "severely curtail[]" its speech as 31.6% to 36.9% of 10-second ads would be consumed by the spoken disclaimer. CFG-PAC also noted how such short "TV spots are important in the current media landscape with multiplication of viewing choices, increased competition from the Internet, and ever increasing costs." Club for Growth PAC, *Advisory Opin. Req.*, AO 2007-33, *available at* www.fec.gov (Advisory Opinion Requests). The FEC denied the request to use an abbreviated identifier in place of the mandated disclaimer. AO 2007-33 (July 29, 2008).

It held that the Movie was a prohibited corporate electioneering communication because it "is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." App. 13a.

As to the Ads, the court held that they could not be prohibited under *WRTL II*'s appeal-to-vote test, but that disclosure could be required. First, the court rejected Citizens' argument that, as the court put it, "the *WRTL II* decision narrowed the constitutionally permissible scope of what may be considered an electioneering communication." App. 16a. Second, the court said that, while *McConnell* had left open for as-applied challenges the question resolved in *WRTL I*, 546 U.S. 410 (application of the electioneering communications Prohibition), "when . . . *McConnell* . . . sustained the disclosure provision . . . , it did so for the 'entire range of electioneering communications.'" App. 17a (citation omitted). Since, "[the Ads] obviously are within that range," the court concluded that *McConnell* resolved all as-applied challenges. App. 17a.

Citizens appealed the denial of the preliminary injunction directly to this Court, which denied Citizens' appeal for want of jurisdiction. (Doc. 63). Parties then filed cross motions for summary judgment (Doc. 52, 55). The district court denied Citizens' motion and granted summary judgment to the FEC, App. 1a, relying on its previous opinion denying a preliminary injunction. App. 4a. Citizens noticed appeal on July 24, 2008. App. 22a.

The Questions Presented Are Substantial

The substantial questions raised in this appeal address vindication of core political speech rights generally and proper application of this Court's precedents by federal courts and agencies.

I. *McConnell*'s Facial Upholding of the Disclosure Requirements Did Not Resolve This As-Applied Challenge.

Despite this Court's expeditious, unanimous rejection of a nearly-identical argument in *WRTL I*, 546 U.S. 410, the FEC is again arguing, and the district court is again agreeing, App. 17a, that *McConnell*'s facial upholding of the Disclosure Requirements on electioneering communications resolves the present as-applied challenge. Specifically, the district court granted summary judgment to the FEC because it found that this Court's statement in *McConnell* that "*Buckley* amply supports application of FECA § 304's disclosure requirements to the *entire range* of 'electioneering communications,'" 540 U.S. at 196 (emphasis added), resolved this as-applied challenge. App. 17a. *McConnell*'s statement, however, was facial-challenge language, closely akin to the *McConnell* statement at issue in *WRTL I*: "We uphold *all applications* of the primary definition and accordingly have no occasion to discuss the backup definition." *McConnell*, 540 U.S. at 190 n.73. *WRTL I* rejected the district court's notion that such facial-challenge language precluded as-applied challenges, concluding that "[i]n upholding § 203 against a facial challenge, we did not purport to resolve future as-applied challenges." *WRTL I*, 546 U.S. at 411-12.

This Court needs to decide whether *McConnell's* facial upholding of the Disclosure Requirements resolves all as-applied challenges to them. This is a substantial issue for this Court to decide.

II. Disclosure Requirements Impose an Unconstitutional Burden When Mandated for Non-"Campaign Speech."

For a burden on First Amendment rights to pass muster in the campaign-finance area, a law must meet a threshold requirement and pass constitutional scrutiny. First, the threshold requirement is that the affected speech or activity be unambiguously campaign related. *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) ("after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate'" (*quoting Buckley*, 424 U.S. at 80)). Second, if the law passes this threshold requirement, the law must pass the appropriate level of constitutional scrutiny.

A. Disclosure Requirements May Only Be Imposed on Communications That Are Unambiguously Related to a Candidate's Campaign.

Buckley held that disbursements for political speech may not be subjected to compelled disclosure unless they are for communications "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. To assure that "the relation of the information sought to the purposes of the Act [was not] too remote," *id.*, this Court imposed the express-advocacy requirement on certain communications:

To insure that the reach of § 434(c)[, requiring

> disclosure of expenditures,] is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(c) to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related* to the *campaign* of a particular federal candidate.

Id. (emphasis added; footnote omitted). This Court summed up its analysis of the expenditure disclosure provision, indicating that, as construed, the provision "shed[s] the light of publicity on spending that is *unambiguously campaign related.*" *Id.* at 81 (emphasis added).

Buckley applied this unambiguously-campaign-related requirement to (1) expenditure limitations, *id.* at 42-44; (2) PAC status and disclosure, *id.* at 79; (3) non-PAC *disclosure* of contributions and independent expenditures,[8] *id.* at 79-81; and (4) contributions. *Id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act[, i.e., regulating elections], for they are connected with a candidate or his campaign."). Because *Buckley* expressly applied this unambiguously-campaign-related requirement to the *disclosure of expenditures*, *id.* at 80, it has direct application here.

Buckley employed two tests to implement this

[8]"Independent expenditure" is a term of art referring to an express-advocacy communication that is not coordinated with a candidate so as to become a contribution. *See* 2 U.S.C. § 431(17).

unambiguously-campaign-related requirement. First, for determining PAC status, the Court created the major-purpose test for "political committees": "To fulfill the purposes of the Act[, i.e., regulating elections,] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* at 79. "Expenditures of candidates and of 'political committees' so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related.*" *Id.* (emphasis added). Second, to limit the speech subject to FECA to only campaign-related speech, this Court created the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candidate. *Id.* at 44, 80. This test assures that expenditures are "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.

WRTL II also limited BCRA's new "electioneering communications" to only "*campaign* speech." 127 S. Ct. at 2672 (emphasis added), when it stated its test for functional equivalence: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. So *WRTL II*'s appeal-to-vote test is the application of the unambiguously-campaign-related requirement to electioneering communications, just as the express-advocacy test was the *Buckley* Court's application of the requirement to reporting independent expenditures and the major-purpose test was the application of the requirement to determination of PAC status.

The purpose of the unambiguously-campaign-related requirement—and the appeal-to-vote test applying it is twofold. Negatively, it confines government within the pale of its constitutional authority to regulate elections. *Buckley*, 424 U.S. at 13 ("The constitutional power of Congress to *regulate federal elections* is well established and is not questioned by any of the parties in this case." (footnote omitted; emphasis added)). Positively, it protects what *WRTL II* called "political speech," 127 S. Ct .at 2659, a term it equated with "'genuine issue ads,'" *id.* at 2659 (*quoting McConnell*, 540 U.S. at 206 & n.88), 2668 (same), 2673 (same), or "issue advocacy," *id.* at 2667, as distinguished from "campaign speech" or "express advocacy." *Id.* at 2659. *WRTL II* explained that "[i]ssue advocacy conveys information and educates," *id.* at 2667, and reaffirmed *Buckley*'s statement that, because issue advocacy and candidate advocacy often look alike, bright-line tests are required to protect political speech, or issue advocacy, from being chilled. *Id.* at 2669. And lest there be any doubt as to the necessity of speech-protective lines, *WRTL II* reiterated that: "the benefit of any doubt [goes] to protecting rather than stifling speech." *Id.* at 2667 (citation omitted). *See also id.* at 2669 & n.7, 2674.

Yet the FEC has asserted that its interest in compelling disclosure extends "beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues . . . ." FEC SJ Mem. (Doc. 55) at 22. The district court agreed by recognizing the FEC's authority to regulate just such speech in this case. App. 1a.

B. The Disclosure Requirement Is Subject to and Fails Strict Scrutiny.

This Court recently reaffirmed that "'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Davis*, 128 S. Ct. at 2774-75 (*quoting Buckley*, 424 U.S. at 64). The level of scrutiny to be applied depends on the extent of the burden imposed. *Id.* at 2775.

Here the scrutiny must be strict. The Disclosure Requirements include the disclosure of donors, which is a severe burden. *Buckley* 424 U.S. at 64-66, 68 (identifying per ser burdens), 237 (Burger, C.J., concurring in part and dissenting in part) (stating examples of burdens).[9] An on-communication disclaimer is also

[9]Evidence of such burdens was put in the *McConnell* record by the National Rifle Association, the Associated Builders and Contractors, the Associated General Contractors of America, the U.S. Chamber, and the ACLU. *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-29 (D.D.C. 2003) (per curiam). The evidence ranged from large numbers of contributions at just below the disclosure trigger amount, to vandalism after disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support for causes that are not popular everywhere and the results of such disclosure. *Id. See also AFL-CIO v. FEC*, 333 F.3d 168, 176, 179 (D.C. Cir. 2003) (recognizing that releasing names of volunteers, employees, and members would make it hard to recruit personnel, applying strict scrutiny, and striking down an FEC rule requiring public release of all investigation materials upon conclusion of an investigation); William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of*

required by the Disclosure Requirements, for which this Court required strict scrutiny in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."). The scrutiny must also be strict simply because the Disclosure Requirements burden what *WRTL II* called "political speech." 127 S. Ct. at 2664 ("Because BCRA § 203 burdens political speech, it is subject to strict scrutiny.").

Buckley required "exacting scrutiny" of disclosure provisions, 424 U.S. at 64, which it referred to as the "strict test," *id.* at 66, and by which it meant "strict scrutiny." *See WRTL II*, 127 S. Ct. at 2669 n.7 (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, was "strict scrutiny."); *see also McIntyre*, 514 U.S. at 347 (*citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), as equating "exacting" scrutiny with "strict" scrutiny).

In applying strict scrutiny, the FEC has the burden of proving that the Disclosure Requirements are narrowly tailored to a compelling interest. *See WRTL II*, 127 S. Ct at 2664 (stating scrutiny standard).

Buckley set out three interests applicable in the disclosure context generally. "First, disclosure provides the electorate with information 'as to where political

Political Contribution Disclosure, 6 U. Pa. J. Const. L. 1 (2003); Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at http://www.ij.org/publications/other/disclosurecosts.html).

campaign money comes from and how it is spent by the *candidate*' in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67 (emphasis added; footnote omitted). "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above." *Id.* at 67-68.

The second and third of these interests deal with preventing corruption. But *Buckley* held that with respect to "independent expenditures," "[t]he absence of prearrangement and coordination . . . with the candidate . . . undermines the value of the expenditure to the candidate . . . [and] alleviates the danger [of] quid pro quo," so that restrictions on independent expenditures do not "prevent[] circumvention of the contribution limitations . . . ." *Id.* at 47. If this is true of independent express advocacy, then *a fortiori* it is true of independent "issue advocacy," *WRTL II*, 127 S. Ct. at 2667. *WRTL II* questioned whether a circumvention interest applies to expenditures, but held that, in any event, it did not apply to speech that is not the functional equivalent of express advocacy: "[T]o justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *Id.* at 2672 (emphasis in original).

WRTL's identification of preventing *quid-pro-quo* corruption as the government's compelling interest in regulating in the campaign-finance area is consistent with *Davis*. 128 S. Ct. 2759. In *Davis*, this Court considered possible compelling interests for burdening (not restricting) a self-funding candidate's ability to make expenditures for his own speech. 128 S. Ct. at 2773. The Court rejected as compelling any interest in equalizing spending and reaffirmed that the only compelling interest in this area is preventing corruption and its appearance. *Id.* So in the present context, where the Disclosure Requirements burden Citizens' political speech. those requirements must be narrowly-tailored to preventing corruption.

Buckley's first interest by its terms deals with "campaign" funds and "candidate" spending, "to aid the voters in evaluating those who seek federal office," 424 U.S. at 66-67, which address the *quid-pro-quo* corruption interest. The Disclosure Requirements here reach independent issue advocacy communications by non-candidates, so the Disclosure Requirements do not address the *quid-pro-quo* corruption interest and do not help the voters evaluate candidates for office. Therefore, the Disclosure Requirements fail strict scrutiny.

The district court, however, did not engage in strict scrutiny, instead relying on its view that (1) the analysis of *WRTL II* does not control beyond the prohibition context to the disclosure context and (2) *McConnell*'s facial analysis resolved as-applied challenges. App. 16a-18a.

So this case presents the purely legal question of whether electioneering communications, that do not contain an "appeal to vote," 127 S. Ct. at 2667, may

constitutionally be subject to the Disclosure Requirements. This presents a substantial issue for this Court to decide.

III. *WRTL II*'s Appeal-to-Vote Test Requires a Clear Plea for Action Urging a Vote.

The district court decided that the Movie failed *WRTL II*'s appeal-to-vote test and so was a prohibited corporate electioneering communication. App. 16a.

WRTL II framed the appeal-to-vote test two ways, and both are freestanding. An "ad" is a regulable electioneering communication "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. Conversely, if an ad "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," it is not regulable. *Id.* at 2670. Both of these contain the key "appeal to vote" language. Notably, the test didn't ask whether an ad "supports or opposes," or is "for or against," or "praises or criticizes" a candidate. Rather, it specified that the ad must constitute an "appeal," i.e., a call to act, which appeal is "to vote."

The district court, however, said that the Movie "does not focus on legislative issues," App. 10a, "references the election and Senator Clinton's candidacy," App. 11a, and "takes a position on her character, qualifications, and fitness for office." *Id.* It then recited a statement by "one political commentator featured in *The Movie*," about how the Movie "'g[ave] people the flavor and an understanding of why she should not be president.'" *Id.* (citation omitted). From these, and some excerpts it recited, it concluded that the Movie "is

susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.*

First, it should be noted that *WRTL II* expressly required that in applying the appeal-to-vote test a court must focus on the *language of the communication* itself, i.e., the test "must be objective, focusing on the *substance of the communication* rather than amorphous considerations of intent and effect." *Id.* at 2666 (emphasis added). This focus on the actual words of the communication is also required by *WRTL II*'s rejection of reliance on "contextual factors." *Id.* at 2669. Thus, the district court was wrong to rely on statements not made in the Movie to interpret the Movie.

Second, the district court relied on comments that *WRTL II* made in its *application* of the appeal-to-vote test to the grassroots lobbying context, employing wording from arguments made by the parties. 127 S. Ct. at 2667. But these application statements are not part of the rule itself. *See id.* at 2667, 2670. Thus, whether "political speech," *id.* at 2659, addresses a legislative issue is not part of *WRTL II*'s appeal-to-vote test.

Third, the *WRTL II* test specifically requires that the ad only be capable of being interpreted as an "*appeal to vote*," that "discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election," *id.* at 2669, and that all doubts are to be resolved in favor of the speaker. *See id.* at 2667, 2669 & n.7, 2674. This requires a "call to

action" to distinguish between (1) "discussion of issues and candidates," and (2) "advocacy of election or defeat of candidates." *Buckley*, 424 U.S. at 42. "'The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" 127 S. Ct. at 2670 (citation omitted).

So the correct application of *WRTL II*'s test is whether there are actual words in the Movie that constitute an "appeal to vote." In the Movie, there is no "exhortation to vote," nor a "clear plea for action" urging a vote, nor even a "Don't let him do it!," which was found in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), to have "urged readers to vote against Jimmy Carter." *Id.* at 865. Thus, the Movie "may reasonably be interpreted as *something other* than as an appeal to vote," *WRTL II*, 127 S. Ct. at 2670 (emphasis added). A reasonable interpretation is that it is a full-length, documentary movie about the public life of Senator Hillary Clinton.

The question of the proper scope of *WRTL II*'s appeal-to-vote test, and whether it was correctly applied in this case to prohibit the Movie, is a substantial question that this Court should decide.

IV. A Feature-Length Movie May Not Be Treated as the Broadcast "Ads" at Issue in *McConnell*.

The Movie is categorically different from the broadcast "ads" at issue in *McConnell*, 540 U.S. at 126, that were the subject of the studies relied upon by Congress in passing BCRA and by this Court and the District

Court in *McConnell*. *See infra*. While the FEC has correctly noted that the electioneering communication definition "draws no distinction between ad[s] and movies," FEC SJ Mem. (Doc. 33) at 33, this begs the question of whether the First Amendment mandates such a distinction.

Examination of the *McConnell* record indicates that full-length documentary films were nowhere in the sights of the campaign finance reform lobby or Congress in promoting and passing BCRA, nor were they in the consideration of the district court or the this Court in *McConnell*. *McConnell* specifically identified the focus of BCRA as being "advertisements," "ads," and "commercials," *see McConnell*, 540 U.S. at 126-28, and the opinion nowhere mentioned a book or a movie as the focus of the law. *McConnell* specifically identified the sort of communication that it perceived to be the problem that BCRA addressed, i.e., the Bill Yellowtail "ad," which was a brief commercial. *Id.* at 193 n.78.

In the *McConnell* three-judge district court, the court's per curiam memorandum opinion plainly identified "ads" as being the communications at issue in that facial challenge, actually equating "electioneering communication" and "so-called 'issue *ads*'," *McConnell*, 251 F. Supp. 2d at 184 (emphasis added), and consistently spoke of "ads" and "advertisements," never movies. *See id.* at 229-33.

Similarly, the three separate district court opinions are replete with references to "ads" and "advertisements," but not movies. Judge Leon specifically identified the sham issue ads that BCRA targets: "In an attempt to prevent actual and apparent corruption

arising from the funding of such sham issue *advertisements*, Congress enacted a sweeping set of reforms . . . ." *Id.* at 757 (op. of Leon, J.) (emphasis added). And he cited the government's studies which only examined *advertisements* (both "genuine" and "sham"). *Id.* at 796-97. Judge Kollar-Kotelly likewise confirmed that the government's studies were based on "advertisements," *see, e.g.*, *id.* at 719-24 (op. of Kollar-Kotelly, J.), and Judge Henderson specifically pointed out that a 30-minute NRA "infomercial" and two 30-minute "news magazine[s]" were not included in the government's studies. *Id.* at 305-06, 316-17 (op. of Henderson, J.). So when *WRTL II* framed the appeal-to-vote test as applicable to "an *ad*," 127 S. Ct. at 2667, it correctly identified the sort of communication targeted by the electioneering communication restrictions.

A full-length documentary movie, therefore, is not the same as an "ad," even if the movie is broadcast, and the record in *McConnell* provides no justification for treating it as such. Consequently, a full-length movie enjoys the same, full First Amendment protection as a book has historically enjoyed. *See Jenkins v. Georgia*, 418 U.S. 153 (1974) (movies protected); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (books protected). It is not subject to regulation as an "ad."

Thus, whether a feature-length documentary movie is subject to the restrictions imposed on electioneering communications is a substantial question for this Court to decide.

Conclusion

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully submitted,

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Appendix Table of Contents

Order 1a
Memorandum Opinion ("Mem. Op. II") 2a
Memorandum Opinion ("Mem. Op. I")* 4a
Ad Script – "Wait" 5a
Ad Script – "Pants" 6a
Ad Script – "Questions" 6a
*Errata** 21a
Notice of Appeal to U.S. Supreme Court 22a
U.S. Constitution, First Amendment 23a
2 U.S.C. § 434(f)(1)-(3) 24a
2 U.S.C. § 441b(a)-(c) 28a
2 U.S.C. § 441d 30a
BCRA § 403 ..... 32a
11 C.F.R. § 100.29 ..... 33a
11 C.F.R. § 110.11(a)-(c) 40a

*The *Memorandum Opinion* (Doc. 39) was amended by the *Errata* (Doc. 40).

[Doc. 66, filed July 18, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

ORDER

This case returns to us on cross motions for summary judgment. Upon full consideration of the parties' filings, the entire record herein, and applicable law, it is for the reasons set forth in an accompanying Memorandum Opinion, hereby

ORDERED that plaintiff's motion [52] for summary judgment is **DENIED**, and defendant's motion [55] for summary judgment is **GRANTED**.[1] Judgment is hereby entered for defendant.

[1]Defendant's motion [43] to dismiss Counts 3 and 4 of the Amended Complaint is hereby **GRANTED** in part and **DENIED** in part as moot. As to Count 3, defendant's motion is denied as moot. As to Count 4, defendant's motion to dismiss is granted without prejudice by agreement of the parties.

SO ORDERED.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on July 18, 2008.

[Doc. 65, filed July 18, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELECTION COMMISSION, Defendant.	)	

MEMORANDUM OPINION

This case returns to us on cross motions for summary judgment. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Mills v. Winter*, 540 F. Supp. 2d 178, 183 (D.D.C. 2008). There are no genuine issues of material fact presented in this case. Based on the reasoning of our prior opinion, we find that the Federal

Election Commission is entitled to judgment as a matter of law. *See Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (denying Citizens United's request for a preliminary injunction). Therefore, plaintiff's motion [52] for summary judgment will be **DENIED**, and defendant's motion [55] for summary judgment will be **GRANTED**.[1] Accordingly, judgment will be entered for defendant.

A separate order shall issue this date.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on July 18, 2008.

[1]Defendant's motion [43] to dismiss Counts 3 and 4 of the Amended Complaint is hereby **GRANTED** in part and **DENIED** in part as moot. As to Count 3, defendant's motion is denied as moot. As to Count 4, defendant's motion to dismiss is granted without prejudice by agreement of the parties.

[Editor's Note: The following Memorandum Opinion (Doc. 39) was amended by an Errata (Doc. 40). Editing notes of the changes are included in the following text. Page numbers from the unreported opinion (*) and the reported opinion, 530 F. Supp. 2d 274 (**), are indicated.]

[Doc. 39, filed Jan. 15, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELEC- TION COMMISSION, Defendant.	)	

MEMORANDUM OPINION

For the reasons that follow we deny Citizens United's ("Citizens") motions for a preliminary injunction to enjoin the Federal Election Commission ("FEC") from enforcing provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[1] with respect to Citizens' advertisements for a movie *Hillary: The Movie* and its distribution of *The Movie* through cable TV video on-demand.

[1]Pub. L. No. 107–155, 116 Stat. 81 (2002), codified at 2 U.S.C. § 431 *et seq.*

I.

Citizens United is a nonprofit membership corporation, tax-exempt under Internal Revenue Code § 501(c)(4). (Am. Compl. ¶ 5.) Citizens produced a movie titled *Hillary: The Movie*. (*Id.* Ex. 2; Notice [30] Regarding Joint Stip.) *The Movie* focuses on Senator Hillary Rodham Clinton's "Senate record, her White House record during President Bill Clinton's presidency, . . . her presidential bid," and includes "express opinions on whether she would make a good president." (Am. Compl. ¶ 14.) Citizens plans to distribute *The Movie* in January or [*2] February 2008 through theaters, video on-demand ("VOD") broadcasts, and DVD sales. (*Id.*) Citizens notified the court on January 7, 2008, that it had released *The Movie* for "public sale and exhibition." (Notice [30] Regarding Joint Stip.); *see* http://www.hillarythemovie.com (last visited Jan. 11, 2008) (offering *The Movie* on DVD for $23.95 and promoting screenings of the film in seven movie theaters across the country). *The Movie*'s release date coincides with the dates when many states will hold primary elections or party caucuses. Senator Clinton is a presidential candidate in those states. (Am. Compl. ¶ 17.) Citizens intends to fund at [**276] least three television advertisements two 10-second advertisements, "Wait"[2] and

[2]The script for the television advertisement, "Wait" reads as follows:

[Image(s) of Senator Clinton on screen]

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."

[Film Title Card]

[Visual Only] Hillary: The Movie.

"Pants,"[3] and one 30-second advertisement, "Questions"[4] to coincide with the release of its movie. (*Id.* Ex. 1.) The [*3] advertisements promote *The Movie* and direct viewers to *The Movie*'s website for more information about the film and how to see or purchase it. (*Id.* ¶ 19.) If Senator Clinton becomes the Demo-

[Visual Only] www.hillarythemovie.com

[3]The script for the television advertisement, "Pants" reads as follows:

[Image(s) of Senator Clinton on screen]
"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."
"Now, a movie about the everything else."
[Film Title Card]
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com

[4]The script for the television advertisement, "Questions" reads as follows:

[Image(s) of Senator Clinton on screen]
"Who is Hillary Clinton?"
[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."
[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."
[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."
"If you thought you knew everything about Hillary Clinton . . . wait til you see the movie.
[Film Title Card]
[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.
[Visual Only] www.hillarythemovie.com

cratic presidential nominee, Citizens plans to broadcast the three advertisements and possibly other advertisements within 30 days before the Democratic National Committee Convention and within 60 days before the November general election both periods are within BCRA's definition of an electioneering communication. (*Id.* ¶ 20); 2 U.S.C. § 434(f)(3)(A)(i)(II)(bb). Citizens has elected not to broadcast its advertisements pending resolution of this litigation. (Am. Compl. ¶ 26.) It has entered into negotiations to broadcast *The Movie* through the "Political Movies" component of a new nationwide VOD channel, "Elections '08," but has decided to forego the opportunity pending resolution of the current litigation because, according to Citizens, the broadcast would be banned under BCRA and, even if this were not so, the broadcast would require Citizens to disclose certain information and make certain statements as described below. (*Id.* ¶ 28–30.)

BCRA amended the Federal Election Campaign Act of 1971 ("FECA").[5] BCRA, Pub. L. No. 107–155, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 431 et seq.). Passed in 2002, it represented "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of big money' campaign contributions." *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (internal citation omitted). BCRA introduced a new system for [*4] regulating what it termed "electioneering communications." Under BCRA § 201, an "electioneering communication" is:

[5]Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 USC § 431 *et seq.*).

> any broadcast, cable, or satellite communication which
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within [**277]
>
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate
>
> . . .

2 U.S.C. § 434(f)(3)(A). For presidential candidates, the communication must also be capable of being received by 50,000 or more persons. *See* 11 C.F.R. § 100.29(b)(3)(ii). Citizens recognizes that under this statutory definition, both its advertisements and a VOD[6] broadcast of *The Movie* would be electioneering communications. (Am. Compl. ¶¶ 17, 29.) Electioneering communications are subject to a host of restric-

[6]The parties did not raise the issue of whether VOD was within the definition of "electioneering communication." However, a broadly worded FEC regulation defining "electioneering communications" indicates that VOD would be a "broadcast, cable, or satellite communication" because it is "disseminated through the facilities of a . . . cable television system." *See* 11 C.F.R. §§ 100.29(b)(1), (b)(3)(i) (indicating that "broadcast, cable, or satellite communications" include communications "aired, broadcast cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system").

tions imposed by BCRA. Three are relevant here: § 203, § 201, and § 311. Section 203 prevents corporations and labor unions from funding electioneering communications out of their general treasury funds, unless the communication is made to its stockholders or members, to get out the vote, or to solicit donations for a segregated corporate fund for political purposes. 2 U.S.C. § 441b(b)(2). This provision does not bar [*5] electioneering communications paid for out of a segregated fund that receives donations only from stockholders, executives and their families. 2 U.S.C. §§ 441b(b)(2)(C), (b)(4)(A).[7] Any electioneering communication that is not prohibited is subject to the disclosure requirements of § 201 and the disclaimer requirements of § 311, which are set out in part II.B.

Citizens' complaint, filed on December 13, 2007,[8] contains two major claims: (1) that § 203's prohibition of corporate disbursements for electioneering communications violates the First Amendment on its face and as applied to *The Movie* and to the 30-second advertisement "Questions"[9]; and (2) that BCRA § 201 requir

[7]Corporations and labor unions may also contribute to Political Action Committees, which are permitted to make electioneering communications. *See McConnell*, 540 U.S. at 204 (citing *FEC v. Beaumont*, 539 U.S. 146, 162–63 (2003)).

[8]On December 14, 2007, Citizens' motion for a three-judge district court was granted [14] pursuant to BCRA § 403 and 28 U.S.C. § 2284. On January 10, 2008, the three-judge court held an expedited hearing on the motions for preliminary injunctions.

[9]Plaintiff's challenge regarding the prohibition of "Questions" will be denied as moot. The FEC, in its filings and at

ing disclosure and § 311 requiring disclaimers are unconstitutional as applied to Citizens' three advertisements (and to *The Movie*, if Citizens broadcasts it in a manner that does not violate § 203).

II.

The court will not issue a preliminary injunction unless the movant shows that it has "1) a substantial likelihood of success on the merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would [**278] not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Omar v. Harvey*, 479 F.3d 1, 18 (D.C. Cir. 2007) (citing *City-Fed Fin. Corp. v. Office of Thrift Supervision*, 58 [**6] F.3d 738, 746 (D.C. Cir. 1995)). Granting injunctive relief is an "extraordinary and drastic remedy," and it is the movant's obligation to justify, "by a clear showing," the court's use of such a measure. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

A.

We will analyze first Citizens' likelihood of prevailing on the merits of its claims regarding *The Movie*. In *McConnell*, the Supreme Court upheld § 203 on its face, rejecting claims that the financing of "electioneering communications" constituting express advocacy or its functional equivalent were within the protection of the First Amendment. 540 U.S. at 203–09. *McConnell* did not, however, "purport to resolve future as-

oral argument, conceded that the advertisement is exempt from the Prohibition. (Opp'n to 2d Mot. for Prelim. Inj. at 17.)

applied challenges." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2661 (2007) (citation omitted) ("*WRTL*"). The Chief Justice's opinion in *WRTL* stated that an advertisement could not be considered the functional equivalent of express advocacy unless it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[10] *Id.* at 2667. To promote the objectivity of this analysis, courts are to disregard contextual evidence of the corporation's intent in running an advertisement.[11] *See id.* at 2668.

Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional [*7] burden on the First Amendment right to freedom of speech. The

[10]The parties agree, as do we, that the Chief Justice's formulation is now the governing test for the functional equivalent of express advocacy. Although the Court's opinion in *WRTL* was fragmented, the Chief Justice's opinion approved the judgment of the district court on the narrowest grounds. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

[11]*WRTL* discounted evidence that included the corporation's other candidate-related advocacy, the timing of the advertisements, and the advertisement's reference to an Internet address that directed viewers to a website containing express advocacy against the election of candidates for federal office. 127 S. Ct. at 2668–69 (Opinion of Roberts, C.J.).

theory is that with respect to § 203, *WRTL* narrowed *McConnell* to such an extent that it "left the door open to facial invalidation based on the sort of circumstances that have now arisen." (2d Mot. for Prelim. Inj. Mem. at 2). For Citizens to prevail on this claim, we would have to overrule *McConnell*, which is to say that Citizens has no chance of prevailing. Only the Supreme Court may overrule its decisions. The lower courts are bound to follow them. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

With respect to Citizens's as-applied claims regarding *The Movie*, the first question under Chief Justice Roberts' *WRTL* opinion and as it turns out, the last question is whether the film is express advocacy or its functional equivalent. If it is, *McConnell* makes it likely that [**279] Citizens would not win on the merits of its claim that the First Amendment permits it to broadcast the movie within the electioneering communications period as currently funded. Citizens contends that *The Movie* is issue speech and, as it stated in oral argument, that issue speech is any speech that does not expressly say how a viewer should vote. The trouble is that the controlling opinion in *WRTL* stands for no such thing. Instead, if the speech cannot be interpreted as anything other than an appeal to vote for or against a candidate, it will not be considered genuine issue speech even if it does not expressly advocate the candidate's election or defeat. *WRTL*, 127 S. Ct. at 2667.

The Movie does not focus on legislative issues. *See*

id.; 11 C.F.R. § 114.15(b). *The Movie* references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office. *See id.*; 11 C.F.R. § 114.15(b). Dick Morris, one [*8] political commentator featured in *The Movie*, has described the film as really "giv[ing] people the flavor and an understanding of why she should not be President." Dick Morris, Hillary's Threat, Address (Mar. 2007) (available at www.citizensunited.org/blog/?entryid=4563815). After viewing *The Movie* and examining the 73-page script at length, the court finds Mr. Morris's description to be accurate. *The Movie* is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.[12] [*9] *The* [**280] *Movie* is thus the

[12]A selection of excerpts from the movie are indicative of the film's message as a whole and serve to demonstrate the difficulty that this court had in its ultimately unsuccessful attempt to find a reasonable interpretation of *The Movie* that would take it out of the *WRTL* "functional equivalent to express advocacy" classification.

Excerpts include statements by the film's narrator, one of several political commentators or another interviewee stating:

"She's driven by the power. She's driven to get the power. That is the driving force in her life." (Am. Compl. Ex. 2 at 1.)

"She is the expert at not saying what she believes—she will run on attacking Republicans, and being the first woman president oh isn't that amazing, she's a woman she can walk and talk." (*Id.*)

"She is steeped in controversy, steeped in sleaze, that's why they don't want us to look at her record." (*Id.* at 1–2.)

"Over the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many." (*Id.* at 6.)

"I mean think of what it says about Hillary Clinton that she was willing to put up with his open philandering, with anything in a skirt who wanders before his eyesight—all for the power—at least with Bill Clinton he was just good time Charlie. Hillary's got an agenda and she's willing to put up with that to be [P]resident of the [U]nited [S]tates, she's got a to do list when she gets to the White House." (*Id.* at 21–22.)

"I think the American people have a right to as much of a public record as possible about Hillary Clinton. Those records should be released before the 2008 elections so that we can learn a lot more about exactly how much influence she had in the White House, what her positions were in the White House, and how she acted in the White House." (*Id.* at 60.)

"Finally, before America decides on our next president, voters should need no reminders of [] what's at stake the well being and prosperity of our nation." (*Id.* at 68–69.)

"It[']s been said and I agree with it that this is the most personal political choice that Americans make. They want, they—their personality traits, their—will they consider a person that they could trust, that they would like, that they were comfortable with, and that's [where] think Hillary Clinton as a candidate has great defects." (*Id.* at 69.)

"If she reverts to form, Hillary Clinton will likely be in the future what she has been in the past, which is a person, a woman, a politician of the left, and I don't think that's going to [be] good for the security of the United States." (*Id.* at 70.)

functional equivalent of express advocacy. *See WRTL*, 127 S. Ct. at 2667 (setting out the "functional equivalent" standard). As such, it falls within the holding of *McConnell* sustaining, as against the First Amendment, § 203 insofar as it bars corporations from funding electioneering communications that constitute the functional equivalent of express advocacy. There is no substantial likelihood that Citizens will prevail on its as-applied challenge with respect to *The Movie*. [*10]

B.

Citizens' proposed advertisements present a different picture. The FEC agrees that Citizens may broadcast the advertisements because they fall within the safe harbor of the FEC's prohibition regulations implementing *WRTL*. They did not advocate Senator Clinton's election or defeat; instead, they proposed a

"I think we are at a very critical time in this country. I can tell you beyond a shadow of a doubt that uh, the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." (*Id.* at 71.)

"[T]his vote comes down to one thing: liberty. Do you believe in liberty or don't you? Economic liberty, free speech, protecting our borders, protecting our country from terrorism—the issue is liberty." (*Id.*)

"[W]e must not ever underestimate this woman. We must not ever understate her chances of winning. We mustn't be lolled into a state of security and complacency by the new found moderation that she likes to talk about. And we must never forget the fundamental danger that this woman [poses] to every value that we hold dear." (*Id.* at 72).

In sum, plaintiff's counsel's representation at oral argument that the movie did not exhort viewers to vote against Senator Clinton, is simply untrue.

commercial transaction buy the DVD of *The Movie*. *See WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(b). Although Citizens may therefore run the advertisements, it complains that requirements of § 201 and § 311 of BCRA, 2 U.S.C. §§ 434(f)(2), 441d, impose on it burdens that violate the First Amendment.

Section 201 is a disclosure provision requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes among other things the names and addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications. §§ 434(f)(1), (2)(F); 11 C.F.R. § 104.20(c)(9). Section 311 is a disclaimer provision. 2 U.S.C. § 441d. For advertisements not authorized by a candidate or her political committee, the statement " is responsible for the content of this advertising" must be spoken during the advertisement and must appear in text on-screen for at least four seconds during the advertisement. § 441d(d)(2). In addition, such advertisements are required to include the name, address, and phone number or web address of the organization behind the advertisement. § 441d(a)(3).

Citizens thinks that § 201 and § 311 are unconstitutional because its advertisements do not constitute express advocacy or the functional equivalent of express advocacy. The argument is that the Supreme Court's *WRTL* decision narrowed the constitutionally permissible scope of what could be considered an electioneering communication. Under Citizens' reading of *WRTL*, [***11**] anything that is not express advocacy or

not "susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate" cannot be constitutionally regulated by Congress under BCRA. *See* 127 S. Ct. at 2667.

[**281] We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in *WRTL*, reserving it for decision on an as-applied basis. In contrast, when the *McConnell* Court sustained the disclosure provision of § 201 and the disclaimer provision of § 311, it did so for the "entire range of electioneering communications" set forth in the statute. *McConnell*, 540 U.S. at 196; *see also id.* at 230–31 (discussing § 311). Citizens's advertisements obviously are within that range.

Although Citizens styles its argument as an as-applied challenge, it offers only one distinction between its advertisements and the mine-run of speech that constitutes electioneering communication under BCRA. The distinction, so goes the argument, is that Citizens' speech is constitutionally protected, as *WRTL* holds. [*Editor's Note: The following sentence was struck by the Errata, and footnote 13 was moved where indicated below.*] Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say.[13] We know that the Supreme Court has not

[13][*Editor's Note: The Errata changed the following "See" citation to a "But See" citation.*] *See Majors v. Abell*, 361

adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment. [*Editor's Note: Footnote 13 was moved by the Errata to here.*] *See FEC v. Mass. Citizens for Life*, 479 [*12] U.S. 238, 259–62 (1986) (striking down a prohibition, and noting that the disclosure provisions will apply to the newly permitted speech); *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297–98 (1981) (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791–92 & n.32 (1978) (discussing how disclosure provisions can help offset the coercive aspects of corporate speech).

The *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied if disclosure would lead to reprisals and thus "impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. To this, the Court added that the plaintiff must show a "reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals." *Id.* (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). Citizens' memorandum in support of its motion states that there may be reprisals, but it has

F.3d 349, 356–57 (7th Cir. 2004) (Easterbrook, J., dubitante).

presented no evidence to back up this bald assertion. In that respect, Citizens is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support. *See* 540 U.S. at 199.

We therefore hold that Citizens has not established the requisite probability of prevailing on the merits of its arguments against the disclosure and disclaimer provisions § 201 and § 311, respectively.

C.

Citizens tells us that without a preliminary injunction it will not be able to broadcast *The Movie*, that it will have to disclose the identity of its contributors to the FEC if it runs the advertisements, and that some portion of the time it purchased for the advertisements would be consumed by [**282] the disclaimers BCRA requires. If Citizens had made more of a showing that it [***13**] had a chance of prevailing in this court on the merits, these kinds of harms might have warranted preliminary relief. But in the face of *McConnell*'s ruling that the disclosure and disclaimer provisions are constitutional and that the restriction on corporate speech advocating the defeat of a candidate does not violate the First Amendment, Citizens is unable to raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714 15 (D.C. Cir. 2001), *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

As to the remaining factors governing preliminary relief, we cannot say that enjoining enforcement of the BCRA provisions at issue would serve the public interest in view of the Supreme Court's determination that the provisions assist the public in making informed decisions, limit the coercive effect of corporate speech, and assist the FEC in enforcing contribution limits. *See McConnell*, 540 U.S. at 196, 205, 231.

* * *

Citizens' motion for preliminary injunction with respect to the § 203 Prohibition as applied to "Questions" shall be DENIED as moot as set forth in footnote 9 and shall be DENIED with respect to all other claims. A separate order shall issue this date.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 15, 2008.

[Doc. 40, filed Jan. 16, 2008]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED Plaintiff,	)	
	)	Civil Action No. 07-2240
v.	)	(ARR, RCL, RWR)
	)	(Three-Judge Court)
FEDERAL ELEC- TION COMMISSION, Defendant.	)	

ERRATA

This court's Memorandum Opinion [39] dated January 15, 2008 is amended as follows:

1. The third sentence of the second full paragraph on page 11 is stricken. This sentence read: "Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say."
2. Footnote 13 is moved to the end of the sentence beginning on page 11 that reads: "And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment."
3. Footnote 13 is changed from a *See* citation to a *But See* citation.

SO ORDERED.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 16, 2008.

[Doc. 67, filed July 24, 2008]

United States District Court
District of Columbia

Citizens United, ***Plaintiff,***	
v.	**Civil No. 07-2240-RCL**
Federal Election Commission, ***Defendant.***	THREE-JUDGE COURT

Notice of Appeal to U.S. Supreme Court

Notice is given that Plaintiff hereby appeals to the United States Supreme Court this Court's Order (July 18, 2008; Doc. 66) denying Plaintiff's Motion for Summary Judgment (Doc. 52) and granting Defendant's Motion for Summary Judgement (Doc. 55) as to Counts 1, 2, and 3 of Plaintiff's Amended Verified Complaint for Declaratory and Injunctive Relief (Doc. 22). Appeal is taken pursuant to § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002. Pub. L. No.

107-155, 116 Stat. 81, 113-14 (providing for direct appeal to the Supreme Court).

July 24, 2008

Respectfully submitted,

/s/ James Bopp, Jr.
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**pro hac vice motion granted*

U.S. Constitution, First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2 U.S.C. § 434(f)(1)-(3)

§ 434. Reports

* * *

(f) *Disclosure of electioneering communications.*

(1) *Statement required.* Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $ 10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) *Contents of statement.* Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for

permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $ 1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) *Electioneering communication.* For purposes of this subsection –

(A) *In general.*

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within –

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or

caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) *Exceptions.* The term "electioneering communication" does not include –

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure

under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)).

(C) *Targeting to relevant electorate.* For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons–

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

2 U.S.C. § 441b(a)-(c)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations.

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) * * *

(2) For purposes of this section and section 791(h) of Title 15, the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any

services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

* * *

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

2 U.S.C. § 441d

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 434(f)(3) of this title)) (2 U.S.C. § 434(f)(3)), such communication -

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its

agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

* * *

(d) *Additional requirements*

* * *

(2) *Communications by others.* Any communication described in paragraph (3) of subsection (a) of this section which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: " is responsible for the content of this advertising." (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

BCRA § 403(a), 116 Stat. at 113-14

Sec. 403. Judicial Review

(a) Special Rules for Actions Brought on Constitutional Grounds. – If any action is brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and to the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by filing a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

11 C.F.R. § 100.29

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section–(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, *publicly distributed* means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) *A special election* or a *runoff election* is a primary election if held to nominate a candidate. A special election or a runoff election is a general election if held to elect a candidate.

(5) *Targeted to the relevant electorate* means the communication can be received by 50,000 or more persons–

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or

satellite system, shall be available on the Federal Communications Commission's Web site, *http://www.fcc.gov*. A link to that site is available on the Federal Election Commission's Web site, *http://www.fec.gov*. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Website on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) *Can be received by 50,000 or more persons* means–

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or

network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour–

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that–

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) The following communications are exempt from the definition of electioneering *communication*. Any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(5) Is paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate. *See* 11 CFR 300.71 for communications paid for by a candidate for State or local office that promotes, supports, attacks or opposes a Federal candidate.

11 C.F.R. § 110.11(a)-(c)

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope.* The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) *General content requirements.* A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candi-

date, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) *Disclaimer specifications* (1) *Specifications for all disclaimers.* A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

* * *

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, "XXX is responsible for the content of this advertising," spoken clearly, with the blank to be filled in

with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the "XXX is responsible" statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

MOTION

Supreme Court, U.S.
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No. 08-205

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the three-judge district court correctly held that the disclosure requirements of federal campaign finance law may permissibly be applied to advertisements that are not the functional equivalent of express advocacy under the test set forth in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

2. Whether the three-judge district court correctly concluded that appellant's film about Senator Hillary Clinton is the functional equivalent of express advocacy.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 11
Conclusion 26

TABLE OF AUTHORITIES

Cases:

Brown v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) 6, 12

Buckley v. *American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) 19

Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*

Citizens Against Rent Control v. *City of Berkeley*, 454 U.S. 290 (1981) 19

Davis v. *FEC*, 128 S. Ct. 2759 (2008) 14, 16, 17

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 17, 18

FEC v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ..... *passim*

First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 15, 18, 19

McConnell v. *FEC*:

540 U.S. 93 (2003) ..... *passim*

251 F. Supp. 2d 176 (D.D.C.), aff'd in part and rev'd in part, 540 U.S. 93 (2003) 4, 6, 13, 16, 21, 26

McIntyre v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995) 15, 16

Cases—Continued: Page

North Carolina Right to Life, Inc. v. *Leake*, 525 F.3d 274 (4th Cir. 2008) 17
United States v. *Harriss*, 347 U.S. 612 (1954) 19
United States v. *Virginia*, 518 U.S. 515 (1996) 15

Constitution, statutes and regulations:

U.S. Const. Amend. I 14, 18, 19, 21, 26
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81:
§ 201, 116 Stat. 88 2
§ 203, 116 Stat. 91 ..... 7, 8, 9, 11, 12, 17
§ 311, 116 Stat. 105 2
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 2
2 U.S.C. 431(11) 4
2 U.S.C. 431(f)(1) (Supp. IV 1974) 3
2 U.S.C. 434(f)(2) 2, 4
2 U.S.C. 434(f)(2)(E) 5
2 U.S.C. 434(f)(3)(A)(i) 4, 16
2 U.S.C. 437c(b)(1) 2
2 U.S.C. 437d(a)(7) 2
2 U.S.C. 437d(a)(8) 2
2 U.S.C. 437f 2
2 U.S.C. 438(a)(8) 2
2 U.S.C. 438(d) 2
2 U.S.C. 441b 18
2 U.S.C. 441b(a) 17
2 U.S.C. 441b(b)(2) 7

Statutes and regulations—Continued: Page

2 U.S.C. 441d 4
2 U.S.C. 441d(a) 2
2 U.S.C. 441d(a)(3) 5
2 U.S.C. 441d(d)(2) 5
26 U.S.C. 501(c)(4) 8
11 C.F.R.:
Section 104.20 4
Section 104.20(c) 4
Section 104.20(c)(7) 5
Section 110.11 4
Section 110.11(b)(3) 5
Section 110.11(c)(4) 5
Section 114.15 23

Miscellaneous:

Citizens United, *Hype: The Obama Effect* (visited Oct. 16, 2008) <http://www.hypemovie.com> 11
Citizens United Political Victory Fund, *Statement of Organization* (June 15, 1994) <http://query.nictusa.com/cgi-bin/fecimg/?94039043287+0> 13
FEC, *Individuals Who Gave to This Committee: Citizens United Political Victory Fund* (visited Oct. 16, 2008) <http://query.nictusa. com/cgi-bin/com_ind/C00295527/> 14
FEC Disclosure Reports—Filer ID C00295527, (visited Oct. 16, 2008) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527> 13

In the Supreme Court of the United States

No. 08-205

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

OPINIONS BELOW

The opinion of the three-judge district court granting appellee's motion for summary judgment (J.S. App. 2a-3a) is unreported. The opinion of the three-judge district court denying appellant's motions for preliminary injunctions (J.S. App. 4a-20a) is reported at 530 F. Supp. 2d 274.

JURISDICTION

The decision of the three-judge district court was entered on July 18, 2008. A notice of appeal was filed on July 24, 2008 (J.S. App. 22a-23a), and the jurisdictional statement was filed on August 15, 2008. The jurisdiction of this Court is invoked under Section 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 113.

STATEMENT

In the district court, appellant argued that, under this Court's decision in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*), the reporting and disclaimer requirements imposed by Sections 201 and 311 of BCRA, 116 Stat. 88, 105 (2 U.S.C. 434(f)(2), 441d(a)), are unconstitutional as applied to appellant's film criticizing Senator Hillary Clinton and to three planned advertisements to promote that film. The three-judge district court denied appellant's motion for a preliminary injunction, J.S. App. 4a-20a, and this Court dismissed appellant's direct appeal for lack of jurisdiction. 128 S. Ct. 1732 (2008) (No. 07-953). On similar reasoning, the district court then granted summary judgment to the Federal Election Commission (Commission or FEC). *Id.* at 2a-3a.

1. The FEC is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, and other federal campaign-finance statutes. The Commission is empowered to "formulate policy" with respect to FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [FECA]," 2 U.S.C. 437d(a)(8), 438(a)(8); see 2 U.S.C. 438(d); and to issue written advisory opinions concerning the application of FECA and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. Since 1910, federal law has required disclosure of information related to the financing of federal election campaigns. See *Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam). After Congress enacted a new disclosure regime in 1974, see *id.* at 62-64, this Court held that the new provisions were constitutional on their face, *id.* at

64-84. The Court explained that disclosure serves the important government interests of (1) providing the electorate with information on campaign financing "in order to aid the voters in evaluating those who seek federal office," *id.* at 66-67; (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," *id.* at 67; and (3) "gathering the data necessary to detect violations of the contribution limitations" that were simultaneously enacted, *id.* at 68.

The disclosure requirements at issue in *Buckley* pertained to "the use of money or other objects of value 'for the purpose of . . . influencing' nominations or elections to federal office." 424 U.S. at 77 (quoting 2 U.S.C. 431(f)(1) (Supp. IV 1974)). In order to avoid "serious problems of vagueness," the Court held that, as applied to organizations whose major purpose was not campaign activity, the disclosure provisions would "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate," *i.e.*, "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 76, 79-80 (footnote omitted). Consistent with earlier decisions regarding compelled disclosure, the Court held that the challenged provisions, so construed, would unconstitutionally infringe on associational rights only in the limited circumstance when such disclosure would result in a "reasonable probability" of "threats, harassment, or reprisals" against an organization or its members. *Id.* at 74.

3. Based on its assessment of evolving federal campaign practices and abuses, Congress subsequently determined, inter alia, that entities had been funding broadcast advertisements designed to influence federal

elections "while concealing their identities from the public," including by "hiding behind dubious and misleading names." *McConnell* v. *FEC*, 540 U.S. 93, 196-197 (2003) (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 237 (D.D.C.) (three-judge court), aff'd in part and rev'd in part, 540 U.S. 93 (2003)). In enacting BCRA, Congress amended FECA to require disclosure about the sources of funding for "electioneering communications." The term "electioneering communication" is defined, in the context of elections for President or Vice President, as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate; and (2) is made within 60 days before a general election, or within 30 days before a presidential primary election or nominating convention. 2 U.S.C. 434(f)(3)(A)(i).

The disclosure provisions at issue in this case include both reporting requirements, 2 U.S.C. 434(f)(2); 11 C.F.R. 104.20, and disclaimer requirements, 2 U.S.C. 441d; 11 C.F.R. 110.11. The reporting provisions state that any "person" (defined to include any corporation, labor organization, or other group, 2 U.S.C. 431(11)) expending more than $10,000 to produce or air an electioneering communication must file a statement with the Commission. 2 U.S.C. 434(f)(2). The statement must identify the person making the disbursement, the amount and date of the disbursement, and, in the case of an electioneering communication made by a corporation, "the name and address of each person who made a donation aggregating $1,000 or more to the corporation * * * for the purpose of furthering electioneering communications." 11 C.F.R. 104.20(c). If the disbursement is made out of a "segregated bank account established to pay for electioneering communications," the corporation making the electioneering communication need only

identify those individuals who contributed $1000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E); 11 C.F.R. 104.20(c)(7).

BCRA's disclaimer provisions require that a televised electioneering communication include on the screen (1) "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," and (2) a statement "that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a)(3); 11 C.F.R. 110.11(b)(3). The communication must also include a statement that the entity funding the communication "is responsible for the content of this advertising," and that statement must be (1) made orally by a representative of the person making the communication, and (2) printed "for a period of at least 4 seconds" in text meeting size and contrast requirements. 2 U.S.C. 441d(d)(2); 11 C.F.R. 110.11(c)(4).

4. Soon after BCRA was enacted, appellant and other plaintiffs challenged the constitutionality of numerous BCRA provisions, including the reporting and disclaimer requirements that are at issue in this appeal. In *McConnell*, this Court rejected the plaintiffs' challenges to those disclosure provisions. See 540 U.S. at 194-202, 230-231.

In upholding the reporting requirements applicable to "electioneering communications," the Court in *McConnell* explained that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA." 540 U.S. at 196. For that

reason, the Court concluded, "*Buckley* amply supports application of [the] disclosure requirements to the entire range of 'electioneering communications.'" *Ibid.* The Court also endorsed the conclusion of the district court in that case that the plaintiffs' challenge to BCRA's reporting requirements "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (quoting *McConnell*, 251 F. Supp. 2d at 241). Three other Justices in *McConnell*, while rejecting much of the Court's reasoning, agreed that BCRA's reporting requirements are generally constitutional because they "substantially relate" to the informational interest identified in the Court's opinion. *Id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part); see *id.* at 286 n.*.

Consistent with *Buckley*, the Court in *McConnell* recognized that, under certain limited circumstances, "compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. The Court explained that, under the governing standard, disclosure may not be required in circumstances where there is a "reasonable probability" that such disclosure "would subject identified persons to 'threats, harassments, and reprisals.'" *Id.* at 198-199 (quoting *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 100 (1982)). The Court agreed with the district court that the evidence in *McConnell* had "not establish[ed] the requisite 'reasonable probability' of harm to any plaintiff group or its members," but it noted that its rejection of the facial challenge to the reporting requirements did "not foreclose possible future challenges to particular applications of that requirement." *Id.* at 199.

The Court in *McConnell* also upheld BCRA's disclaimer requirements. 540 U.S. at 230-231. Chief Justice Rehnquist, writing for eight Members of the Court (see *id.* at 224 n.*), explained that BCRA's "inclusion of electioneering communications in the [pre-existing disclaimer] regime bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id.* at 231 (quoting *Buckley*, 424 U.S. at 81).

5. In *McConnell*, this Court also rejected a facial challenge to Section 203 of BCRA, 2 U.S.C. 441b(b)(2), which prohibits corporations or labor unions from using general treasury funds to pay for electioneering communications. 540 U.S. at 206. The Court noted that this corporate funding restriction encompassed both campaign advocacy and some "issue ads," but held that the government's long-recognized and compelling interests in regulating corporation-funded express advocacy apply with equal force to corporation-funded speech that is "the functional equivalent of express advocacy." *Id.* at 205-206. The Court reasoned that, because the statutory definition of "electioneering communication" encompasses only communications that refer to a specific candidate shortly before an election, the fact that a communication meets the statutory criteria "strongly supports" a finding that any given electioneering communication is the functional equivalent of express advocacy, such that the funding restriction's potential "application to pure issue ads" is insubstantial. See *id.* at 207. The Court further noted that, "[e]ven if we assumed that BCRA will inhibit some constitutionally protected corporate and union speech, that assumption would not justify prohibiting all enforcement of the law unless its application to protected speech is substantial." *Ibid.* (citation

and internal quotation marks omitted). Thus, the Court in *McConnell* held that the electioneering communication provision was "amply justifie[d]," *id.* at 208, and that the plaintiffs had not "carried their heavy burden" to show the funding restriction to be unconstitutional on its face, *id.* at 207.

Four years later, in *WRTL*, this Court considered and sustained an as-applied challenge to Section 203. Two Members of the Court framed the relevant inquiry as whether the advertisements at issue constituted "express advocacy or its functional equivalent." 127 S. Ct. at 2664 (opinion of Roberts, C.J.). Under their approach, "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Those two Justices concluded that, "[u]nder this test, WRTL's three ads are plainly not the functional equivalent of express advocacy." *Ibid.* The lead opinion therefore concluded that no compelling interest supported Section 203 as applied to those advertisements. *Id.* at 2670-2673. Three other Justices concluded that Section 203 is unconstitutional on its face and would have overruled the Court's contrary holding in *McConnell*. *Id.* at 2684-2687 (Scalia, J., concurring in part and concurring in the judgment).

6. Appellant is a nonprofit corporation with tax-exempt status under 26 U.S.C. 501(c)(4). J.S. App. 5a. In early 2008, appellant released a film about Senator Hillary Clinton, entitled *Hillary: The Movie*, which appellant intended to distribute through theaters, video-on-demand broadcasts, and DVD sales while Senator Clinton was a candidate for President of the United States. See *ibid.* The video-on-demand broadcast was

to be made available to cable television subscribers for a fee to be paid by appellant, in the manner of an infomercial. See *id.* at 7a; Am. Compl. ¶ 28. Appellant also produced three television advertisements for the movie. J.S. App. 5a-7a & nn.2-4.

In December 2007, appellant filed suit in federal district court, challenging BCRA's application to both the film and the proposed advertisements. See J.S. App. 9a-10a. With respect to the film itself, appellant contended that Section 203's ban on the use of general treasury funds to broadcast the movie is unconstitutional under this Court's decision in *WRTL*. See *id.* at 11a-12a. With respect to the advertisements for the film, the FEC conceded in the district court that, under *WRTL*, appellant could not constitutionally be foreclosed from financing those advertisements with general treasury funds. See *id.* at 15a. The parties disagreed, however, on the question whether BCRA's reporting and disclaimer provisions were constitutional as applied to the advertisements. See *id.* at 16a.

7. The three-judge district court denied preliminary injunctive relief on both of appellant's claims. J.S. App. 4a-20a. Citizens United appealed that decision to this Court, which dismissed the appeal for want of jurisdiction. 128 S. Ct. 1732 (2008) (No. 07-953). The district court then granted summary judgment to the Commission "[b]ased on the reasoning of [the court's] prior opinion" denying preliminary injunctive relief. J.S. App. 2a-3a.

a. The district court rejected appellant's challenge with respect to the film itself on the ground that the film is the functional equivalent of express advocacy. J.S. App. 12a-15a. The court stated that the film "is susceptible of no other interpretation than to inform the elec-

torate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.* at 13a. The court held that, under *McConnell* and *WRTL*, the film may constitutionally be subject to BCRA's corporate financing restriction. *Id.* at 15a.

b. The district court also rejected appellant's contention that BCRA's reporting and disclaimer provisions are unconstitutional as applied to appellant's proposed advertisements. J.S. App. 15a-19a. The court explained that this Court in *McConnell* had upheld those provisions "for the 'entire range of electioneering communications' set forth in the statute." *Id.* at 17a (quoting *McConnell*, 540 U.S. at 196). The court rejected appellant's contention that this aspect of *McConnell* had been superseded by *WRTL*, stating that "[t]he only issue in [*WRTL*] was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period." *Ibid.* The district court also observed that, in various contexts, this Court "has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.* at 18a.

The district court recognized that this Court in *McConnell* had "suggest[ed] one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals and thus 'impose an unconstitutional burden on the freedom to associate in support of a particular cause.'" J.S. App. 18a (quoting *McConnell*, 540 U.S. at 198). The court explained, however, that while appellant's "memorandum in support of its motion [for a preliminary in-

junction] states that there may be reprisals," appellant had "presented no evidence to back up this bald assertion." *Id.* at 18a-19a. The court observed that appellant "is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support." *Id.* at 19a.

ARGUMENT

The district court correctly granted the Commission's motion for summary judgment, and that decision rests on a straightforward application of settled legal principles. The appeal should therefore be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.[1]

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[1] Although at the present time *Hillary: The Movie* is no longer subject to the restrictions on electioneering communications—Senator Clinton will not be a candidate for federal office again before 2012—in our view the appeal is not moot in light of this Court's holding in *WRTL* that a comparable challenge remained justiciable. This Court held that the timing of Section 203's pre-election windows does not permit full litigation of as-applied challenges in advance, and that WRTL had sufficiently established that the issue was likely to recur by "credibly claim[ing] that it planned on running 'materially similar' future targeted [electioneering communications] mentioning a candidate during the [pre-election window]." 127 S. Ct. at 2662-2663. The Court accordingly held that WRTL's challenge was "capable of repetition, yet evading review," and thus not moot. *Id.* at 2662. Appellant averred in the district court that it planned to produce, and to promote, a film about Senator Barack Obama; that the film would "raise[] similar issues as *Hillary*" and would be an electioneering communication; and that it desired to broadcast the film during the 60-day period before the general election (in which Senator Obama is a candidate for federal office). Affidavit of David N. Bossie ¶¶ 8-11 (attachment to Pl.'s S.J. Mot.). That film apparently has since been released. See Citizens United, *Hype: The Obama Effect* (visited Oct. 16, 2008) <http://www.hypemovie.com>. More generally, appellant "reaffirm[ed] its intention to do materially similar advertising in materially similar situations in

1. In *McConnell*, eight Members of this Court—including three Justices who would have held Section 203's prohibition on the use of corporate treasury funds for "electioneering communications" to be unconstitutional on its face—agreed that the reporting and disclaimer requirements applicable to such communications are facially valid. See pp. 5-7, *supra*. In particular, the opinion for the Court stated that "*Buckley* amply supports application of [FECA's] disclosure requirements to the entire range of 'electioneering communications.'" 540 U.S. at 196. That holding controls this case.

Contrary to appellant's suggestion (J.S. 15-16), the government does not contend that *McConnell* precludes all as-applied challenges to BCRA's reporting and disclaimer requirements. The Court in *McConnell* made clear that as-applied challenges *are* available, stating that the Court's "rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. The Court further explained that, to succeed in such an as-applied challenge, a plaintiff must demonstrate a "reasonable probability" that the forced disclosures "would subject identified persons to 'threats, harassment, and reprisals.'" *Id.* at 198-199 (quoting *Brown*, 459 U.S. at 100). The Court observed that, although some plaintiffs had expressed concern that disclosure might lead to such harms, no plaintiff—including appellant—had made a sufficient evidentiary showing that those injuries

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the future." Pl.'s Statement of Undisputed Material Facts ¶ 15 (attachment to Pl.'s S.J. Mot.). Accordingly, as in *WRTL*, appellant's challenge appears to be "capable of repetition, yet evading review."

were actually likely to occur. *Id.* at 199.[2] The Court's statement in *McConnell* that BCRA's reporting requirements may constitutionally be applied "to the entire range of 'electioneering communications,'" 540 U.S. at 196, *combined with* the Court's express recognition that those requirements are subject to a different sort of as-applied challenge, *id.* at 199, strongly suggests that the Court did not contemplate as-applied challenges based solely on the content of the relevant communication.

Similarly, in the instant case, the district court did not read *McConnell* as foreclosing all as-applied challenges to BCRA's reporting and disclaimer requirements. To the contrary, the district court specifically noted that "[t]he *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals." J.S. App. 18a. The district court concluded, however, that appellant could not prevail in such an as-applied challenge because appellant (like the plaintiffs in *McConnell*) had raised the possibility of reprisals but had offered no evidence to support that concern. *Ibid.*[3] In this Court, appellant does not

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[2] Appellant notes (J.S. 20 n.9) that certain plaintiffs in *McConnell* did attempt to make such a factual showing regarding disclosure-related burdens. The Court deemed those submissions insufficient. And in any event, appellant itself introduced no such evidence, either in that case or this one. See *McConnell*, 251 F. Supp. 2d at 227-229 (discussing evidentiary submissions of NRA, ACLU, and three trade associations).

[3] Appellant has maintained a separate segregated fund (commonly referred to as a political action committee, or PAC) for more than 13 years and has disclosed the names and addresses of its donors pursuant to federal law. See Citizens United Political Victory Fund, *Statement of Organization* (June 15, 1994) <http://query.nictusa.com/cgi-bin/fecimg/?94039043287+0>; *FEC Disclosure Reports—Filer ID*

contend that the district court overlooked any record evidence showing a genuine burden.

2. Rather, appellant contends that reporting and disclaimer requirements are automatically so burdensome as to trigger strict scrutiny and that they cannot survive that exacting analysis when applied to communications that (like the advertisements promoting appellant's movie) are not the functional equivalent of express advocacy. Appellant's argument lacks merit.

It is well established that First Amendment challenges to disclosure requirements are analyzed under a standard that is more permissive than strict scrutiny. This Court has used the formulation "exacting scrutiny" and has required that the compelled disclosure bear a "substantial relation" to a "sufficiently important" government interest. *Buckley*, 424 U.S. at 64, 66, 75 (citation omitted); accord *Davis* v. *FEC*, 128 S. Ct. 2759, 2775 (2008) (reiterating that "there must be 'a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed,' and the governmental interest 'must survive exacting scrutiny'") (quoting *Buckley*, 424 U.S. at 64); *McConnell*, 540 U.S. at 196, 231.

"Exacting scrutiny," as this Court applies it to disclosure requirements, is more permissive than the "strict

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C00295527 (visited Oct. 16, 2008) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527>. During that time, appellant has disclosed approximately 1000 contributions from individuals in amounts of $200 or more, including address and employer information for most of the individuals. See FEC, *Individuals Who Gave to This Committee: Citizens United Political Victory Fund* (visited Oct. 15, 2008) <http://query.nictusa.com/cgi-bin/com_ind/C00295527/>. Appellant's inability to produce any evidence of actual reprisals is particularly striking in light of the large volume of donor information that it has previously released.

scrutiny" standard that appellant advocates. Strict scrutiny requires that the chosen means be "narrowly tailored" to serve a "compelling interest"; this Court in *Buckley* required only a "substantial relation" to a "sufficiently important" interest. That standard corresponds to *intermediate* scrutiny. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

Citing a footnote in *WRTL*, appellant contends (J.S. 21) that "exacting scrutiny" *is* "strict scrutiny." But both the footnote in *WRTL* (127 S. Ct. at 2669 n.7) and the passage of *Buckley* that the footnote cites (424 U.S. at 44) used the phrase "exacting scrutiny" in striking down *expenditure limits*, to which the Court applied strict scrutiny. See *id.* at 44-45. And the Court in *Buckley* explicitly distinguished the scrutiny applicable to such "limitations on core First Amendment rights of political expression," *ibid.*, from that applicable to encroachments on the "privacy of association" by *disclosure requirements*, *id.* at 64.

Appellant also cites *First National Bank* v. *Bellotti*, 435 U.S. 765, 786 (1978), and *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334 (1995), in support of its contention that the strict-scrutiny standard applies to the disclosure requirements at issue here. But in *Bellotti*, as in *WRTL*, the Court applied strict scrutiny to a prohibition on corporate campaign expenditures, "a prohibition * * * directed at speech itself." 435 U.S. at 786. In *McIntyre*, the Court explicitly distinguished the state law at issue, which prohibited the distribution of anonymous handbills addressing a variety of political issues, see 514 U.S. at 338 n.3, from the disclosure requirements contained in federal campaign-finance laws, see *id.* at 355. And because BCRA's definition of "electioneering communication" is limited to specified categories

of "broadcast, cable, or satellite communication[s]," 2 U.S.C. 434(f)(3)(A)(i), the materials subject to the challenged disclosure requirements are far removed from the "personally crafted statement of a political viewpoint" involved in *McIntyre*, 514 U.S. at 355. In any event, the Court in *McConnell* resolved any confusion by expressly stating that the proper standard for disclosure obligations is the intermediate "important state interests" test. 540 U.S. at 196.

Appellant is also incorrect in arguing that this Court's cases treat disclosure as creating, per se, the type of burden on protected speech that *ought* to trigger strict scrutiny. Appellant cites the statement in *Buckley* that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." J.S. 20 (quoting *Davis*, 128 S. Ct. at 2774-2775) (in turn quoting *Buckley*, 424 U.S. at 64). The statement that disclosure *can* be a burden is far from a flat holding that it always *is* a burden. In fact, the Court in *Buckley* immediately followed this statement by analyzing whether the allegations of burden were supported by evidence showing a "reasonable probability that the compelled disclosure * * * will subject [the plaintiffs] to threats, harassment, or reprisals." See *Buckley*, 424 U.S. at 74. Finding the evidence insufficient to demonstrate such a probability, the Court upheld FECA's disclosure provisions. *Ibid.* The Court in *McConnell* employed the same mode of analysis and arrived at the same conclusion. See *McConnell*, 540 U.S. at 197-199; see also *McConnell*, 251 F. Supp. 2d at 246-249. In *Davis*, the Court did not even reach the issue of constitutional burdens because the government's sole interest in the disclosure provisions at issue was the administration of contribution limits that the Court had

struck down facially. See *Davis*, 128 S. Ct. at 2775. Thus, none of these cases supports appellant's claims that disclosure is burdensome per se. Rather, when the Court has addressed the issue, it has held that the government's interests were sufficient to justify disclosure in the absence of evidence of threats, harassment, and reprisals.

3. In addition to seeking the application of strict scrutiny, appellant argues (J.S. 18-19) that, because *WRTL* precludes the application of Section 203's corporate-financing restriction to appellant's advertisements promoting its movie, application of BCRA's reporting and disclaimer provisions is necessarily barred as well. That argument rests on the premise that the authority of Congress (and state legislatures) to require disclosure of financing sources is coextensive with the authority to bar the use of corporate treasury funds to pay for particular communications. This Court has repeatedly rejected that proposition, and nothing in *WRTL* endorsed it.[4]

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), for example, this Court held that the defendant corporation was constitutionally entitled to use its general treasury funds to engage in express advocacy in federal campaigns, notwithstanding the ban imposed by 2 U.S.C. 441b(a) on use of corporate treasury funds for that purpose. 479 U.S. at 263-264. The

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[4] Appellant also seeks (J.S. 16) to draw support for this notion from *North Carolina Right to Life, Inc.* v. *Leake*, 525 F.3d 274 (4th Cir. 2008). But in holding that legislatures' power to "establish campaign finance laws" is limited to regulating express advocacy and its functional equivalent, *id.* at 282-283, the Fourth Circuit was referring to regulation of expenditures, and did not consider reporting requirements standing alone. See *id.* at 280.

Court explained that, given the particular characteristics of the corporation involved, the corporation's campaign-related spending would not pose the danger at which Section 441b was directed. See *ibid.* The Court made clear, however, that the corporation remained subject to the applicable FECA disclosure requirements. See *id.* at 262 (explaining that "MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures").

The Court has taken a similar approach to corporate spending in the context of ballot initiatives. In *Bellotti*, this Court struck down a Massachusetts law that prohibited banks and business corporations from making certain expenditures for the purpose of influencing the outcome of public referenda. 435 U.S. at 767, 786-795. In holding that the plaintiff bank had a First Amendment right to engage in such advocacy, the Court specifically contrasted public referenda with "the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26. The Court observed, however, that even in the context of ballot initiatives, "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. The Court's subsequent decisions have continued to recognize that, while advocacy of particular referendum outcomes is entitled to full constitutional protection, persons who engage in such advocacy may be required to identify their expendi-

tures and the sources of their funding. See *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202-203, 205 (1999); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 n.4, 298-299 (1981).

This Court has also held that "those who for hire attempt to influence legislation" may be required to disclose the sources and amounts of the funds they receive to undertake lobbying activities. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). The Court explained that, if Congress could not mandate the provision of that information, "the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* at 625. In *Bellotti*, this Court noted its prior First Amendment holdings "protect[ing] the right of corporations to petition legislative and administrative bodies," 435 U.S. at 792 n.31, but cited *Harriss* with approval as support for the proposition that compelled disclosure of financing information is permissible, *id.* at 792 n.32. The Court has thus recognized that legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence occurs outside the election context.

Many of these cases postdate *Buckley*, on which appellant principally relies. Appellant repeatedly invokes the Court's determination in *Buckley* that a prior FECA disclosure provision was limited to spending that is "unambiguously related to the campaign of a particular federal candidate." J.S. 16, 18 (quoting *Buckley*, 424 U.S. at 80). Appellant's reliance on that aspect of *Buckley* is misplaced. The Court in *Buckley* announced the express advocacy test (for which the reference to "unambiguously campaign related" spending, 424 U.S. at 81, was

shorthand) as a *construction* of the statutory phrase "for the purpose of * * * influencing [federal elections]." *Id.* at 78-81; see p. 3, *supra*. This Court has since recognized that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-192; see *WRTL*, 127 S. Ct. at 2670 n.7 (opinion of Roberts, C.J.). With respect to disclosure requirements in particular, this Court's precedents squarely refute appellant's contention that Congress's power is limited to communications that are "unambiguously related" to an identified federal candidate's campaign. The decisions discussed above make clear that compelled disclosure of financing information may be permissible even when the disbursements in question have *nothing* to do with any candidate election.

Nothing in *WRTL* unsettles that principle.[5] The lead opinion determined that, when a particular "electioneering communication" can reasonably be viewed as "something other than as an appeal to vote for or against a specific candidate," Congress may not prohibit the use of corporate or union money to finance the advertise-

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[5] The plaintiff in *WRTL* did not link BCRA's corporate-financing and disclosure requirements in the manner that appellant now advocates, but instead affirmatively disavowed any challenge to BCRA's reporting and disclaimer provisions. WRTL's brief in this Court explained: "Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimers and public reports. The whole system will be transparent. With all this information, it will then be up to the people to decide how to respond to the call for grassroots lobbying on a particular governmental issue." Br. for Appellee at 49, *WRTL*, *supra* (Nos. 06-969 & 06-970).

ment. *WRTL*, 127 S. Ct. at 2670, 2673 (opinion of Roberts, C.J.). But the Court did not hold that this sort of electioneering communication is constitutionally exempt from *any* form of regulation. The fact that appellant's advertisements are not *unambiguously* election-related—*i.e.*, the fact that they may reasonably be construed as something other than an appeal to vote against Senator Clinton—does not eliminate the possibility that the advertisements may influence electoral results. See *id.* at 2659 ("We have long recognized that the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application.'") (quoting *Buckley*, 424 U.S. at 42).

Disclosure requirements do not result in "suppression" of speech, however, and nothing in *WRTL* suggests that these lesser burdens render disclosure requirements invalid as applied to issue advocacy. As this Court has long recognized, disclosure regulations *increase* the range of information available to citizens and thereby further First Amendment values. See *McConnell*, 540 U.S. at 197 (explaining that "[p]laintiffs' argument for striking down BCRA's disclosure provisions * * * ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace") (quoting *McConnell*, 251 F. Supp. 2d at 237); *Buckley*, 424 U.S. at 82 (characterizing FECA disclosure requirements as "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view"). The corporate-financing prohibition that this Court invalidated in *WRTL* had no such similar potential to increase the range of information available to the public, and *WRTL* therefore does not cast doubt on this Court's

prior decisions upholding the application of disclosure requirements to various forms of political advocacy.

4. Appellant next contends (J.S. 24-26) that the district court erred when it concluded from the evidence that *Hillary: The Movie* is the functional equivalent of express advocacy. The district court's legal analysis straightforwardly applies the holding of *WRTL*, and its application of that holding to the facts presented here is unexceptionable. Further review of the movie's status as an electioneering communication therefore is not warranted.

a. The lead opinion in *WRTL* held that BCRA's restriction on corporate funding for electioneering communications is constitutional only insofar as it applies to communications that are either "express advocacy or its functional equivalent." *WRTL*, 127 S. Ct. at 2664. The lead opinion defined "the functional equivalent of express advocacy" as speech that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. The opinion immediately then listed criteria relevant to the application of this standard and explained why the advertisements at issue in *WRTL* could be so interpreted:

> Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or

> challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Ibid. The FEC included these criteria, effectively verbatim, in its regulations implementing *WRTL*. See 11 C.F.R. 114.15.

As the district court correctly found, *Hillary: The Movie* is the functional equivalent of express advocacy under these criteria. First, *Hillary: The Movie* repeatedly adverts to Senator Clinton's candidacy and her fitness for the office she sought. J.S. App. 13a n.12; Def.'s Statement of Material Facts As to Which There Is No Genuine Dispute ¶¶ 4-5 (FEC Facts) (attachment to FEC Mot. for S.J.). For example, the film makes the election a central focus, stating that Senator Clinton "will run on attacking Republicans, and being the first woman president—oh isn't that amazing, she's a woman she can walk and talk," and that "[o]ver the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many." J.S. App. 13a-14a n.12. The movie also attacks Senator Clinton's character and fitness by declaring that she is "steeped in sleaze," "is not equipped, not qualified to be our commander in chief," and lacks "the legislative gravitas and qualifications enough to elect her [P]resident of the [U]nited [S]tates." *Id.* at 14a-15a n.12; FEC Facts ¶ 5(e). The film concludes that Senator Clinton poses a "fundamental danger * * * to every value that we hold dear." J.S. App. 15a n.12.

Second, these key "indicia of express advocacy" are not offset by any focus on a genuine legislative issue. *WRTL*, 127 S. Ct. at 2667. Rather, the film focuses exclusively on Senator Clinton's character and fitness

for office and her actions in relation to certain controversies during Bill Clinton's presidency. In the few short portions of the film that touch on legislative issues, the film consistently and explicitly uses those issues to further attack Senator Clinton's character and fitness for the presidency. The inclusion of such issue-based criticisms does not mean that appellant's movie is genuine issue advocacy. See *id.* at 2667 n.6 (contrasting issue advertisements in that case with hypothetical advertisement described in *McConnell* that "condemned [the candidate]'s record on a particular issue"). And the overwhelming majority of the movie's advocacy criticizes Senator Clinton's character without reference to any issues at all.

b. Appellant does not seriously contend otherwise.[6] Rather, it asserts that *Hillary: The Movie* is constitutionally exempt from the corporate funding restriction because the film purportedly contains no "actual words * * * that constitute 'an appeal to vote'" against Senator Clinton. J.S. 26. This argument fails as a matter of law, for it seeks to reintroduce a test akin to the "magic words" requirement that this Court rejected in *McConnell* and *WRTL*. The *WRTL* test does not ask whether the communication *contains* specific words constituting an appeal to vote, but instead whether the communication "is susceptible of no reasonable interpreta-

[6] Appellant briefly asserts that the district court erred by quoting a statement that one of the movie's interviewees made about the movie in another forum, *i.e.*, not in the movie itself. J.S. 24-25. But the district court made abundantly clear that its focus was the correct one—on the "substance of the [electioneering] communication" itself. *WRTL*, 127 S. Ct. at 2666; see J.S. App. 13a-15a & n.12 ("[a]fter viewing *The Movie* and examining the 73-page script at length," the court identified a dozen excerpts "indicative of the film's message as a whole").

tion other than *as* an appeal to vote." *WRTL*, 127 S. Ct. at 2667 (emphasis added). As discussed above, the application of the test in *WRTL* further demonstrates that the inquiry is holistic, examining whether the "focus" of the communication is on a legislative issue or instead on an election and the desirability or undesirability of one candidate (or party) in that election. See *id.* at 2666-2667. The lead opinion in *WRTL* looked for "*indicia* of express advocacy," *id.* at 2667 (emphasis added), not just (as appellant proposes) for particular words that were alone sufficient to *constitute* express advocacy. See also *id.* at 2669 n.7 (declining to adopt, as a constitutional test, the interpretation requiring express advocacy that the Court adopted in *Buckley* to narrow an ambiguous term in FECA). Indeed, as the lead opinion in *WRTL* recognized throughout, Congress could permissibly regulate the "*functional equivalent* of express advocacy." *Id.* at 2664, 2665, 2667, 2668, 2669, 2670 (emphasis added). Appellant's reading, under which Congress has the power to regulate express advocacy *and no more*, is therefore unpersuasive. And as appellant effectively concedes, it can prevail on this factual record only if the absence of "magic words" is alone enough to upset the district court's finding that *Hillary: The Movie* is functionally equivalent to express advocacy. Because appellant's legal contention fails, the district court's factual finding is dispositive here.

c. Appellant's final argument (J.S. 26-28) is that the Court in *McConnell* upheld the electioneering-communication financing restriction only as applied to "ads," and that although the statute makes no distinction based on the length of the broadcast, the prohibition is unconstitutional as applied to a "full-length documentary film[]." J.S. 27. This assertion (which the district court

did not separately address) is without merit. The *McConnell* record included evidence of broadcast advocacy longer than the traditional 30- or 60-second spot, such as paid, 30-minute "infomercials." See *McConnell*, 251 F. Supp. 2d at 305-306, 316-317 (opinion of Henderson, J.); *id.* at 547-548 (opinion of Kollar-Kotelly, J.); *id.* at 906 (opinion of Leon, J.). Thus, "to the extent that [broadcast communications during the 30- and 60-day periods] are the functional equivalent of express advocacy," *McConnell*, 540 U.S. at 206, there is no basis in the statute, in this Court's decisions, or in the First Amendment for treating those communications differently when they are broadcast in the form of a two-hour film or when they otherwise vary in length or form from standard television advertisements.

CONCLUSION

The appeal should be dismissed for lack of a substantial federal question. In the alternative, the judgment of the district court should be affirmed.

Respectfully submitted.

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REPLY BRIEF

109

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In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant,*
v.
FEDERAL ELECTION COMMISSION, *Appellee.*

On Appeal from the United States District Court
for the District of Columbia

Brief Opposing Motion to Dismiss or Affirm

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Corporate Disclosure Statement

Citizens United has no parent corporation, and no publicly-held company owns ten percent or more of its stock. Rule 29.6.

Table of Contents

Corporate Disclosure Statement. ..... (i)

Table of Authorities. ..... (iii)

Argument..... 1

I. McConnell Did Not Resolve This Case.. 1

II. Only "Campaign" Speech Is Subject to Disclosure..... 2

III. An "Appeal to Vote" Requires a Clear Plea for Action.. 9

IV. Movies Are Not "Ads"and Are Not Subject to Regulation..... 12

Conclusion. 13

Table of Authorities

Cases

Buckley v. Valeo, 424 U.S. 1 (1976). 2

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987). 11

FEC v. Massachusetts Citizens for Life,
479 U.S. 238 (1986)..... 6, 7

FEC v. Wisconsin Right to Life,
127 S. Ct. 2652 (2007)..... 1, 2, 4, 5, 9-11

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978)..... 8

McConnell v. FEC,
251 F. Supp. 2d 176 (D.D.C. 2003)..... 12

McConnell v. FEC, 540 U.S. 93 (2003). 1, 4, 12

*Nat'l Right to Work Legal and Educ.
Found. v. Herbert*, No. 2:07-CV-809,
2008 WL 4181336 (D. Utah Sep. 8, 2008)..... 3

North Carolina Right to Life v. Leake,
525 F.3d 274 (4th Cir. 2008) 3

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994)..... 12

United States v. Harriss, 347 U.S. 612 (1954). 8, 9

Argument

This case involves three substantial questions not answered by *McConnell v. FEC*, 540 U.S. 93 (2003), that are answered by the analysis in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"):

(1) Given the First Amendment's liberty and privacy guarantees and the government's authority to regulate elections, where is the *line* at which the government may compel disclosure as to independent communications touching on elections?

(2) In determining whether a communication may only be "interpret[ed] . . . as an appeal to vote for or against a specific candidate," *WRTL II*, 127 S. Ct. at 2667, can a communication constitute this "appeal to vote" absent a clear *plea for action* that can only be understood as a call *to vote* for or against a candidate?

(3) May a feature-length movie be regulated as a campaign "*ad*," or is it different in kind and protected from regulation by the First Amendment?

I. *McConnell* Did Not Resolve This Case.

While *McConnell* resolved none of these questions, the FEC argues that *McConnell* precludes this as-applied challenge. The *Jurisdictional Statement* notes this Court's unanimous rejection of a near-identical argument when the *WRTL II* case first came before this Court. JS 15.

The FEC argues that as-applied challenges are precluded except for one that Citizens does not assert,

i.e., that it is the sort of socially-disfavored group needing a blanket exemption from otherwise constitutionally permissible disclosure requirements due to the probability of donor harm. Although Citizens does not seek a blanket exemption based on the probability of harm to donors, this Court has recognized that such concerns, along with others, must always be considered when disclosure is compelled, whether or not they warrant blanket exemption. JS 20-21.

Citizens complies with *constitutional* disclosure requirements, but asserts that the Disclosure Requirements at issue herein are *un*constitutional as applied to "electioneering communications" lacking an "electioneering nature," *WRTL II*, 127 S. Ct. at 2667, because they "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." *Id.* at 2670.

II. Only "Campaign" Speech Is Subject to Disclosure.

Where is the constitutional line dividing expression subject to disclosure from expression retaining full First Amendment privacy protection? There must be a line, and it must be bright and speech-protective, for we deal with "political speech," *id.* at 2670, which is at the core of First Amendment protection.

Only one disclosure line has been drawn by this Court for independent communications by persons who are not political committees or candidates. It is the line where political speech becomes "*unambiguously* related to the *campaign* of a particular federal

candidate." *Buckley*, 424 U.S. at 80 (emphasis added).[1]

This disclosure line was not drawn merely to resolve the vagueness of "the phrase, 'for the purpose of . . . influencing' an election or nomination," *id.* at 79, but also to "insure that the reach of [the disclosure requirement] is not *impermissibly broad*," *id.* at 80 (emphasis added), namely, that "the relation of the information sought to the purposes of the Act may [not] be too remote." *Id.* The overbreadth concern was about reaching beyond the constitutionally permissible disclosure line to regulate communications that were not "unambiguously related to the campaign of a particular federal candidate." *Id.*

The unambiguously-campaign-related requirement was implemented by a test, as this Court has always implemented it, which was the express-advocacy test. *Id.* No disclosure could be required for communica-

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[1]The Fourth Circuit recognizes this line for all campaign-finance regulation:

> "*Buckley* . . . recognized the need to cabin legislative authority over elections . . . . It . . . demarcat[ed] a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular . . . candidate."

North Carolina Right to Life v. Leake, 525 F.3d 274, 281 (4th Cir. 2008) (*quoting Buckley*, 424 U.S. at 80). *See also Nat'l Right to Work Legal and Educ. Found. v. Herbert*, No. 2:07-CV-809, 2008 WL 4181336, at *5 (D. Utah Sep. 8, 2008) (same).

tions that did not "expressly advocate the election or defeat of a clearly identified candidate." *Id.* (footnote omitted). So *Buckley* drew the disclosure line for non-political committee, non-candidate, independent communications at express-advocacy, but that in turn was based on the unambiguously-campaign-related line.

McConnell facially recognized some electioneering communications as "the functional equivalent of express advocacy," 540 U.S. at 206, and facially upheld the Disclosure Requirements, *id.* at 196. But it reserved the question of how to distinguish those ads that were the functional equivalent of express advocacy from those that were not. *Id.* at 206 n.88 ("interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads").

WRTL II answered that reserved question, establishing the appeal-to-vote test to determine which electioneering communications were the functional equivalent of express-advocacy communications. The test stated that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. If "ads may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, . . . they are not the functional equivalent of express advocacy." *Id.* at 2670. "[I]n a debatable case, the tie is resolved in favor of protecting speech." *Id.* at 2669 n.7.

This appeal-to-vote test—by its emphasis on bright-line certitude ("unambiguously") and focus on "vote" and "candidate" ("campaign-related")—is a

clear application of the unambiguously-campaign-related requirement. The FEC agrees. *See* FEC Mot. 21 ("The fact that appellant's advertisements are not *unambiguously* election-related—*i.e.* the fact that they may reasonably be construed as something other than an appeal to vote against Senator Clinton. . . .").

So this Court should now decide whether ads that are *not* unambiguously campaign related may nonetheless be subject to disclosure requirements under BCRA. Communications that are not the functional equivalent of express advocacy under the appeal-to-vote test should no more be subject to compelled disclosure than the non-express-advocacy communications that *Buckley* protected from disclosure. Just as the express-advocacy test marked the disclosure line for independent expenditures, so the appeal-to-vote test marks the disclosure line for electioneering communications because both tests implement the unambiguously-campaign-related requirement beyond which disclosure may not be required.

But the FEC proclaims that it may go beyond this line to require disclosure of communications that have "*nothing* to do with any candidate election." FEC Mot. 20. So the Federal *Election* Commission asserts that, pursuant to the Federal *Election* Campaign Act and the Bipartisan *Campaign* Reform Act, it may compel disclosure of communications that are not unambiguously campaign related.[2] In short, when it comes to

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[2]The FEC argues that though Citizens' Ads are not unambiguously campaign related, they "may influence electoral results." FEC Mot. 21. The appeal-to-vote test rejects intent-and-effect inquiries. *WRTL II*, 127 S. Ct. at 2666.

disclosure, the FEC claims there is no constitutional line.

The FEC points to cases that "postdate *Buckley*" to argue that Congressional authority to compel disclosure of communications is broader than Congressional authority to prohibit certain communications. FEC Mot. 17-19. But the FEC evades the relevant issue, which is not whether disclosure is permitted as to some communications that may not be prohibited. The issue is whether campaign finance regulation—whether prohibition or disclosure—is restricted to expenditures for communications that are "unambiguously related to the campaign of a particular candidate." *Buckley*, 424 U.S. at 80.

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ("*MCFL*") embraced the unambiguously-campaign-related requirement, specifically citing the *Buckley* passage establishing it. *Id.* at 248-49. All of the disclosure of non-prohibited activity that *MCFL* referenced fell within the unambiguously-campaign-related requirement. *MCFL* said that even though it eliminated the independent expenditure prohibition for *MCFL*-corporations,

> an *independent expenditure* of as little as $250 . . . will trigger the disclosure provisions . . . . MCFL will be required to identify all *contributors* who annually provide in the aggregate $200 in *funds intended to influence elections*, will have to specify all *recipients of independent spending* amounting to more than $200, and will be bound to identify all persons making contributions over $200 who *request that the*

> *money be used for independent expenditures.* These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions.

479 U.S. at 262 (emphasis added).

What did *MCFL* say must be disclosed? First, "independent expenditure[s]," including the "recipients of independent spending" must be disclosed. *Id.* "Independent expenditures" have been express-advocacy communications since *Buckley* imposed the express-advocacy construction on them, 424 U.S. at 44 & n.52, 80-81, based on the unambiguously-campaign-related requirement—which *MCFL* confirmed. 479 U.S. at 248-49. Second, "contributors . . . [of] funds intended to influence elections" must be disclosed. *Id.* at 262. Such contributions meet the unambiguously-campaign-related requirement under *Buckley*'s construction, in the disclosure context, of "'contributions' . . . 'for the purpose of . . . influencing' the nomination or election of candidates for federal office," 424 U.S. at 77, which it construed to be either a donation to a candidate, political party, or campaign committee or "earmarked for political purposes." *Id.* at 78.

As to the applicability of an informational interest, *MCFL* declared that disclosure of the listed unambiguously-campaign-related information was enough: "These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions." 479 U.S. at 262. So *MCFL* embraced *Buckley*'s analysis that campaign-finance disclosure may only extend to contributions, expenditures, and entities that are "un-

ambiguously related to the campaign of a particular candidate." *Buckley*, 424 U.S. at 80.

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978), although in the ballot measure context, is not contrary. *Bellotti* Court noted that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. The law at issue barred corporations "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.'" *Id.* at 768 (citation omitted). Since *Buckley* had already found "for the purpose of influencing" unconstitutionally vague and given it the express-advocacy construction to implement the unambiguously-campaign-related requirement, 424 U.S. at 77, 81, it is clear in *Bellotti* that the "disclosure" of the "source" of any "expenditure" for a communication was only for one that expressly advocated passage or defeat of a measure, i.e., was unambiguously campaign related.[3]

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[3]The FEC's citation to *United States v. Harriss*, 347 U.S. 612 (1954), is inapposite. Whatever Congressional power and interests justify lobbying disclosure are not at issue here. At issue here is Congress' regulation of campaign financing under the Federal *Election Campaign* Act and the Bipartisan *Campaign* Reform Act ("BCRA"), which stem from "[t]he constitutional power of Congress to regulate federal *elections*," *Buckley*, 424 U.S. at 13 (emphasis added). Furthermore, *Harriss* construed a lobbyist disclosure act to avoid constitutional difficulties so that it ap-

The FEC argues at length over the meaning of "exacting scrutiny." FEC Mot. 13-17. Citizens asserts that strict scrutiny is applicable because this case deals with core political speech and BCRA's disclosure requirements place a substantial burden on that speech. JS 20-21. However, regardless of the level of scrutiny, disclosure may only be compelled for communications that are "unambiguously campaign related," which Citizens' Ads are not.

Whether the unambiguously-campaign-related requirement limits government ability to compel disclosure in the campaign-finance context is a substantial question that this Court should decide.

III. An "Appeal to Vote" Requires a Clear Plea for Action.

WRTL II requires that only electioneering communications "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" are "the functional equivalent of express advocacy," 127 S. Ct. at 2667, and thereby subject to BCRA's prohibition on corporate funding. So first, a communication must be interpreted "as an appeal," and second, that required appeal must be "to

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plies only to persons paid to do lobbying that involves direct contact with Congress, and the person, or a contribution to that person, has the "primary purpose" of such lobbying. *Id.* at 619, 622. The "principal purpose" test of *Harriss* in the lobbying context serves to limit regulation to that which is unambiguously lobbying related, much as the "major purpose" test in *Buckley* limits regulation to that which is, "by definition, campaign related," 424 U.S. at 79, i.e., "unambiguously campaign related." *Id.* at 81.

vote for or against a specific candidate." And all doubts and ties must be resolved in favor of free speech, with no forbidden considerations of intent and effect. *Id.* at 2666-67.

Applying this test, Citizens' Movie cannot be deemed the functional equivalent of express advocacy. The Movie is a full-length documentary film about a prominent American politician. It contains no clear call for action to vote against Senator Clinton and can reasonably be interpreted as a documentary film on the public life of a United States Senator.

But the FEC and the District Court came to a different conclusion by applying a different test, confusing *WRTL II*'s application of the "appeal to vote" test with the test itself. The result is a new test with additional "criteria," which criteria may be offset by a "focus on a genuine legislative issue." FEC Mot. 22-23. The FEC is mistaken. As set out in the *Jurisdictional Statement*, *WRTL II*'s appeal-to-vote test is clear and concise. JS 24. This Court's *application* of that test to the specific ads at issue in *WRTL II* is not relevant beyond the context of grassroots lobbying, which Citizens' Movie is not.

The FEC further states that "specific words constituting an appeal to vote" are not required, and instead leans heavily on the "*as*" in *WRTL II*'s appeal-to-vote test. FEC Mot. 24-25. But that *as* has no meaning absent the words that follow it. The communication must be subject to only one interpretation: "as an appeal to vote for or against a specific candidate," *WRTL II*, 127 S. Ct. at 2667. The words are carefully chosen. It is helpful to note what is *not* said. The communication is not to be interpreted *as* "for or against a spe-

cific candidate," or *as* "promoting," "attacking," "supporting," or "opposing" ("PASO") the candidate. Similarly, the question is not whether the communication may only be interpreted *as* "focusing" on a candidate or *as* "criticizing" a candidate. And the question is not whether the communication may be interpreted *as* "the functional equivalent of express advocacy" because *WRTL II* was narrowing the broad *McConnell* language with careful specificity. Rather, the communication must be interpreted "as an *appeal* to *vote* for or against a specific candidate." It is impossible to interpret a communication as an *appeal* unless there is some verb calling for action.

Citizens does not seek to "reintroduce a test akin" to a "magic words" requirement. FEC Mot. 24. On the contrary, Citizens has demonstrated, with the illustration of *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), how an ad might avoid "magic words" but still be subject only to an interpretation "as an appeal to vote for or against a specific candidate" based on a clear plea for action. JS 26.

Finally, that the Movie does not focus on a single legislative "issue" is irrelevant. "[P]olitical speech," or "issue advocacy," *WRTL II*, 127 S. Ct. at 2667, is not defined as being about some particular legislative issue, as the FEC tries to require. FEC Mot. 24. On the contrary, issue advocacy, i.e. political speech, is defined by the absence of *campaign* speech. "Issue advocacy conveys information and educates." *WRTL II*, 127 S. Ct. at 2667. "An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *Id.*

WRTL II's definition of "issue advocacy" plainly encompasses Citizens' Movie. But Citizens was prohibited from broadcasting its Movie simply because it raised issues relevant to an impending election.

Whether the appeal-to-vote test requires a clear plea for action to vote for or against a candidate is a substantial question that this Court should decide.

IV. Movies Are Not "Ads"and Are Not Subject to Regulation.

Feature-length documentary movies are different in kind from "ads." The FEC has not shown that movies pose the same dangers as the ads targeted by Congress in passing BCRA, which ads were subsequently relied upon by this Court in *McConnell*. The FEC argues that "the *McConnell* record included evidence of broadcast advocacy longer than the traditional 30- or 60-second spot, such as paid, 30-minute 'infomercials.'" FEC Mot. 26. In fact, however, the district court pointed out that such infomercials had *not* been included in the studies upon which the court relied. *McConnell v. FEC*, 251 F. Supp. 2d 176, 305-06, 316-17 (D.D.C. 2003) (op. of Henderson, J.). Moreover, even a thirty-minute infomercial is different in kind from a feature-length film that has a compendium book, is shown in theaters, and is sold on DVD.

Unlike "ads," movies are not imposed unawares on a captive audience that has chosen to watch a different program. Rather, movies must be selected by a willing viewer. And unlike the ads in *McConnell*, the FEC has not shown that movies were an "electioneering" problem giving rise to a Congressional remedy, 540 U.S. at 127 n. 20, a showing the FEC is required

to make. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Feature-length movies were nowhere at issue in *McConnell*. Whether they are subject to regulation as "electioneering communications" remains a substantial question that this Court should decide.

Conclusion

The Court should note probable jurisdiction.

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REPLY BRIEF

123

21

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Appellant remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

REPLY BRIEF FOR APPELLANT 1

I. THE GOVERNMENT'S SUPPRESSION OF *HILLARY: THE MOVIE* CANNOT BE RECONCILED WITH THE FIRST AMENDMENT 4

A. The Government's Brief Confirms That It Has No Compelling Interest In Suppressing Video On Demand Distribution Of Feature-Length Films 5

B. The Government's Brief Identifies No Compelling Basis For Suppressing Corporate Speech That Is Funded Almost Entirely By Individuals 13

C. The Government's Brief Confirms That *Hillary: The Movie* Is Open To Interpretations Other Than As An Appeal To Vote 17

II. THE BURDENS THE GOVERNMENT WOULD IMPOSE ON ADVERTISEMENTS FOR *HILLARY: THE MOVIE* VIOLATE THE FIRST AMENDMENT 20

A. BCRA's Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Strict Scrutiny 21

B. BCRA's Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Exacting Scrutiny 22

1. The Government's Informational Interest Is Inapplicable To Citizens United's Advertisements 22

2. The Government's Enforcement Interest Is Inapplicable To Citizens United's Advertisements 27

3. The Burdens Imposed By BCRA §§ 201 And 311 Outweigh Any Government Interest In Applying Those Speech Restrictions To Citizens United 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 13, 16

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 12

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 15, 21, 23

Davis v. FEC, 128 S. Ct. 2759 (2008) 27

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) 19

FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) 14, 21

FEC v. Wisc. Right to Life, Inc., 127 S. Ct. 2652 (2007) 6, 7, 9, 16, 18, 19, 21, 22, 30

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 15, 16

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 21

Lamont v. Postmaster Gen., 381 U.S. 301 (1965) 19

McConnell v. FEC, 540 U.S. 93 (2003) 7, 8, 10, 22

McConnell v. FEC,
251 F. Supp. 2d 176 (D.D.C. 2003)
(per curiam) 5, 6, 8, 10, 11

Riley v. Nat'l Fed'n of the Blind, Inc.,
487 U.S. 781 (1988) 17, 21

United States v. Grubbs,
547 U.S. 90 (2006) 14

Wisc. Right to Life, Inc. v. FEC,
546 U.S. 410 (2006) (per curiam) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 1

STATUTES

2 U.S.C. § 434(f)(2) 27

2 U.S.C. § 434(f)(3)(B)(ii) 7

2 U.S.C. § 434(f)(3)(C) 7, 13

2 U.S.C. § 441b(b)(2) 7

REGULATIONS

11 C.F.R. § 100.29(b)(7)(i)(G) 13

OTHER AUTHORITIES

60 Minutes (CBS television broadcast
Mar. 15, 1998) 19

148 Cong. Rec. S2135
(daily ed. Mar. 20, 2002) 5

Dick Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007).....29

Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Is 2-Edged Sword*, N.Y. Times, Feb. 8, 2009.....29

REPLY BRIEF FOR APPELLANT

The government defends its effort to criminalize Citizens United's political documentary by repeatedly invoking its authority, purportedly exercised "[s]ince 1907," to suppress political expression that might influence federal elections by individuals who have organized themselves into corporations or labor unions. FEC Br. 2; *see also id.* at 15.

If the government had started instead with the First Amendment's imperative that "Congress shall make *no* law . . . abridging the freedom of speech" (U.S. Const. amend. I (emphasis added)), it would have been forced to articulate some compelling constitutional justification for prohibiting dissemination of a 90-minute movie by a nonprofit, ideologically motivated group concerning the qualifications, character, and fitness of a candidate for the Nation's highest office. Because Citizens United's documentary engages in precisely the political debate the First Amendment was written to protect, only a narrow restriction carefully crafted to prevent actual or threatened electoral corruption could be used to suppress it.

Yet nowhere in its brief does the government make any effort to advance a remotely plausible theory as to how Video On Demand dissemination of Citizens United's movie could have been a corrupting influence in last year's Democratic Party presidential primaries. The government certainly does not even hint that Senator Clinton's opponents might have been so grateful for Citizens United's documentary movie that they might have been tempted to endow Citizens United or its members with *quid pro quo* benefits.

Instead, the government rests its case on the simple but disturbing proposition that election-related speech by a union or corporation (unless licensed by the government as an "*MCFL*" corporation or defined by the government as "news media") is so inherently evil that it must be prohibited and, if attempted, punished as a felony with a five-year prison term. The government's position is so far-reaching that it would logically extend to corporate or union use of a microphone, printing press, or the Internet to express opinions—or articulate facts—pertinent to a presidential candidate's fitness for office.

Citizens United's documentary movie is condemned by the government as the functional equivalent of express advocacy because it focuses on, and criticizes, Senator Clinton's character, fitness, and qualifications for office. FEC Br. 18. Indeed, it is the government's position that the movie is to be suppressed precisely because it expresses a point of view on *issues* that bear upon a presidential candidate's suitability for the Nation's highest office. That is a perverse basis for pronouncing election-related debate unworthy of First Amendment protection.

It is the government's deep suspicion of election-related debate—not Citizens United's efforts to participate in that debate—that "reflects a jaundiced view of American democracy." FEC Br. 25. That cynicism is flatly incompatible with any reasoned or historically grounded understanding of the First Amendment. As applied to Video On Demand dissemination of *Hillary: The Movie*, BCRA's criminalization of election-related debate plainly exceeds Congress's sharply limited authority to abridge the freedom of speech.

The government's defense of its application of BCRA's message-distorting disclaimer requirements, donor-discouraging disclosure obligations, and resource-consuming reporting mandates is equally indefensible under the First Amendment. Even if, as the government asserts, governmental concerns less compelling than the prevention of *quid pro quo* corruption can sustain the imposition on speech of these burdens, expenses, and intrusions, the government's justification for doing so collapses under its own weight when scrutinized.

Whatever interest the government may have in facilitating the criminal enforcement of BCRA's substantive restrictions on "electioneering communications," that interest cannot be extended to communications that the government concedes do not constitute express advocacy or its functional equivalent and that are therefore beyond the reach of BCRA's prohibitions. Nor is the governmental interest in providing the public "information about participants in the electoral process" meaningfully advanced by application of the disclaimer, disclosure, and reporting requirements to messages that the government acknowledges are "not unambiguously election-related," and, in fact, may "have *nothing* to do with a candidate election." FEC Br. 12, 46. Even the relaxed scrutiny urged by the government is, after all, "*exacting*," and requires a "*substantial relation*" between the specific application of BCRA's commands and an important governmental objective. *Id.* at 37 (emphases added). Applying the full panoply of BCRA's disclaimer, disclosure, and reporting requirements to messages that have "*nothing*" to do with a candidate election cannot conceivably provide the public with "information about participants in the electoral process." On the other hand, that level

of government intrusiveness and regulatory bureaucracy can, and surely will, stifle constitutionally protected speech that the public has a right to receive.

I. THE GOVERNMENT'S SUPPRESSION OF *HILLARY: THE MOVIE* CANNOT BE RECONCILED WITH THE FIRST AMENDMENT.

In its opening brief, Citizens United demonstrated that: (1) nothing in BCRA's legislative record or the litigation record compiled in *McConnell* even remotely suggests that feature-length films that viewers must affirmatively choose to view pose a serious threat of *quid pro quo* corruption; (2) as applied to the speech of nonprofit ideological corporations like Citizens United, the FEC's one-corporate-dollar-and-you're-in-prison rule is far more restrictive than necessary to achieve the government's asserted (and invalid) objective of preventing business corporations from expressing political views in a manner that outstrips the public's support for those views; and (3) *Hillary: The Movie* is open to a reasonable interpretation as a critical assessment of Hillary Clinton's political record and her "'character, qualifications, [and] fitness for office.'" FEC Br. 18 (alteration in original). In response, the government and BCRA's sponsors concede the first and third points, and do not seriously dispute the second. While each is a sufficient basis for reversal of the judgment below, the long-stifled marketplace of political ideas would be well-served if the Court reversed on all three grounds.

A. The Government's Brief Confirms That It Has No Compelling Interest In Suppressing Video On Demand Distribution Of Feature-Length Films.

Both the government and BCRA's congressional sponsors concede that neither the Congress that enacted BCRA nor the *McConnell* Court that upheld the statute on its face had before it *any evidence at all* that feature-length films distributed through Video On Demand contributed to the corruption of officeholders or the appearance of such corruption. *See* FEC Br. 27 (acknowledging "the apparent absence of evidence that such films had been the subject of widespread abuse"). Rather, as BCRA's sponsors explain, BCRA was "principally motivated by one practice[,] corporate and union funding of broadcasts and cablecasts of ads containing candidate-related advocacy." McCain Br. 17.[1] In keeping with that legislative record, the "voluminous" *McConnell* litigation record compiled by the government and BCRA's sponsors also focused on "corporate-funded ads" and purported to demonstrate that those same "corporate-funded broadcast attacks" contributed to the appearance of *quid pro quo* corruption of officeholders. FEC Br. 6, 27; *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 555-57, 569-73 (D.D.C. 2003) (per curiam) (describing litigation record).

McConnell's rejection of the plaintiffs' facial challenges "was grounded in the evidentiary record be-

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[1] *See also* 148 Cong. Rec. S2135 (daily ed. Mar. 20, 2002) (statement of Senator Snowe) (BCRA's definition of "electioneering communication" would apply to "so-called issue ads run on television and radio only").

fore the Court." *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) ("*WRTL II*") (opinion of Roberts, C.J.). And "elephantine" though that record was (*McConnell*, 251 F. Supp. 2d at 209 n.40), the government can locate within it *not one word* about feature-length documentaries, much less feature-length films distributed through Video On Demand to citizens who request them.

1. In its efforts to apply BCRA § 203 to Video On Demand films, the government seeks to unmoor *McConnell*'s holding from the evidentiary record on which the government and, in turn, the Court had placed such great reliance. The government's argument proceeds in three steps: (1) The First Amendment allows the government to suppress "*all* forms of express advocacy" by corporations and labor unions, including "newspaper advertising or the Internet" (FEC Br. 25, 26); (2) express advocacy is constitutionally indistinguishable from the "functional equivalent" of express advocacy (*id.* at 26); and, therefore, (3) the First Amendment allows the government to suppress *all* functional equivalents of express advocacy. *See* FEC Br. 26 n.8 (claiming that limitations on Internet electioneering are not "constitutionally compelled"). Because the First Amendment permits it to restrict *any* corporate speech that it deems the functional equivalent of express advocacy—from broadcast advertisements to yard signs—"*McConnell*'s holding" should not be viewed as "limited to 30-second advertisements" and can be extended to cover films selected through Video On Demand. *Id.* at 11. Or so says the government.

This is an audacious assertion of governmental power. If accepted, it is only by Congress's grace that BCRA's definition of "electioneering communication" is limited to broadcast communications that

"can be received by 50,000 or more persons" and does not embrace the Internet, the printing press, and the soapbox. 2 U.S.C. § 434(f)(3)(C).[2] But the government's argument is deeply flawed: Even if one were to assume the truth of the government's major premise that it may prohibit any and all corporate express advocacy (a proposition that this Court might have assumed in *McConnell v. FEC*, 540 U.S. 93, 203-05 (2003), but has never actually held), its minor premise founders on its unstated assumption that the "functional equivalent of express advocacy" may be identified solely by reference to the *content* of a message.

What permits Congress to regulate certain classes of election-related speech is not simply its *content*, but rather its supposedly corrupting *effects* on officeholders. And the unmistakable holding of *WRTL II* is that speech may be viewed as the functional equivalent of proscribable express advocacy *only* to the extent that such speech is found to "pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.); *see id.* ("Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them.").

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[2] In any event, it is not at all clear what the statutory definition of "electioneering communication" actually encompasses. BCRA defines the term "expenditure" to include a "payment . . . for any . . . electioneering communication" (2 U.S.C. § 441b(b)(2)), but simultaneously excludes from the definition of "electioneering communication" any "communication which constitutes an expenditure." *Id.* § 434(f)(3)(B)(ii). Such hopeless opacity is constitutionally intolerable in a statute that makes it a felony to engage in core First Amendment activity.

As the district court in *McConnell* observed, outside the realm of express advocacy, whether speech fairly can be viewed as the equivalent of an outsized campaign contribution must be determined not only by reference to its *content*, but also by evaluating its *efficacy* in influencing the outcome of an election. This is because the "risk of corrupting the political process" corresponds to the "effectiveness" of the speech in influencing election outcomes. 251 F. Supp. 2d at 646, 647 (Kollar-Kotelly, J.). The Congress that enacted BCRA recognized that the efficacy of campaign speech depends on its timing, its reach, and—critically, for this case—the form and medium in which it is delivered. Thus, "the principal focus of the congressional deliberations . . . was traditional ads" broadcast in the weeks leading up to the election. McCain Br. 15. Broadcast ads were the "most effective form of communicating an electioneering message" (*McConnell*, 251 F. Supp. 2d at 647 (Kollar-Kotelly, J.)), and thus presented the "most acute" "phase of the problem." *McConnell*, 540 U.S. at 208 (internal quotation marks omitted). Other media were not "as effective as television and radio advertising for conveying an electioneering message" and accordingly presented less of a "risk of corrupting the political process." *McConnell*, 251 F. Supp. 2d at 646 (Kollar-Kotelly, J.).[3]

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[3] This was not only the view of both the district court and this Court, but the government as well, which consistently defended BCRA as an appropriately tailored response to the unique threat of corruption posed by broadcast advertisements. *See* Brief for the Federal Election Commission at 93, *McConnell* (No. 02-1674) ("BCRA § 201's definition of 'electioneering communications' is limited to advertisements distributed by broadcast, cable, or satellite (*i.e.*, television or radio) . . . because

To say, as the government now does, that it may restrict corporate electioneering speech without regard to the form or medium in which the speech is delivered, is to say that it may restrict corporate electioneering speech without regard to whether the speech presents a danger of contributing to the *quid pro quo* corruption of officeholders. "This," as the Court said in *WRTL II*, "is not how strict scrutiny works"; "the *Government* must prove" that "a compelling interest supports *each application* of a statute restricting speech." 127 S. Ct. at 2664, 2671 (opinion of Roberts, C.J.). That the government may have a compelling interest in restricting speech that presents the "most acute" risks of corruption cannot itself justify restrictions on speech that presents no similar dangers.

2. The government and its *amici* alternatively contend that, because it harnesses "the power of the visual medium to promote a message," Video On Demand distribution of *Hillary: The Movie* is "[l]ike any other television advertisement"; it "poses exactly the same threats of potential corruption," and, accordingly, should be subjected to "the same financing restrictions as other broadcast advertisements." FEC Br. 11, 26; McCain Br. 17. But that just blinks reality. Except for the fact that it is likely to be viewed on a television, a feature-length film viewed through Video On Demand is nothing like a "television advertisement."

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those media reach the largest audience and are considered to be the most effective means of communicating an electioneering message"); *id.* at 115 ("broadcast advertisements are much more likely than other types of advertisements to cause the fact or appearance of [corruption]").

Neither the government nor BCRA's sponsors dispute that viewers of Video On Demand films must "opt-in" to the communication at two levels: The viewer first must "dec[ide] to select [the film] from an on-screen menu," and then must choose to invest 90 minutes or more to view and listen to the film's message. FEC Br. 25; *see also* McCain Br. 15 (contrasting "advocacy that members of the public must first choose to view" with "broadcast ads that are imposed on television viewers"). Indeed, when BCRA's sponsors complain that Citizens United's arguments are "equally applicable" to "advocacy over the Internet (where access to content is typically user-initiated)," *id.* at 16, they implicitly concede Citizens United's argument that "Video On Demand service . . . is analogous in every relevant respect to an Internet user's download of video content." Citizens Br. 26.

BCRA's sponsors argue that, notwithstanding their self-selecting audiences, opt-in "narrowcasts" such as Video On Demand films pose "exactly the same threats of potential corruption" as the broadcast advertisements that were the "principal focus of the congressional deliberations." McCain Br. 15, 17. But after reviewing the available evidence, the *McConnell* district court explicitly rejected this argument, concluding that communications that require a viewer to "opt-in" do not "influenc[e] federal elections to the same degree as . . . broadcast advertising campaigns" and thus present a lesser "risk of corrupting the political process." 251 F. Supp. 2d at 646. And, at least implicitly, so did this Court when it recognized that "televised election-related ads" were the "most acute" "phase of the problem." *McConnell*, 540 U.S. at 207-08.

Years after embracing it (*see supra* note 3), the government now attacks the *McConnell* district

court's reasoning, arguing that, even though Citizens United's film would have been delivered only to a self-selecting audience, "it would not follow that the film lacked electoral influence." FEC Br. 25. This misconceives Citizens United's (and the *McConnell* district court's) argument. Citizens United does not argue that Video On Demand transmission of *Hillary* (if the FEC had permitted it) would not have had *any* "electoral influence." Citizens United's point is the same as that made by the *McConnell* district court with respect to webcasts: There is "no evidence" that such opt-in communications are "influencing federal elections to the same degree as . . . broadcast advertising campaigns." 251 F. Supp. 2d at 646 (Kollar-Kotelly, J.). When there is "no evidence" of significant "electoral influence," the government cannot presume the existence of a danger of corruption.

3. Finally, the government argues that Citizens United waived its right to rely upon the opt-in nature of its proposed speech by failing to argue below that the proposed Video On Demand transmission method made it improbable that the film would contribute to corruption. FEC Br. 23. For two reasons, the government is wrong.

First, Citizens United indisputably raised and preserved its argument that, "[u]nlike 'ads,'" "movies must be selected by a willing viewer." Br. Opp. Mot. to Dismiss or Affirm 12. And the government does not dispute Citizens United's argument (at 25) that a movie's length, separate and apart from its method of transmission, makes it an "opt-in" communication.[4]

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[4] The government observes that the *McConnell* record contained evidence of several 30-minute "infomercials" broadcast

Second, even if Citizens United did not invoke below the opt-in nature of Video On Demand programming, "in cases raising First Amendment issues," this Court "has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984). As in cases alleging that a communication "is within one of the few classes of 'unprotected' speech," the question whether political speech presents a risk of corruption requires "judicial evaluation of special facts that have . . . constitutional significance." *Id.* at 503, 505. Here, those "facts . . . about the nature of video-on-demand" (FEC Br. 24) are not disputed by the government or its *amici* and are publicly ascertainable in any event. This Court should not—indeed, cannot—conclude that a film distributed through Video On Demand

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by the National Rifle Association and argues that "nothing about the duration of *Hillary* separates it from" those infomercials. FEC Br. 28. The government seems to be implying that this Court decided in *McConnell* that BCRA's restrictions could be constitutionally applied to the NRA's infomercials—but *McConnell* did no such thing. The NRA introduced its issue-advocacy infomercials to demonstrate that BCRA's definition of "electioneering communication" captured a substantial amount of protected issue advocacy. This Court's rejection of the NRA's facial overbreadth challenge would not preclude the NRA from challenging BCRA's application to its infomercials (*Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (per curiam)), and their presence in the *McConnell* record accordingly nets the government nothing.

presents an intolerable risk of corruption without examining the characteristics of that medium.[5]

B. The Government's Brief Identifies No Compelling Basis For Suppressing Corporate Speech That Is Funded Almost Entirely By Individuals.

The government's attempt to prohibit the Video On Demand distribution of *Hillary* also suffers from a second—and even more fundamental—constitutional flaw: Where election-related speech is financed almost entirely by individuals gathered under the banner of a nonprofit advocacy corporation, like Citizens United, that speech presents no cognizable threat of corruption. Corporate speech funded predominantly by individuals does not generate the "corrosive and distorting effects of immense aggregations of wealth" that are purportedly associated with the electoral advocacy of for-profit corporations (*Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990)) because the "resources" of Citizens United and similarly funded nonprofits "are not a function of [their] success in the economic market-

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[5] Nor should the Court hold, as the government urges (at 23 n.7), that a Video On Demand transmission to a single household actually "can be received by 50,000 or more persons." 2 U.S.C. § 434(f)(3)(C). When a communication is sent only to a single household—a fact universally true of Video On Demand transmissions, never disputed by the government, and so affirmatively embraced by its *amici* that they refer to such transmissions as "narrowcast[s]" (McCain Br. 15)—it is manifestly unreasonable to determine the number of people who can receive that "narrowcast" communication by reference to "the viewership of the *cable system*." 11 C.F.R. § 100.29(b)(7)(i)(G) (emphasis added).

place, but [their] popularity in the political marketplace." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258-59 (1986) ("*MCFL*").

The government urges the Court not to reach this issue because it supposedly is not presented in this case. FEC Br. 29. But whether the First Amendment prohibits the government from restricting corporate political speech funded predominantly by individuals is a "predicate to intelligent resolution of"—and thus fairly included within—one of the questions on which this Court granted review: Whether *Hillary: The Movie* is "subject to regulation as an electioneering communication." J.S. i; *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) (internal quotation marks omitted). If the government lacks the constitutional authority to prohibit electioneering communications funded predominantly by individuals, then the government necessarily is barred from regulating feature-length documentary movies financed in that manner. The Court therefore need not delay resolution of this important First Amendment question, which has been fully briefed by the parties and *amici* in this case. *See, e.g.*, NRA Br. 9-28.[6]

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[6] The government also argues that "the evidentiary record is inadequate to determine whether *Hillary* was in fact financed 'overwhelmingly' by individual donations." FEC Br. 30. But it is the *government's* burden to demonstrate that its asserted interest in preventing big corporate money from distorting electoral outcomes was implicated by Citizens United's speech. The record compiled by the government demonstrates that it was not. *See* J.A. 251a-52a (for-profit corporations were responsible for only $2,000 of the more than $200,000 that Citizens United received from donors who gave $1,000 or more to fund *Hillary*). Strict scrutiny does not permit the government to suppress speech on the basis of fanciful speculation that the Video On

On the merits, the government contends that it has a compelling interest in silencing the electoral advocacy of nonprofit corporations, even when that speech is funded overwhelmingly by individuals, because it imagines business corporations could use such nonprofits as "conduits" to circumvent BCRA's restrictions on corporate political speech. FEC Br. 32. The government's far-fetched speculation that a business corporation could exert electoral influence by donating small amounts to numerous advocacy groups is not remotely the type of concrete proof that strict scrutiny requires. If it were, the government would possess the constitutional authority to prohibit *individuals'* electioneering communications simply because a for-profit corporation could conceivably use an individual as a conduit for its own expenditures on electioneering communications. Such a restriction on individuals' independent expenditures would be flatly unconstitutional. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam).

The government's "conduit" speculation also fails because it rests on the false premise that the government has a compelling "interest in preventing the use of . . . corporations' treasury funds for electoral advocacy." FEC Br. 32. This Court rejected the same assertion in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *See id.* at 790 ("To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it."). Subsequent cases

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Demand distribution of *Hillary* (had it been permitted) might have been financed with hundreds of donations of $999.99 or less from for-profit corporations.

have found compelling only the much narrower governmental interest in preventing distortion of the electoral marketplace by corporate speech that "ha[s] little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. *Bellotti* rejected that rationale, too (*see* 435 U.S. at 791 & n.30), but, it could not, in any event, be implicated by speech that is funded predominantly by individuals (*i.e.*, the "public"). When, as here, corporate dollars are outnumbered by "the public's support" 99-to-1, the corporate funding does not disturb—much less distort—the electoral marketplace.[7]

The government also objects to excluding Citizens United and similarly funded nonprofits from BCRA § 203 because doing so would purportedly "abandon [*MCFL*'s] existing bright-line rule for a more amorphous inquiry." FEC Br. 31 (citations omitted). But there is nothing "amorphous" about a judicial inquiry into whether the majority of the funding for a nonprofit corporation's speech is received from individuals. This standard can be applied just as easily as the existing *MCFL* framework, which inquires whether a nonprofit corporation received any funding from a for-profit corporation. And even if there were some marginal administrative benefit to the *MCFL* standard, efficiency alone could never constitute the compelling interest neces-

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[7] If *Austin* is construed to stand for the broader proposition that any corporate advocacy in electoral settings is *per se* corrupting, then it should be overruled. The growing prevalence of massive independent expenditures by wealthy individuals (*WRTL II*, 127 S. Ct. at 2686 (opinion of Scalia, J.))—has revealed the flaws in *Austin*'s condemnation of corporate independent expenditures, which are no more likely to be corrupting than expenditures by individuals. *See* Citizens Br. 31. Simply put, *Austin* has failed the test of time.

sary to sustain the government's one-corporate-dollar-and-you're-in-prison funding restriction. *See Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 795 (1988) ("the First Amendment does not permit the State to sacrifice speech for efficiency").

C. The Government's Brief Confirms That *Hillary: The Movie* Is Open To Interpretations Other Than As An Appeal To Vote.

The appeal-to-vote standard articulated in *WRTL II* presents a third constitutional barrier to the government's effort to suppress the distribution of *Hillary*. The movie is not the functional equivalent of express advocacy—and is therefore beyond the government's constitutional authority to proscribe—because it can reasonably be interpreted as a critical biographical assessment of Senator Clinton that provides viewers with information about her public record and political background.

The government's defense of its authority to suppress the movie rests on the proposition that *WRTL II* divided the universe of "electioneering communications" into two mutually exclusive categories: issue advocacy and express advocacy (and its functional equivalent). FEC Br. 20-21. That is a false dichotomy. *WRTL II* did not purport to hold that *all* electioneering communications that do not constitute issue advocacy are necessarily express advocacy or its functional equivalent and are therefore susceptible to prohibition by the government.

Indeed, the government's distorted reading of *WRTL II* would lead to absurd results. Consider, for example, a hotel advertisement that mentions that a presidential candidate recently spent a night there. That advertisement is not issue advocacy—it does

not "focus on a legislative issue" or "urge the public to contact public officials with respect to the matter"—nor is it an "appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). Accordingly, there must be an additional category of candidate-related speech that is neither express advocacy (or its functional equivalent) nor issue advocacy, and that—like issue advocacy—is beyond the government's constitutional authority to proscribe because it does not generate the specter of political corruption.

Whether *Hillary* is properly classified as issue advocacy or some other form of candidate-related speech, the salient fact remains that the movie *cannot* be classified as the functional equivalent of express advocacy because it is susceptible to reasonable interpretations other than as an appeal to vote against Senator Clinton. It is simply not the case, as the government contends (at 18), that every critical examination of a candidate's "'character, qualifications, [or] fitness for office'" constitutes an appeal to vote for or against that candidate. If it were, then the government could ban a documentary movie examining whether Senator McCain—who was born in the Panama Canal Zone—is a natural born citizen qualified under the Constitution to be President, and countless other criticisms (or commendations) of our political leaders, even though those communications plainly would be susceptible to interpretations other than as an appeal to vote. The fact that after "voters hear[d] the information" that such a documentary conveyed, they might "choose—uninvited by the [movie]—to factor it into their voting decisions" does not transform a documentary designed to educate the public about a candidate's qualifications for office into an appeal to vote for or against that candidate.

WRTL II, 127 S. Ct. at 2667 (opinion of Roberts, C.J.).

For similar reasons, the fact that *Hillary* presents a critical assessment of Senator Clinton's political background, character, and fitness for office does not convert the movie—which is designed to "convey[ ] information and educate[ ]" viewers about the political history of an important public figure—into an appeal to vote against Senator Clinton. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). Indeed, a critical exposition of the political background and policy views of a former First Lady and sitting U.S. Senator is precisely the type of "uninhibited, robust, and wide-open debate and discussion that" the First Amendment protects and encourages. *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (internal quotation marks omitted).[8]

Citizens United's argument that a proscribable "appeal to vote" must at a minimum contain an unambiguous call to action is not—as the government misleadingly contends (at 22)—a plea for the return of the "magic words" framework administered by the FEC for nearly three decades after *Buckley*. There are an almost unlimited number of ways that an unambiguous call to electoral action can be communicated. *See, e.g.*, *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) ("Don't let him do it" is "susceptible of no other reasonable interpretation but as an exhortation to vote"). That the government is unable to

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[8] And it is precisely the type of inquiry undertaken by the news media, which—unencumbered by campaign finance laws—interviewed many of the same individuals featured in *Hillary*. *See, e.g.*, *60 Minutes* (CBS television broadcast Mar. 15, 1998) (interview with Kathleen Willey about alleged misconduct in the Clinton White House).

identify even a single excerpt from *Hillary* that unambiguously exhorts viewers to action with respect to Senator Clinton does not mean that the "call to action" test lacks content. It instead means that *Hillary* very likely would be interpreted by viewers as something other than an appeal to vote.

II. THE BURDENS THE GOVERNMENT WOULD IMPOSE ON ADVERTISEMENTS FOR *HILLARY: THE MOVIE* VIOLATE THE FIRST AMENDMENT.

The government contends that it possesses the constitutional authority to apply BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's advertisements because "their airing during [pre-election] periods would implicate important governmental interests related to the federal electoral process." FEC Br. 36. But even if the interests that the government identifies—disseminating election-related information to the public and enforcing substantive prohibitions on corporate express advocacy and other unambiguous appeals to vote—were sufficient to justify the application of BCRA's disclaimer, disclosure, and reporting requirements to *some* advertisements that are not express advocacy or its functional equivalent, they would be insufficient to justify the application of those requirements to *Citizens United's* advertisements. Those advertisements are not "related to the federal electoral process," but instead encourage viewers to see a movie in the theater, purchase it on DVD, or download it through Video On Demand. The mere fact that Citizens United's movie advertisements mention the name of a candidate for federal office does not provide the government with an interest—"compelling," "impor-

tant," or otherwise—in applying BCRA §§ 201 and 311 to those advertisements.

A. BCRA's Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Strict Scrutiny.

The government argues that BCRA §§ 201 and 311 should be examined under "exacting scrutiny," which requires a "substantial relation" between a "sufficiently important" "governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64, 66; *see also* FEC Br. 37. This Court has repeatedly made clear, however, that *any* content-based restriction on speech must be narrowly tailored to further a compelling government interest. *See WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.); *MCFL*, 479 U.S. at 256, 261. The fact that BCRA's disclaimer, disclosure, and reporting requirements do not, on their face, "'prevent anyone from speaking'" (FEC Br. 37), but instead compel Citizens United to make statements that it "would rather avoid" (*Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995)), does not exempt these government-imposed speech restrictions from the stringent requirements of strict scrutiny. In the absence of a "compelling necessity" furthered by "narrowly tailored" means, the government may "not dictate the content of speech" (*Riley*, 487 U.S. at 798, 800)—including by requiring Citizens United to run oral and written disclaimers in its advertisements for *Hillary* and disclose the identity of the advertisements' financial backers.

The government does not even attempt to defend the application of these speech restrictions to Citizens United under strict scrutiny. And with good reason. The only compelling government interest

that this Court has recognized in the campaign-finance setting—the interest in preventing corruption and the appearance of corruption (*WRTL II*, 127 S. Ct. at 2671-72 (opinion of Roberts, C.J.))—is demonstrably inapplicable to Citizens United's advertisements, which concededly are not express advocacy or its functional equivalent. FEC Br. 36.

B. BCRA's Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Exacting Scrutiny.

BCRA's disclaimer, disclosure, and reporting requirements fare no better under the government's watered-down "exacting scrutiny" standard. Neither the government's informational interest nor its enforcement interest is sufficient to sustain the application of these speech restrictions to movie advertisements that are wholly unrelated to any federal election.

1. The Government's Informational Interest Is Inapplicable To Citizens United's Advertisements.

The government contends that the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's advertisements promotes an "important" government interest because "'[i]ndividual citizens seeking to make informed choices in the political marketplace' have 'First Amendment interests' in learning how electoral advocacy is funded." FEC Br. 40 (quoting *McConnell*, 540 U.S. at 197). But the government never plausibly explains how the application of these speech-suppressing requirements to Citizens United's ten- and thirty-second movie advertisements is substantially related to its interest in promoting informed political decision-making.

a. BCRA purports to impose its disclaimer, disclosure, and reporting requirements on *any* broadcast, cable, or satellite communication that mentions a federal candidate during pre-election periods. The government apparently concedes, however, that there are at least some "electioneering communications" to which its informational interest is inapplicable, and it confines the application of BCRA §§ 201 and 311 to those advertisements that can "reasonably be construed as electoral advocacy" and that therefore "have an obvious potential to affect voting behavior." FEC Br. 42.

The government's attempt to narrow the scope of BCRA §§ 201 and 311 does not go nearly far enough. The government's contention that these requirements can constitutionally be applied to any advertisement susceptible to being interpreted as electoral advocacy disregards this Court's previous conclusion that reporting requirements can only be applied to "spending that is *unambiguously* related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80 (emphasis added). The government's proposed standard is also hopelessly imprecise. To demand that—on pain of felony prosecution—a speaker guide its conduct based on whether a voter might "perceive a connection between an advertisement and an upcoming election" (FEC Br. 42) effectively requires speakers to comply with BCRA's disclaimer, disclosure, and reporting requirements in every one of the inevitably numerous instances where the government's malleable standard does not yield a clear result.

b. Even if one were to disregard prior precedent on disclosure requirements and overlook the practical shortcomings of the government's proposed standard, BCRA's disclaimer, disclosure, and reporting

requirements still could not be constitutionally applied to Citizens United.

Citizens United's advertisements cannot "reasonably be construed as electoral advocacy." In fact, they are not even a distant cousin of "electoral advocacy." Citizens United's advertisements are not intended to promote the election or defeat of Senator Clinton, but instead to promote the movie *Hillary*—a biographical documentary about a prominent public figure—and encourage viewers to see the movie in a theater, purchase it on DVD, or download it through Video On Demand. While the government may have an important interest in helping citizens "'make informed choices in the *political* marketplace,'" this Court has never suggested that the government has an equally important interest in facilitating "informed choices" in the movie marketplace. Indeed, if Citizens United's movie advertisements can reasonably be construed as electoral advocacy, then *any* advertisement mentioning a candidate's name—even a restaurant advertisement touting the President's recent visit or a college advertisement listing a U.S. Senator as an alumnus—would inevitably be subject to BCRA's disclaimer, disclosure, and reporting requirements, without regard to whether the advertiser actually intended to influence an election. The government's effort to narrow the reach of those statutory requirements is thus virtually meaningless because, according to the government, the mere mention of a candidate's name seems to be sufficient to convert an advertisement into electoral advocacy.

Tellingly, the government makes absolutely no effort to explain how the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's two ten-second advertisements would further its interest in enabling citizens to

"learn[ ] how electoral advocacy is funded." Indeed, the government does not mention the ten-second advertisements anywhere in its six-page defense of its informational interest—a startling omission given that one of the issues before this Court is whether BCRA §§ 201 and 311 can constitutionally be applied to those advertisements.

The government's reluctance to discuss Citizens United's two ten-second advertisements becomes more understandable when the content of those advertisements is examined. One of the advertisements informs viewers that, "[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." Citizens Br. 8 n.1. The other humorously presents a "kind word about Hillary Clinton" from conservative commentator Ann Coulter—"[s]he looks good in a pant suit"—and then describes *Hillary* as "a movie about everything else." *Id.* The advertisements do not mention an election, Senator Clinton's candidacy for office, her views on political issues—or anything else remotely related to the electoral process. It thus cannot reasonably be suggested that requiring Citizens United to report these advertisements to the FEC, disclose the advertisements' financial backers, and broadcast disclaimers identifying itself as responsible for the advertisements is substantially related to "the public interest in full information about participants in the electoral process" (FEC Br. 12)—which is probably why the government could not bring itself even to articulate that argument. And while applying BCRA §§ 201 and 311 to Citizens United's ten-second advertisements might provide the public with "full information" about their selection of movies, that, of course, is not an important government interest.

The government does at least mount a defense of its application of BCRA §§ 201 and 311 to Citizens United's thirty-second advertisement, but it fails in its attempt to transmogrify that advertisement into "electoral advocacy." That advertisement presents three statements about Senator Clinton from public commentators—"[S]he's continually trying to redefine herself and figure out who she is," "Hillary's got an agenda," and "Hillary is the closest thing we have in America to a European socialist"—and then, like one of the ten-second advertisements, declares "[i]f you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie." Citizens Br. 8 n.1. In the context of an advertisement for a critical biographical documentary about Senator Clinton, those statements cannot reasonably be construed as "electoral advocacy" for or against her candidacy. They are instead provocative statements about a controversial public figure that attempt to capture viewers' attention and generate interest in the documentary movie marketed by Citizens United. In another context—in an advertisement urging viewers to "Call Senator Clinton and tell her what you think about her voting record," for example—it may well be reasonable to construe the advertisement's statements as "electoral advocacy." Against the very different backdrop of an advertisement promoting the distribution of a movie, however, it is not plausible to conclude that Citizens United included these statements in its advertising for the purpose of opposing Senator Clinton's candidacy.

2. The Government's Enforcement Interest Is Inapplicable To Citizens United's Advertisements.

The government's "interest in facilitating the enforcement of substantive regulation of contributions and funding sources" provides equally little support for the application of BCRA §§ 201 and 311 to Citizens United. FEC Br. 46.

The government asserts that its "ability to enforce BCRA Section 203's financing restrictions with respect to electioneering communications that *are* the functional equivalent of express advocacy would be impeded" if it could not rely on BCRA's disclaimer, disclosure, and reporting requirements to learn that a corporate-funded advertisement has been aired. FEC Br. 47. But the government has explicitly conceded that Citizens United's advertisements are *not* the functional equivalent of express advocacy (*id.* at 36), and this concession categorically forecloses its reliance on its enforcement interest to regulate those advertisements. *See Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). Where the government is aware of an advertisement—and has concluded that the advertisement cannot be constitutionally prohibited under BCRA § 203—the government's enforcement interest evaporates.

Moreover, the enforcement interest is only applicable, if at all, to BCRA's reporting requirement, which requires the person funding an electioneering communication to submit a statement to the FEC that identifies itself as responsible for the communication. 2 U.S.C. § 434(f)(2). BCRA's disclaimer and disclosure requirements do not provide the FEC with any additional information that could facilitate its enforcement of BCRA § 203's restrictions on corpo-

rate-funded electioneering communications. And, as applied to Citizens United, not even the reporting requirement could further the government's enforcement interest (or its purported informational interest, for that matter) because, as the government concedes, Citizens United "already discloses its identify at the website referred to in the advertisements." FEC Br. 51. In this case, then, the government's supposed enforcement interest is pure fiction.

3. The Burdens Imposed By BCRA §§ 201 And 311 Outweigh Any Government Interest In Applying Those Speech Restrictions To Citizens United.

Even if the government did have an informational or enforcement interest in applying BCRA's disclaimer, disclosure, and reporting requirements to Citizens United, those interests would be outweighed by the extraordinary burdens that those requirements impose on First Amendment freedoms—including the risk of harassment and retaliation faced by Citizens United's financial supporters, and the substantial compliance costs borne by Citizens United.

The government dismisses the risk of reprisal against Citizens United's supporters because the record does not document previous acts of retaliation. But the risk of reprisal against contributors to Citizens United—and other groups that espouse controversial ideological messages—has vastly increased in recent years as a result of the same "technological advances" that the government touts in BCRA's defense, which "make it possible . . . for the public to review and even search the [contribution] data with ease." FEC Br. 40-41. The widespread economic re-

prisals against financial supporters of California's Proposition 8 dramatically illustrate the unsettling consequences of disseminating contributors' names and addresses to the public through searchable websites (*see, e.g.*, CCP Br. 13; IJ Br. 13)—some of which even helpfully provide those intent upon retribution with a map to each donor's residence. *See* Brad Stone, *Prop 8 Donor Web Site Shows Disclosure Is 2-Edged Sword*, N.Y. Times, Feb. 8, 2009.

The chilling effect on First Amendment expression generated by the specter of retribution is substantiated by empirical studies, which have found that "'[e]ven those who strongly support forced disclosure laws will be less likely to contribute'" where their personal information will be disclosed. IJ Br. 10 (quoting Dick Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 8 (2007)). And this chilling effect on First Amendment freedoms is compounded by the extreme administrative burdens generated by BCRA's disclosure requirements, which are notoriously difficult to implement for even the lawyers and accountants who advocacy groups are inevitably required to retain to monitor their disclosure obligations. *See id.* at 19 (discussing an empirical study in which none of the 255 participants was able to comply successfully with campaign disclosure requirements).

The fact that the record does not explicitly document the burdens that BCRA's disclaimer, disclosure, and reporting requirements impose on Citizens United's First Amendment rights is not a sufficient basis for discounting these very real impositions on Citizens United's freedom of expression. In this as-applied challenge, it is the *government* that bears the burden of establishing that BCRA's speech restrictions are compatible with the First Amendment

(*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.))—and it therefore falls to the government to demonstrate that BCRA does not intolerably restrict Citizens United's First Amendment freedoms. The government has not met that burden.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTIONS COMMISSION,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

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TABLE OF CONTENTS

INTEREST OF *AMICUS* IN THIS CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THERE EXISTS A STRONG AND HISTORICALLY PROTECTED INTEREST IN PROMOTING AND PRESERVING AN INDIVIDUAL'S RIGHT TO EXPRESS HIS OR HER POLITICAL VIEWPOINTS. THIS COURT HAS CONSISTENTLY SUBJUGATED GOVERNMENTAL INTERESTS, SUCH AS THOSE FOUND IN THE BCRA, TO THOSE INDIVIDUAL RIGHTS WHEN ADDRESSING ISSUE ADVOCACY. 4

II. THE COURT SHOULD FOLLOW ITS LONG-STANDING PRECEDENTS AND CONTINUE TO DISTINGUISH BETWEEN EXPRESS ADVOCACY AND ISSUE ADVOCACY WHEN FACED WITH REGULATORY SCHEMES COMPELLING DISCLOSURE OF A SPEAKER'S IDENTIFYING INFORMATION 11

A. First Amendment Rights to Freedom of Speech and Association are Core, Fundamental Rights. 11

B. Political Speech is an Integral Part of Free Speech and Association Rights. 12

C. The Right to Choose Anonymity is an Important Part of Engaging in Political Speech. 14

D. One of Purposes of Allowing Anonymity is to Allow Expression without Fear of Reprisal, a Purpose Whose Importance Has Been Highlighted by Recent Events. 16

E. Given the Purpose of Protecting One's Right to Express His or Her Political Issue Viewpoints Freely, this Court has Consistently Stood for Individual Freedoms. 22

F. This Court Should Again Stand for Individual Freedoms in Viewing Those Provisions of the BCRA that Could Be Interpreted to Encompass Issue Advocacy. 28

CONCLUSION 30

APPENDIX 1 ..... 1a

APPENDIX 2 ..... 6a

APPENDIX 3 ..... 12a

APPENDIX 4..... 15a

APPENDIX 5..... 22a

APPENDIX 6..... 24a

APPENDIX 7..... 29a

TABLE OF AUTHORITIES

Cases

Abrams v. United States,
250 U.S. 616 (1919) 13
Agostini v. Felton,
521 U.S. 203 (1997) 1
Bates v. Little Rock,
361 U.S. 516 (1960) 22
Buckley v. Valeo,
424 U.S. 1 (1976) 4, 5, 6, 8, 24, 25, 26, 27
Cantwell v. Connecticut,
310 U.S. 296 (1940) 12, 13
Dale v. Boy Scouts of America,
530 U.S. 640 (2000) 1
De Jonge v. Oregon,
299 U.S. 353 (1937) 12
Fed. Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) 2, 5, 8, 9
First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 2
Gibson v. Fla. Legis. Investigation Comm'n.,
372 U.S. 539 (1963) 15
Good News Club v. Milford Central Schools,
533 U.S. 98 (2001) 1
Grosjean v. Am. Press Co., Inc.,
297 U.S. 233 (1936) 11-12
Lovell v. Griffin, 303 U.S. 444 (1938) 14
McConnell v. Fed. Election Comm'n,
540 U.S. 93 (2003 ..... 6, 7

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 4, 5, 12, 14, 15, 22, 23, 28
Mitchell v. Helms,
530 U.S. 793 (2000) 1
NAACP v. Alabama,
357 U.S. 449 (1958) 12, 15, 16, 22, 27
North Carolina Right to Life, Inc. v. Leake,
525 F.3d 274 (4th Cir. 2008) 9
ProtectMarriage.com v. Bowen,
2:09-cv-00058-MCE-DAD (E.D.
California January 7, 2009) 17, 18, 19, 20
Rita v. United States,
354 U.S. 476 (1957) 4
Schneider v. Irvington,
308 U.S. 147 (1939) 12
Shelton v. Tucker,
364 U.S. 479 (1960) 24
Sweezy v. New Hampshire,
354 U.S. 234 (1957) 13
Talley v. California,
362 U.S. 60 (1960) 14, 15, 16, 24
Thomas v. Collins,
323 U.S. 516 (1945) 12, 14, 23, 24, 26, 27
Williams v. Rhodes,
393 U.S. 23 (1968) 12

Other Authorities

2 U.S.C. §434 (f)(3)(A)(i) 7
2 U.S.C. §434 (f)(3)(A)(ii) 7
Adrienne S. Gaines, Radical Gay Activists
Seek to Intimidate Christians, Charisma
Magazine, Nov. 19, 2008, *available at*
http://www.charismamag.com/cms/news/

archives/111908.php 19, 20
Bipartisan Campaign Reform Act of 2002..... 1, *passim*
Cal. Gov't Code §§ 84600–12 17
Cal. Gov't Code §84211 17
Californians Against Hate, http://www.californiansagainsthate.com (last visited Jan. 12, 2009) 21
Carri Geer Thevenot, Judge Chides Ballot Groups, Las Vegas Rev. J., June 9, 2006 21
Erksine's Speeches 52 (High's ed.).....12
Federal Election Campaign Act ..... 4, *passim*
John R. Lott & Bradley Smith, Donor Disclosure Has Its Downsides, Wall St. J., December 26, 2008 .....17, 18
Molly Ball, Tax and Spending Control Backers' Foes Get Physical, Las Vegas Rev. J., June 7, 2006 21
Prop. 8 Maps, http://www.eightmaps.com 21
Vandals Spray Paint Signs in Downtown Fullerton, Orange County Register, Oct. 20, 2008, *available at* http://www.ocregister.com/articles/macdonald-one-police-2200383-paint-vandals#..... 19-20

Constitutional Provisions

Cal. Const. art. 1, § 7.5 17
U.S. Constitution amend. I.....4

INTEREST OF *AMICUS* IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF and its allied organizations represent hundreds of thousands of Americans who believe strongly in these topics, and who have a right to express those views through this nation's political process. ADF's allies include more than 1,200 lawyers and numerous public interest law firms, many of whom have been recently pressed into service to represent individuals and organizations being harassed for expressing their viewpoints in the political arena.

ADF has advocated for the rights of Americans to exercise their religious beliefs and to express those beliefs in the political arena. ADF has been directly or indirectly involved in at least 500 cases and legal matters, including cases before this Court such as *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Mitchell v. Helms*, 530 U.S. 793 (2000);

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Agostini v. Felton, 521 U.S. 203 (1997); and *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000).

SUMMARY OF ARGUMENT

ADF contends that the Bipartisan Campaign Reform Act of 2002 ("BCRA"), and specifically its provisions requiring the disclosure of names and addresses of anyone who contributes $1,000.00 or more for the purpose of furthering an electioneering communication, operate as an unconstitutional restraint upon an individual's First Amendment right to express his or her political viewpoints in the public arena, to the extent that the BCRA's definition of "electioneering communication" is interpreted to extend in any manner whatsoever to anything other than express advocacy or its functional equivalent.

ADF first contends that this Court has already addressed this First Amendment concern by limiting the BCRA's definition of "electioneering communications," so that the only communications regulable under any provision of the BCRA are those that are capable of no interpretation other than an appeal to vote for or against a specific candidate. *See Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) *("WRTL")*. As such, the trial court's decision that the BCRA's disclosure provisions apply more broadly is erroneous and should be reversed.

Alternatively, ADF contends that the instant case presents the Court with the opportunity to ensure that the BCRA's disclosure provisions operate in

such a fashion as to ensure that Americans continue to have "the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). This liberty to express one's political views without fear of reprisal is one that pre-dates the very formation of our Constitution; it is a right that has existed throughout the life of this great nation; it is a freedom that now hangs in the balance as clearly evidenced by events emanating from the most recent election cycle. The Court has the opportunity to preserve this very critical privilege accorded to the people of this country, by reversing the decision of the trial court, and holding that the BCRA's disclosure provisions do not apply so broadly as to encompass speech beyond express advocacy or its functional equivalent.

ARGUMENT

I. THERE EXISTS A STRONG AND HISTORICALLY PROTECTED INTEREST IN PROMOTING AND PRESERVING AN INDIVIDUAL'S RIGHT TO EXPRESS HIS OR HER POLITICAL VIEWPOINTS. THIS COURT HAS CONSISTENTLY SUBJUGATED GOVERNMENTAL INTERESTS, SUCH AS THOSE FOUND IN THE BCRA, TO THOSE INDIVIDUAL RIGHTS WHEN ADDRESSING ISSUE ADVOCACY.

The United States Constitution states that "Congress shall make no law...abridging the freedom of speech." U.S. Constitution amend. I. This Court has recognized that political speech "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). "Discussion of public issues...[is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Rita v. United States*, 354 U.S. 476, 484 (1957)). The *McIntyre* Court further noted that these principles extend equally to issue-based elections, and that issue advocacy "is the essence of First Amendment expression." *McIntyre*, 514 U.S. at 347.

It comes as no surprise, then, that this Court has taken an exacting view of any governmental attempt to regulate political speech. *See WRTL*, 127 S. Ct. at 2664 ("Because BCRA §203 burdens political speech, it is subject to strict scrutiny."); *McIntyre*, 514 U.S. at 347 ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."); *Bellotti*, 435 U.S. at 786 (constitutionality of proposed restriction "turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech.").

When this Court has turned that "exacting scrutiny" upon legislation calling for the disclosure of identifying information about either the author of, or a supporter of, some particular speech, it has consistently drawn a distinction between speech that is unambiguously campaign-related (i.e., in support of or in opposition to a particular candidate) and speech that is not unambiguously campaign-related. The Court first articulated this distinction in *Buckley*, 424 U.S. at 80-81, where it was faced with a constitutional challenge to the disclosure requirements of the Federal Election Campaign Act ("FECA"). The Court determined that the disclosure requirement in question potentially suffered from vagueness and overbreadth issues, but then cured those issues by construing the disclosure requirement to reach only those expenditures that were used for "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. The *Buckley* Court used this

same narrowing construction to preserve the "limitation on expenditures" provisions of the FECA against invalidation on the same vagueness and overbreadth grounds. *Id.* at 42-44. *See also McConnell v. Fed. Election Comm'n,* 540 U.S. 93, 121-22 (2003). There was no distinction drawn in the way that the term "expenditures" was to be interpreted for purposes of determining whether the speech could be regulated – it was the type of speech at issue, and the not the manner of restriction, that proved paramount.

Accordingly, from the time of the *Buckley* decision in 1976 up to the passage of BCRA in 2002, individuals were allowed to express, or support the expression of, political viewpoints, retaining the choice of whether to publicly identify themselves as an advocate of those viewpoints. At the same time, the government's interest in ensuring the integrity of the election process was met, to the greatest extent constitutionally permitted.

The BCRA's passage in 2002 now threatens this balance. Indeed, if the decision of the trial court were allowed to stand, the balance will clearly have been upset, and individuals will find their First Amendment rights to express, or support the expressions of, political viewpoints significantly hampered. Like the FECA that was the subject of the *Buckley* opinion, the BCRA, by its terms, seeks to impose contribution and expenditure limitations, and also seeks to impose disclosure requirements, again mandating the reporting of names and addresses of individuals contributing more than a threshold

amount towards a particular campaign. What the BCRA did differently from the FECA (as narrowed by the *Buckley* Court) was to include an expansive definition of the types of speech purportedly falling under its control.

The BCRA, by its terms, specifies "significant disclosure requirements for persons who fund electioneering communications." *McConnell,* 540 U.S. at 190. "Electioneering communications" is a new term coined "to replace the narrowing construction of FECA's disclosure provisions adopted by [the Supreme Court] in *Buckley*." *Id.* at 189. The term "electioneering communication" encompasses any "broadcast, cable, or satellite communication that (a) referred to a clearly identified candidate for Federal office, (b) was made within the 60 days before a general election or within the 30 days before a primary election involving that candidate, and (c) was targeted to the relevant electorate. 2 U.S.C. §434 (f)(3)(A)(i).[2] As enacted, the BCRA extended to speech having nothing to do with a particular candidate's campaign if that speech happened to breathe a word of the candidate within the

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[2] Interestingly, Congress foresaw the very issue being debated here, and enacted an alternative definition for "electioneering communication" to be used in the event the original is found wanting in a Constitutional sense. That alternative definition requires the communication to do much more than simply "refer" to a candidate; indeed, the communication must (a) either support a candidate, or oppose a candidate, for that office, and (b) be suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. 2 U.S.C. §434 (f)(3)(A)(ii).

prescribed blackout period. Congress clearly intended to broaden the regulatory coverage; any such broadening results inevitably in a constriction of individual liberties.

Fortunately for the preservation of those individual liberties, this Court stepped into the discussion and, with its decision in *WRTL*, announced that "enough is enough." 127 S. Ct. at 2672. The *WRTL* Court acknowledged "the governmental interest in preventing corruption and the appearance of corruption" in election campaigns. *Id.* at 2672 (quoting *Buckley*, 424 U.S. at 45). To meet that interest, the Court approved regulations which focused upon the potentially detrimental efforts of using campaign contributions to secure political *quid-pro-quos* from current and potential officer holders. It was that interest which persuaded the Court to approve a certain amount of speech regulation. But, it was the Court's clear understanding of that interest that also prompted it to draw the distinction between "express advocacy" and "issue advocacy." *See WRTL*, 127 S. Ct. at 2672; *Buckley*, 424 U.S. at 42-44, 80-81. And, the *WRTL* opinion is abundantly clear that the Court intends that distinction to continue throughout the framework of the BCRA. BCRA's reach simply does not extend to communications that are not express advocacy or its functional equivalent. 127 S. Ct. at 2673. Specifically, "[i]ssue ads...are by no means equivalent to contributions, and the quid-pro-quo corruption interest cannot justify regulating them." *Id.* at 2672.

While the specific type of regulation addressed by the *WRTL* opinion was BCRA §203 (limits on corporate contributions), it is clear that the opinion extends to BCRA §201 (disclosure requirements) as well. For it was not the nature of the regulation that drove the Court's holding – it was the nature of the speech that the government was trying to regulate that was paramount. The *WRTL* Court did not spend its time discussing distinctions and nuances of the various regulatory schemes; instead, its decision was instead devoted to discerning those distinctions and nuances between express advocacy and issue advocacy. The BCRA continues but one overarching term as to what speech triggers regulatory coverage, that being "electioneering communication." The *WRTL* Court has determined that that term must be construed so as to reach only express advocacy or its functional equivalent if it is to pass constitutional scrutiny. *See also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 280-84 (4th Cir. 2008) (relying in part upon *WRTL* to invalidate North Carolina campaign finance law as unconstitutional in that its scope went beyond both "express advocacy" and its "functional equivalent;" Fourth Circuit focused upon the type of speech regulated, and not the type of regulation; the Court invalidated the entire regulatory scheme to the extent it went beyond "express advocacy and its functional equivalent.")

In the instant case, all parties agree that the advertisements at issue are neither express advocacy nor its functional equivalent. Trial Court Memorandum Opinion, at p. 10. As such, the

advertisements are not subject to regulation of any sort under the BCRA. Subjecting them to such regulation, in light of their recognition as something other than express advocacy communications, clearly imposes unconstitutional burdens upon those individuals or entities seeking to propound such speech. Accordingly, the decision of the trial court granting summary judgment to the FEC should be reversed.

II. THE COURT SHOULD FOLLOW ITS LONG-STANDING PRECEDENTS AND CONTINUE TO DISTINGUISH BETWEEN EXPRESS ADVOCACY AND ISSUE ADVOCACY WHEN FACED WITH REGULATORY SCHEMES COMPELLING DISCLOSURE OF A SPEAKER'S IDENTIFYING INFORMATION.

A. First Amendment Rights to Freedom of Speech and Association are Core, Fundamental Rights.

Alternatively, if the BCRA's provisions have not been limited by *WRTL* to apply only to express advocacy, the BCRA must be so narrowed to uphold its constitutionality. The rights to political speech and free association are core, fundamental rights that include the right to anonymity. These rights have been afforded specific protections throughout this nation's history and are deemed essential to the functioning of a democratic society. Any limitation on these rights is subject to exacting scrutiny and can be upheld only if it is narrowly tailored to serve an overriding state interest. The BCRA, to the extent its restrictions are applied to anything other than express advocacy, is unconstitutional against these standards.

Throughout its history, this Court has consistently extolled the virtues and necessity of vigorously protecting the First Amendment's freedom of speech and association. "The liberty of opinion keeps governments themselves in due subjection to their duties." *Grosjean v. Am. Press Co., Inc.*, 297

U.S. 233, 247-48 (1936) (quoting Erksine's Speeches 525 (High's ed.)). The fundamental right of free speech "reflects the belief of the framers of the Constitution that exercise of the right[] lies at the foundation of free government by free men." *Schneider v. Irvington*, 308 U.S. 147, 161 (1939). "There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise through its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede." *Thomas v. Collins*, 323 U.S. 516, 543 (1945). Inherent in the right to free speech are the rights of freedom of association and assembly. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

B. Political Speech is an Integral Part of Free Speech and Association Rights.

This Court has long recognized that political speech, in particular, lies at the core of these "indispensable" and "great" freedoms. *See McIntyre*, 514 U.S. at 346 (1995); *Thomas*, 323 U.S. at 529-30. "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment Freedoms." *Williams v. Rhodes*, 393 U.S. 23 (1968). After all, "the best test of truth is the power of the thought to get itself accepted in the

competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919).

> Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.

Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion).

The recognition and protection of the right to engage in political speech is protected even though the exercise of such rights are likely to be abused or offensive. Tensions may arise in the realm of political belief and speech, where "the tenets of one man may seem the rankest error to his neighbor." *Cantwell*, 310 U.S. at 310. Despite this friction and the propensity of persons to exaggerate, vilify, or even make false statements, "the people of this nation have ordained in the light of history, that in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Id.* The liberty of free speech "was not protected because the forefathers

expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society"; instead, "this liberty was protected because they knew of no other way by which free men could conduct representative democracy." *Thomas*, 323 U.S. at 545-46 (Jackson, J., concurring). "[P]olitical speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357. Accordingly, this Court has been, and always should be, "extremely reticent to tread" into the liberty of political expression. *Sweezy*, 354 U.S. at 250 (plurality opinion).

C. The Right to Choose Anonymity is an Important Part of Engaging in Political Speech

An integral part of the freedom of speech and association is the right of the speaker to maintain his or her anonymity. *McIntyre*, 514 U.S. at 342; *NAACP*, 357 U.S. at 462. "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *McIntyre*, 514 U.S. at 342. Historically, pamphlets and leaflets have been "'weapons in the defense of liberty.'" *Talley v. California*, 362 U.S. 60, 62 (1960) (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). Some of these "weapons" were either signed with pseudonyms or anonymous: indeed "[a]nonymous pamphlets,

leaflets, brochures and even books have played an important role in the progress of mankind." *See id.* at 63 n.3, 64. Patriots from the Revolutionary War era concealed their authorship or distribution so as to avoid potential prosecution; the writer of the Letters of Junius is still unknown; and even the Federalist Papers were published without disclosing the authors' true identities. *Id.* at 65. History has shown that "it is plain that anonymity has sometimes been assumed for the most constructive purposes." *Id.* In fact, "an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent." *McIntyre*, 514 U.S. at 343.

History also teaches "that in times of high emotional excitement minority parties and groups which advocate extremely unpopular social or governmental innovations will always be typed as criminal gangs and attempts will always be made to drive them out." *Gibson v. Fla. Legis. Investigation Comm'n*, 372 U.S. 539, 571 (1963) (Douglas, J., concurring). A vital relationship exists between the freedom of association and privacy in those associations and there are times during which the government cannot compel group members to be publicly identified. *NAACP*, 357 U.S. at 462; *Talley*, 362 U.S. at 65. "[W]hether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter." *Gibson*, 372 U.S. at 569

(Douglas, J., concurring). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462. "[I]dentification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley*, 362 U.S. at 65. "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.* at 64.

D. One of Purposes of Allowing Anonymity is to Allow Expression without Fear of Reprisal, a Purpose Whose Importance Has Been Highlighted by Recent Events.

The purpose underlying the Constitution's protection of an individual's right to maintain anonymity in speech is no less prominent today than it was during the writing of the Federalist Papers or during the days of the Civil Rights campaigns. The adverse consequences which may result from the voicing of one's political expression are just as likely today as they have been at any time in this nation's history. One has to look no further than this past election cycle for real-world examples of the reprisals which have been exacted on persons who have done nothing more than exercise their constitutionally protected right to express their political opinions.

The most recent examples of persons suffering from retributive acts for political speech come from

California. Proposition 8 was a ballot proposal that restricted the definition of marriage as to between a man and a woman. Cal. Const. art. 1, § 7.5. Similar to the provisions of BCRA at issue here, the California Government Code requires any committee that supports or opposes a ballot measure to disclose the name, address and employer of any individual that makes a contribution to that committee in an amount over $100. Cal. Gov't Code §84211. The same code requires the California Secretary of State to post that information on the internet. *Id.* §§ 84600–12.

Many persons who contributed to organizations that supported the passing of Proposition 8 have suffered greatly as a direct result of their donation. Examples of retributive acts against donors in favor of the measure are prevalent and widespread. John R. Lott & Bradley Smith, Donor Disclosure Has Its Downsides, Wall St. J., December 26, 2008 (Appendix, Exhibit A). Supporters of Proposition 8 have been subjected to threatening and harassing phone calls, emails, and postcards. *See ProtectMarriage.com v. Bowen;* 2:09-cv-00058-MCE-DAD (E.D. California January 7, 2009), Complaint ¶ 31. Some of the phone calls and emails have been accompanied by death threats. *Id.* One such message relayed to a supporter "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter....I've also got a little surprise for Pasor [sic] Franklin and his congregation of lowlife's [sic] in the coming future....He will be meeting his maker sooner than expected....If you thought 9/11 was bad, you haven't

seen anything yet." *Id.* Churches and religious organizations have also been targeted for their support of Proposition 8. *Id.* ¶33. Two temples owned by the Church of Jesus Christ of Latter-day Saints and a Knights of Columbus facility received envelopes containing a suspicious white powdery substance. *Id.*

Although much retaliation has come in the form of personal attacks and threats, the retribution has come in economic form as well. *See* Lott & Smith, Donor Disclosure Has Its Downsides. Scott Eckern, director of the nonprofit California Musical Theater in Sacramento, and Richard Raddon, director of the L.A. Film Festival, were both forced to resign from their jobs after their employers were targeted for protests and boycotts because of the individuals' campaign donations to "Yes on 8", the committee established to advocate for the passage of Proposition 8. Likewise, a store owner in California that personally donated money to ProtectMarriage.com – Yes on 8, displayed a yard sign, and made phone calls on behalf of the campaign received retaliation because of the owner's personal support for Proposition 8. *ProtectMarriage.com v. Bowen;* 2:09-cv-00058-MCE-DAD, Decl. of [John Doe #1] in Support of Plaintiffs' Motion for Preliminary Injunction, ¶¶ 2–27 (Appendix 2). Fliers referencing the owner's support of Proposition 8 were posted on cars parked in the store's parking lot, the store was picketed twice, harassing phone calls were made, and efforts were undertaken to cause persons to boycott the store because of the owner's personal support of Proposition 8. *Id.* at ¶¶ 8, 10–15. Additionally,

Facebook groups have been created urging persons to boycott the store, a sponsored link on Google was purchased and the website referenced the owner's donation and urged a boycott, and negative reviews were posted on other websites based only on the store owner's personal donation to Proposition 8. *Id.* at ¶¶ 10–14.

The harassment which supporters of Proposition 8 have been subjected to goes beyond economic acts, extending to property damage, and physical violence. For example, in November, 2008, someone used a "Yes on 8" yard sign posted on property owned by a Lutheran Church and a heavy object to break a large window on the church building. *ProtectMarriage.com v. Bowen;* 2:09-cv-00058-MCE-DAD, Decl. of [John Doe #3] in Support of Plaintiffs' Motion for Preliminary Injunction, ¶¶ 9-16 (Appendix 3). Churches owned by the Church of Jesus Christ of Latter-day Saints have been vandalized, one of which had the words "No on 8" spray painted upon it. Adrienne S. Gaines, Radical Gay Activists Seek to Intimidate Christians, Charisma Magazine, Nov. 19, 2008, *available at* http://www.charismamag.com/cms/news/archives/111908.php (last visited Dec. 5, 2008) (Appendix 4). Other churches were egged and toilet-papered, had a window broken, marquee vandalized, flags stolen, and adhesive poured onto a doormat, keypad and window. *Id.* Other businesses' buildings were spray painted with messages like "Prop H8TE." Vandals Spray Paint Signs in Downtown Fullerton, Orange County Register, Oct. 20, 2008, *available at* http://www.ocregister.com/articles/macdonald-one-

police-2200383-paint-vandals# (last visited Dec. 5, 2008) (Appendix 5).

There have been many acts of physical violence relating to support given for Proposition 8. A group participating in a prayer walk was accosted by a crowd of individuals that threw hot coffee on and pushed group members. Gaines, Radical Gay Activists Seek to Intimidate Christians, Charisma Magazine, Nov. 19, 2008. One individual was hit with a Bible, pushed to the ground, and kicked. *Id.* The group's leader was threatened with death. *Id.* Another 69-year-old Palm Springs woman was allegedly pushed and spit on by protestors opposing Proposition 8. *Id.*

The harassment has become so severe that some of the contributors to the "Yes on 8" committee have filed a lawsuit in federal district court to have their names removed from the California Secretary of State's website. *See ProtectMarriage.com – Yes on 8 v. Bowen*; 2:09-cv-00058-MCE-DAD (E.D. Calif. January 7, 2009). The Complaint in that lawsuit alleges that supporters of Proposition 8 have been subjected to threats, harassment and reprisals for their support of Proposition 8. *ProtectMarriage.com v. Bowen*; Complaint ¶ 31. The reprisals are well-coordinated and are solely designed to punish the supporters of Proposition 8 for exercising their respective freedom of speech and association. In fact, opponents of Proposition 8 have gone so far as to establish a website that is designed to identify supporters of Proposition 8 and encourages donations to the website in order to "take action" against those

that supported Proposition 8. *See* http://www.californiansagainst hate.com. There is also a website that plots the disclosed names, addresses, occupations, and employers of purported Proposition 8 supporters on a Google street map with the language: "Proposition 8 changed the California state constitution to prohibit same-sex marriage. These are the people who donated in order to pass it." *See Prop. 8 Maps*, http://www.eightmaps.com (last visited Jan. 13, 2009).

Acts of reprisal are not limited to harassing financial supporters of controversial initiative petitions such as Proposition 8. Opponents of some initiative petitions have targeted individuals that merely attempted to collect the required number of signatures in order to place the measure on the ballot. In 2006, signature gatherers for the Tax and Spending Control ("TASC") initiative petition filed a lawsuit against Nevadans for Nevada, a group formed to opposed the ballot measure. Molly Ball, Tax and Spending Control Backers' Foes Get Physical, Las Vegas Rev. J., June 7, 2006. (Appendix 6). The lawsuit alleged that opponents intimidated petition signers, blocked access to petitions and poured soda over the petitions. *Id.* That lawsuit resulted in a court order commanding workers for Nevadans for Nevada to abide by a set of rules that would allow the TASC group to collect signatures. Carri Geer Thevenot, Judge Chides Ballot Groups, Las Vegas Rev. J., June 9, 2006. (Appendix 7).

This brief discussion of recent reprisals exacted upon persons as a result of the exercise of their free

speech rights is indicative of the heated nature of political debate and of the tensions inherent within the political process. These examples should serve to remind this Court of the reasons why the First Amendment's protections have always extended to protecting one's right to voice his or her opinion, especially one of a political nature, anonymously. They should serve also to remind the Court of the need to guard against any weakening of these protections in the name of preventing campaign corruption, especially where the primary purpose and content of the speech is one of issue advocacy, and not express advocacy.

E. Given the Purpose of Protecting One's Right to Express His or Her Political Issue Viewpoints Freely, this Court has Consistently Stood for Individual Freedoms.

In recognition of the importance of such right, this Court has always imposed a strict scrutiny analysis upon any governmental restriction of such right. *See McIntyre*, 513 U.S. at 345-46; *NAACP*, 357 U.S. at 461, 466 (requiring a "compelling interest" and a "controlling justification" for deterring the right to associate); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."). The proper standard of review to apply to this Court's review of the BCRA, therefore, is "exacting scrutiny," where the statute may be upheld "only if it is narrowly tailored to serve an

overriding state interest." *McIntyre*, 514 U.S. 334, 345-46, 347.

The right to be free from compelled disclosure of one's beliefs and associations has consistently been protected by this Court. In *Thomas*, the Court struck down a statute requiring labor union organizers to file a written request with the state before "soliciting" any members to join the union. 323 U.S. at 519. Prior to that time, the Court had largely failed to address the extent to which a state could require identification before speaking. *Id.* at 539. The Court held that "[s]o long as no more is involved than exercise of the rights of free speech and free assembly," the right cannot be subject to a requirement of prior registration. *Id.* at 539-40. "A requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.* at 540.

Decisions following *Thomas* further explained the right to remain free from compelled disclosure of identity and association. In *NAACP*, the Court found an order requiring production of the NAACP's membership lists offended the Constitution inasmuch as privacy in associations may be indispensable to preserving the freedom to associate and the state did not demonstrate a "controlling justification" for the interference the order would create. 357 U.S. at 462. Further precedent was established in *Bates*, where convictions pursuant to a tax ordinance requiring the NAACP to reveal the identity of persons paying dues or making

contributions to the organization were stricken. 361 U.S. at 517-18. The record revealed that former NAACP members did not renew their memberships because of the ordinance and other members were harassed and threatened when the community became aware of their membership. *Id.* at 521-22. Under these circumstances, the compulsory disclosure "would work a significant interference with the freedom of association of their members" and, while partially attributable to private action, "was brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names." *Id.* at 523-24. Because the municipalities did not show justification sufficient to defend the interference, the convictions could not stand. *Id.* at 527; *see also Shelton v. Tucker*, 364 U.S. 479, 485-490 (1960) (although a state has a relevant interest in ensuring its teachers are competent and fit to teach, an inquiry into all associational connections the teachers have had in the past five years was a "comprehensive interference" with the teachers' rights of association and went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers"); *Talley*, 362 U.S. at 63-65 (ordinance barring the distribution of circulars unless they contained the identification of persons preparing, distributing, or sponsoring them was facially void; identification requirement infringed on the right of expression and dissemination of information).

Buckley was the first case to address compelled disclosure in the context of modern election campaign

laws. 424 U.S. at 1 (1976). The Court considered whether the campaign contribution disclosure requirements of the FECA were unconstitutionally vague. *Id.* at 76-77. FECA required political committees—with the threat of criminal fine or confinement, or both—to keep records of contributions and expenditures, including detailed information about persons who had contributed to the committee. *Id.* at 62-64. The committees were then required to submit quarterly reports containing the identity of those who contributed over $100 in a calendar year. *Id.* at 63. FECA also required individuals and groups other than political committees or candidates to report independent expenditures of over $100 to the Federal Election Commission. *Id.* at 63-64. However, FECA attempted to limit its application by defining "contributions" and "expenditures" as "the use of money or other objects of value 'for the purpose of . . . influencing' the nomination or election of any person to federal office." *Id.* at 62-63 (citations omitted).

The Court concluded that the FECA disclosure provision was unconstitutionally vague as written because it "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. In order for the FECA disclosure provision to be constitutional, it was necessary to interpret the provision in such a way that it would only apply in a limited number of circumstances: "(1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent . . . , and (2) when they make expenditures for communications that *expressly advocate the election*

or defeat of a *clearly identified candidate*." *Id.* at 80 (emphasis added).

In conducting a similar analysis of a different section of FECA, the Court suggested that whether a communication meets the express advocacy test is a question of form over substance. *See id.* at 42-44. Indeed, the Court explained that limiting FECA's reach to those communications containing "explicit words of advocacy" was necessary to give a speaker the ability to determine what will or will not subject him to FECA rather than leave the question to the "mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Id.* at 43 (quoting *Thomas*, 323 U.S. at 535). The Court more fully observed that:

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

> *Such a distinction offers no security for free discussion.* In these conditions it blankets with uncertainty whatever may be said. . . .

Id. at 43 (quoting *Thomas*, 323 U.S. at 535) (emphasis added).

Accordingly, the Court found that its construction of FECA would restrict the statute's application to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'case your ballot for,' "smith for Congress,' 'vote against,' 'defeat,' [or] 'reject.'" *Id.* at 44 n.52. The purpose of this requirement is to ensure that "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat are thus not covered." *Id.* at 44.

Even where express words of advocacy are used with respect to a clearly identified candidate, a group may be exempt from having to disclose its contributors if evidence is presented showing "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 71-72, 74 (citing *NAACP*, 357 U.S. at 462.). In such circumstances, the threat to the exercise of First Amendment rights and the risk of chilling speech is so serious that it outweighs the government's interest in requiring disclosure. *Id.* at 71, 73-74.

More recently, in *McIntyre*, this Court determined the extent to which the right to remain anonymous applied to documents that were "intended to influence the electoral process." 514 U.S. at 344. The statute in question, relating only to publications intended to influence an election, required identifying information for the person or business responsible for the publication. *Id.* at 345-56. The state's proffered interests of providing voters with additional relevant information and protecting against fraud and libel did not justify requiring an author to "make statements or disclosures she would otherwise omit" because the author's identity added "little, if anything, to the reader's ability to evaluate the document's message." *Id.* at 348-49. The state's interest in providing additional information, therefore, was "plainly insufficient" to support the statute. *Id.* at 349. Preventing fraud and libel, the state's other proffered interest, was "legitimate," but insufficient to justify the statute. *Id.* at 349-50. Particularly, other state-law provisions protected against fraud, yet the statute at issue in *McIntyre* applied to all campaign literature, even those documents that were devoid of false or misleading statements. *Id.* at 349-51. As such, Ohio's interests were insufficient to outweigh the infringement on the right to free speech. *See id.* at 357.

F. This Court Should Again Stand for Individual Freedoms in Viewing Those Provisions of the BCRA that Could Be Interpreted to Encompass Issue Advocacy.

The Constitution affords special protection to the anonymity of association and speech, especially for independent election-related activity. Under these standards, the provisions of the BCRA, as applied to speech other than express advocacy, is unconstitutional. The restrictions and forced disclosure imposed by the BCRA are akin to the unconstitutional statute considered in *McIntyre* inasmuch as they regulate independent political activity and require disclosure and identification for any writings referencing a candidate, regardless of whether the writing advocates for the candidate's election or defeat.

Nor have the BCRA's provisions been narrowly tailored, as can be seen from the alternate definition suggested by Congress in the event that the term "electioneering communications" is considered too broad. Conceivably, the lesser intrusion upon the right to speech, association and its concomitant right to anonymity served by the alternate definition will serve the government's interest to the same extent as the unconstitutionally broad definition currently adopted. The BCRA, therefore, cannot constitutionally apply to any communications that are not express advocacy or its functional equivalent. Any other interpretation imposes an unconstitutional restraint upon the exercise of First Amendment rights and deters the discussion of public matters of importance. Because the trial court's decision was based upon the BCRA, without limiting the reach of that Act to express advocacy communications, it is constitutionally flawed and must be reversed.

CONCLUSION

Amicus Alliance Defense Fund respectfully request that this Court reverse the judgment of the District Court, and remand the case to that court for further proceedings.

Respectfully submitted,

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January 15, 2009

APPENDIX 1

Donor Disclosure Has Its Downsides

By John R. Lott Jr.
And Bradley Smith

How would you like elections without secret ballots? To most people, this would be absurd.

We have secret balloting for obvious reasons. Politics frequently generates hot tempers. People can put up yard signs or wear political buttons if they want. But not everyone feels comfortable making his or her positions public -- many worry that their choice might offend or anger someone else. They fear losing their jobs or facing boycotts of their businesses.

And yet the mandatory public disclosure of financial donations to political campaigns in almost every state and at the federal level renders people's fears and vulnerability all too real. Proposition 8 -- California's recently passed constitutional amendment to outlaw gay marriage by ensuring that marriage in that state remains between a man and a woman -- is a dramatic case in point. Its passage has generated retaliation against those who supported it, once their financial support was made public and put online.

For example, when it was discovered that Scott Eckern, director of the nonprofit California Musical Theater in Sacramento, had given $1,000 to Yes on 8,

the theater was deluged with criticism from prominent artists. Mr. Eckern was forced to resign.

Richard Raddon, the director of the L.A. Film Festival, donated $1,500 to Yes on 8. A threatened boycott and picketing of the next festival forced him to resign. Alan Stock, the chief executive of the Cinemark theater chain, gave $9,999. Cinemark is facing a boycott, and so is the gay-friendly Sundance Film Festival because it uses a Cinemark theater to screen some of its films.

A Palo Alto dentist lost patients as a result of his $1,000 donation. A restaurant manager in Los Angeles gave a $100 personal donation, triggering a demonstration and boycott against her restaurant. The pressure was so intense that Marjorie Christoffersen, who had managed the place for 26 years, resigned.

These are just a few instances that have come to light, and the ramifications are still occurring over a month after the election. The larger point of this spectacle is its implications for the future; to intimidate people who donate to controversial campaigns.

The question is not whether Prop. 8 should have passed, but whether its supporters (or opponents) should have their political preferences protected in the same way that voters are protected. Is there any reason to think that the repercussions Mr. Eckern faced for donating to Prop. 8 would be different if it

were revealed that instead of donating, he had voted for it?

Indeed, supporters of Prop. 8 engaged in pressure tactics. At least one businessman who donated to "No on 8," Jim Abbott of Abbot & Associates, a real estate firm in San Diego, received a letter from the Prop. 8 Executive Committee threatening to publish his company's name if he didn't also donate to the "Yes on 8" campaign.

In each case, the law required disclosure of these individuals' financial support for Prop. 8. Supposedly, the reason for requiring disclosure of campaign contributions is to allow voters to police politicians who might otherwise become beholden to financiers by letting voters know "who is behind the message." But, in a referendum vote such as Prop. 8, there are no office holders to be beholden to big donors.

Does anyone believe that in campaigns costing millions of dollars a donation of $100, or even $1,000 or $10,000 will give the donor "undue" influence? Over whom? Meanwhile, voters learn little by knowing the names and personal information of thousands of small contributors.

Besides, it is not the case that voters would have no recourse when it comes to the financial backers of politicians or initiatives. Even without mandatory disclosure rules, the unwillingness to release donation information can itself become a campaign issue. If voters want to know who donated, there will

be pressure to disclose that information. Possibly voters will be most concerned about who the donors are when regulatory issues are being debated. But that is for them to decide. They can always vote "no."

Ironically, it has long been minorities who have benefited the most from anonymous speech. In the 1950s, for example, Southern states sought to obtain membership lists of the NAACP in the name of the public's "right to know." Such disclosure would have destroyed the NAACP's financial base in the South and opened its supporters to threats and violence. It took a Supreme Court ruling in *NAACP v. Alabama* (1958) to protect the privacy of the NAACP and its supporters on First Amendment grounds. And more recently, it has usually been supporters of gay rights who have preferred to keep their support quiet.

There is another problem with publicizing donations in political elections: It tends to entrench powerful politicians whom donors fear alienating. If business executives give money to a committee chairman's opponent, they often fear retribution.

Other threats are more personal. For example, in 2004 Gigi Brienza contributed $500 to the John Edwards presidential campaign. An extremist animal rights group used that information to list Ms. Brienza's home address (and similarly, that of dozens of coworkers) on a Web site, under the ominous heading, "Now you know where to find them." Her "offense," also revealed from the campaign finance records, was that she worked for a

pharmaceutical company that tested its products on animals.

In the aftermath of Prop. 8 we can glimpse a very ugly future. As anyone who has had their political yard signs torn down can imagine, with today's easy access to donor information on the Internet, any crank or unhinged individual can obtain information on his political opponents, including work and home addresses, all but instantaneously. When even donations as small as $100 trigger demonstrations, it is hard to know how one will feel safe in supporting causes one believes in.

Mr. Lott, a senior research scientist at the University of Maryland, is the author of "Freedomnomics" (Regnery, 2007). Mr. Smith, a former Federal Election Commission commissioner, is chairman of the Center for Competitive Politics and professor of law at Capital University in Columbus, Ohio.

APPENDIX 2

John Doe #1

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** Pro Hac Vice Application Pending*
** Designated Counsel for Service

United States District Court
Eastern District of California

ProtectMarriage.com, *et al.*, *Plaintiffs,*	Case No. 2:09-CV-00058-MCE-DAD **DECLARATION OF [REDACTED] IN SUPPORT**

v. Debra Bowen, *et al.*, *Defendants.*	**OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: TBD Time: TBD Judge England

I, REDACTED, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of the state of California over 18 years of age, and my statements herein are based on personal knowledge.

2. I supported the passage of Proposition 8.

3. In support of the passage of Proposition 8, I donated $XX XXX to ProtectMarriage.com – Yes on 8.

4. I own REDACTED, a local REDACTED store REDACTED in the Counties of REDACTED, REDACTED, and REDACTED. I have a total of REDACTED stores in this area.

5. My donation to ProtectMarriage.com – Yes on 8 was a personal one, but because one has to list an employer, I had to list the name of my business since I am self-employed.

6. In support of the passage of Proposition 8, I placed a yard sign in the front yard of my home.

7. In support of the passage of Proposition 8, I also made phone calls on behalf of the Proposition 8 campaign with a group of people from my church.

8. In October 2008, someone put flyers on all the cars in the parking lot of my REDACTED store. These fliers referenced my support of Proposition 8 and my financial contribution.

9. I believe that, because I was required to provide the name of my business when I made my personal donation to ProtectMarriage.com – Yes on 8, and because this information was made available to the public, my stores have been targeted for various forms of harassment.

10. On the social networking website of Facebook, at least three "groups" have been formed urging boycotts of REDACTED (Boycott REDACTED, Boycott REDACTED, and Boycott REDACTED – Equality for All!!!). As of January 9, 2009, one of these groups had over 160 members.

11. Someone started REDACTED and for a portion of November 2008, paid for it to be a sponsored link on Google. What this means is that, when one searches for my company on websites that show Google's sponsored links, REDACTED is the first website that appears on the list of sponsored links.

12. The website REDACTED makes reference to my personal donation in support of Proposition 8 and urges people to boycott my stores on the basis of my support

13. On Yelp.com, a website featuring reviews of local businesses and restaurants, several negative reviews of my stores have been posted. None of the reviews have anything to do with my business, but

instead reference my donation to ProtectMarriage.com – Yes on 8.

14. Various other websites have published negative reviews of my stores based solely on my donation to ProtectMarriage.com – Yes on 8.

15. Since the passage of Proposition 8, my REDACTED store has been picketed twice.

16. On November XX, 2008, there was a march in opposition to Proposition 8 in downtown REDACTED. The REDACTED Police Department called and informed me that they had received information that the protestors planned to march to my REDACTED store and picket there.

17. Several of the protestors who came to the REDACTED store on November XX, 2008 were fairly aggressive. They stood in front of the entrance to the store and attempted to give flyers to my customers stating that they should not shop at my stores because of my donation to Proposition 8. A true and correct copy of the flyer distributed by the picketers is attached to this Declaration as Exhibit A.

18. Several people arrived and were fairly aggressive. They stood in front of the entrance to the store and attempted to give flyers to my customers stating that they should not shop at my stores because of my donation to Proposition 8.

19. The second time that my REDACTED store was picketed, several people assembled in front of the

entrance to the store and tried to get my customers to sign some sort of petition.

20. The manager of the store told the protestors they could not block the entrances and exits of the store. The protestors refused to leave.

20. We called the REDACTED Police Department and asked them to ask the protestors to move to the sidewalk, since they were standing in front of the entrances and we believed they were trespassing, because the store is located on private property.

21. The REDACTED Police Department told me that the store is a public place and that the protestors were not trespassing. The Police Department refused to ask the protestors to relocate to the sidewalk.

22. After the passage of Proposition 8, an individual came into my REDACTED store, filled a shopping cart with groceries, and took it to the check-out line. Once the cashier had scanned in all of the items in the shopping cart, the individual announced that he was not going to buy anything because I supported Proposition 8, and left without paying for the items.

23. I have retained many but not all of the letters and hundreds of e-mails that my stores or I received because of my support of Proposition 8.

24. My stores received numerous harassing phone calls that referenced my support of Proposition 8.

25. Around 30-40 people have walked into my stores since the passage of Proposition 8 and expressed their displeasure about my support of Proposition 8.

26. Because of my concerns about product tampering in light of my support of Proposition 8, I have been forced to install an additional sixteen security cameras in my stores to protect the integrity and safety of our products.

27. These experiences will hinder me from donating to a cause similar to Proposition 8 in the future. I feel very strongly about the issue of same-sex marriage, but in the future I would support a measure like Proposition 8 more discretely and would not donate like this again. I feel it is very unfair that I could not make my donation a personal matter only and leave the name of my business out. As a result of my personal donation, my stores and my employees have been subject to harassment, and I feel this is not right.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on: _____

REDACTED

APPENDIX 3

John Doe #3

James Bopp, Jr. (Ind. State Bar No. 2838-84)*
Barry A. Bostrom (Ind. State Bar No. 11912-84)*
Sarah E. Troupis (Wis. State Bar No. 1061515)*
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Counsel for All Plaintiffs

** Pro Hac Vice Application Pending*
** Designated Counsel for Service

United States District Court
Eastern District of California

ProtectMarriage.com, *et al.*,	Case No. 2:09-CV-00058-MCE-DAD **DECLARATION OF**

Plaintiffs, *v.* Debra Bowen, *et al.*, *Defendants.*	REDACTED IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION Date: TBD Time: TBD Judge England

I, REDACTED, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of the state of California over 18 years of age, and my statements herein are based on personal knowledge.

2. I supported the passage of Proposition 8.

3. I am the pastor REDACTED of Lutheran Church in REDACTED, California.

4. Prior to the passage of Proposition 8, I stated to my congregation that the Bible supports marriage between one man and one woman, and that the members of my congregation should vote accordingly.

5. Prior to the passage of Proposition 8, an unknown person placed a "Yes on 8" yard sign on the church property, which remained standing on the property until sometime on November [redacted], 2008 or November [redacted], 2008.

6. Sometime between 10:00 p.m. on November [redacted], 2008 and 8:00 a.m. on November [redacted], 2008, the "Yes on

8" yard sign that had been placed on the church property and a heavy object, such as a rock, were used to break a large window of our church building. Pictures of the broken window and the "Yes on 8" sign are attached as Exhibit A. These pictures are a true and accurate representation of the broken window and "Yes on 8" sign as I discovered them on November [redacted], 2008.

7. Our denominational newspaper of the Lutheran Church, Missouri Synod, published a story about the incident, which is attached as Exhibit B. This account of the events is a true and accurate representation of the events that occurred.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on: _____

REDACTED

APPENDIX 4

Radical Gay Activists Seek to Intimidate Christians

Since Nov. 4, Christians have reported increased incidences of church vandalism and sometimes-violent attacks for their support of traditional marriage.

[11.19.08] The Nov. 4 passage of constitutional amendments banning gay marriage in California, Arizona and Florida has evoked a sometimes-violent response from radical gay activists who have vandalized churches, mobbed intercessors and disrupted a worship service in Michigan.

Intercessors with a house of prayer in San Francisco said they feared they might be killed Friday night during a routine prayer walk through the area's Castro district, which has a large gay community. They said a crowd who thought they were marriage amendment demonstrators shouted lewd remarks, pushed them, threw hot coffee on their faces and threatened the prayer group leader with death. (See related video.)

One man reportedly hit an intercessor on the head with her Bible before shoving her to the ground and kicking her. Before police arrived, another house of prayer member said someone repeatedly tried to pull his pants down.

"We hadn't preached, we hadn't evangelized," one of

the intercessors said after the incident. "We worshipped God in peace, and we were about to die for it."

Police eventually escorted the group to their van, telling the intercessors they had to leave if they wanted to make it out, one witness said.

"These are the nicest kids," said TheCall founder Lou Engle, who knows many of the young intercessors involved in the incident. "That night they were doing only worship. They weren't trying to aggravate anything."

"I think what's happening is an exposure of what's really there and an underbelly of this [radical gay] movement," Engle added. "I think the church has to really reveal what's going on there so the nation gets a clue about what they're making an alliance with."

In Michigan, where voters in 2004 approved an amendment defining marriage as the union of one man and one woman, a Chicago-based gay rights organization called Bash Back interrupted a Nov. 9 service at an Assemblies of God congregation in Lansing. (See related video.)

After staging a demonstration outside Mount Hope Church to draw most of the security staff away from the worship service, protestors masked as congregants stood up in the middle of the service, "declared themselves fags and began screaming loudly," Bash Back leaders said in a statement posted online.

The protestors pulled the fire alarm and threw thousands of fliers into the congregation, while a gay couple rushed to the front and began kissing in front of the pastor. "Let it be known: So long as bigots kill us in the streets, this pack of wolves will continue to BASH BACK!" the group said in a statement about the incident.

Bash Back leaders said Mount Hope was targeted because it is "complicit in the repression of queers" by working to "institutionalize transphobia and homophobia" through "repulsive" ex-gay conferences and hell house plays, "which depict queers, trannies and womyn [sic] who seek abortions as the horrors."

In a statement posted on Mount Hope's Web site, church leaders said they don't "attempt to identify the church as anti-homosexual, anti-choice, or right wing" but do "take the Bible at face value and believes what the Bible says to be the truth."

Mount Hope spokesman David J. Williams Jr., said the sheriff's department had launched an investigation into the incident. "We're really asking for prayer for the people that did this," Williams said. "They need Jesus; they need to know His love."

Attorney John Stemberger, who chaired Florida's marriage amendment campaign, said many gay protestors want to intimidate the public into silence. "Their goal is to create an intense climate of intimidation and hostility within the culture to try and deter people from supporting traditional

marriage and other pro-family initiatives in the future," Stemberger said. "We will not be bullied into silence, indifference or inaction."

In Palm Springs, Calif., a 69-year-old woman planned to file charges against protesters who reportedly pushed the woman and spit on her during a Nov. 8 rally opposing the passage of Proposition 8, which amends the state constitution to define marriage as the union of one man and one woman. Phyllis Burgess said authorities convinced her to press charges against the attackers.

Nationwide, gay rights advocates protested marriage bans on Saturday, pointing particularly to California's Proposition 8, which defined marriage as between one man and one woman and overturned a state Supreme Court ruling that had legalized gay marriage. Many of the demonstrations were peaceful, according to Associated Press (AP) reports, with participants waving rainbow-colored flags and holding signs saying "Don't Spread the H8."

But pastors across the country, particularly in California, say incidents of vandalism and theft have increased since Nov. 4. One California pastor said a minister in his state received death threats for his support of Proposition 8.
According to reports from California's Protect Marriage campaign:

· At Messiah Lutheran Church in Downey, Calif., a "Yes on 8" sign was wrapped around a heavy object and used to smash the window of the pastor's office.

· Several "Yes on 8" yard signs were stolen from Calvary Chapel Ventura, as well as a large banner displaying the church's name and service times.

· Park Community Church in Shingle Springs, Calif., received harassing phone calls and has been threatened with lawsuits by Proposition 8 opponents.

· Bloggers targeted Yorba Linda, Calif., pastor Jim Domen, who is open about his past struggle with same-sex attraction, and his girlfriend for harassment after seeing the couple's photo in news reports about the passage of Proposition 8.

· The words "No on 8" were spray-painted on a Mormon church in Orangevale, Calif.

· A brick was thrown through the window of Family Fellowship Church in Hayward, Calif., and at Trinity Baptist Church in Arcata, Proposition 8 opponents vandalized the church's marquee, which encouraged support for the marriage amendment; stole the church's flags; and committed other acts of vandalism totaling $1,500.

· Eggs thrown on the building of San Luis Obispo Assembly of God and toilet paper was strewn across the property, while a Mormon church in the same city had adhesive poured onto a doormat, a keypad and a window.

The Mormon Church, headquartered in Salt Lake City, Utah, has also become a target of gay rights

activists because it provided major funding to the Proposition 8 campaign and encouraged its members to support the marriage amendment, which passed with 52 percent of the vote.

Some gay rights advocates have called for a boycott of the state of Utah, and Bash Back leaders admitted to vandalizing Mormon churches there, as well as in Washington state and California. A Mormon temple in Salt Lake City reported receiving a letter containing a white, powdery substance that forced the facility to close while police launched an investigation.

"The hypocrisy, hatred, and intolerance shown by the gay rights movement isn't pretty," said Randy Thomasson, president of the Campaign for Children and Families, a leading California-based pro-family group. "While claiming to be against hate and for tolerance and choice, the homosexual activists are revealing their hatred of voters and religion and showing their intolerance of people's personal choices to support man-woman marriage. By attacking the people's vote to protect marriage in the state constitution, homosexual activists have declared war on our republic and our democratic system."

Christian leaders say the backlash is likely to continue and may worsen. "It's actually desperation time for us all across the nation to be praying," Engle said. "They're calling [Christians] haters when all they're doing is simply saying there's a higher authority. It's a raging against Christ and His loving, foundational laws. It is becoming an anti-Christ rage.

They are creating a Jesus of their own mind, a Jesus who lets everybody do whatever they want.

"I think the church has to be prepared [for religious persecution]," he added. "Our allegiance is to God and His Word, and if that means imprisonment and martyrdom, so be it." -- **Adrienne S. Gaines**

APPENDIX 5

VANDALS SPRAY PAINT SIGNS IN DOWNTOWN FULLERTON
IF CAUGHT, VIOLATORS COULD FACE UP TO ONE YEAR IN PRISON, $10,000 FINE.

By BARBARA GIASONE
THE ORANGE COUNTY REGISTER

FULLERTON – Vandals used gold spray paint to scrawl anti-Proposition 8 messages on commercial and residential buildings in the downtown and east Fullerton over the weekend, police said.

The "Prop H8TE" message was found on the Bank of America and Union Bank on north Harbor Boulevard, and on a retail store in the 500 block of north Harbor. Additional tagging was found on houses near Dorothy Lane.

Sgt. Mike MacDonald said anyone caught causing more than $400 in damages is subject to one year in state prison or county jail – and $10,000 in fines. Suspects who are caught causing less than $400 in damages could be charged $1,000 and spend one year in county jail.

In addition to the spray-paint vandalism, 500 "Yes on 8" signs valued at $10 apiece were reported missing throughout the city by a Yes on 8 community organizer, MacDonald said.

At least one resident in the city is using a night-vision camera to catch sign vandals, police said. The homeowner told police he captured images of a woman stealing signs.

"While we respect people's rights to have an opinion on state politics, it's never appropriate to deface property to further their own beliefs," MacDonald said. "We treat this type of crime very seriously.

"Violators will be prosecuted to the fullest extent of the law," he said.

A resident in the northeast section of the city reported late Monday morning that his property was also defaced with gold paint.

"I've lived in the city for 18 years, and I've never had anything like this," Randy Reece said.

"It's ironic the purveyors of tolerance seem to not have any respect for the First Amendment and it's disgusting," Reece said. "I'd like to have a discussion with them if they want to."

Vandalism should be reported to the Fullerton Police Department at 714-738-6715.

APPENDIX 6

Jun. 07, 2006
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TAX AND SPENDING CONTROL: Backers: Foes get physical

Supporters sue, allege intimidation

Swarming around signature-gatherers. Yelling and grabbing clipboards. Pouring a can of soda on a petition.

Such are the intimidating tactics circulators of the Tax and Spending Control ballot initiative petition allege are being used against them by a union-backed group.

On Tuesday, TASC's backers filed a lawsuit against Nevadans for Nevada, the group they allege has overstepped legal bounds to block the petition from getting on the ballot.

"The tactics of the blockers are a clear violation of the law," TASC's executive director, Bob Adney, said at a news conference Tuesday. "They're trying to silence people's voices."

He said the blockers' tactics might prevent TASC from getting the 83,156 valid voter signatures needed to get on the ballot.

Nevadans for Nevada Chairman Danny Thompson denied the allegations.

"We are not harassing them," he said. "All we are doing is exercising our First Amendment rights, just like they are. We don't use physical tactics."

Thompson said the petitioners were failing in their signature-gathering and seeking someone to blame.

"If they were successful in getting signatures, they wouldn't be suing our organization for exercising our rights," said Thompson, who also heads the state AFL-CIO.

The TASC initiative aims to amend the Nevada Constitution to limit the government's ability to spend money.

Its signature-gatherers, posted outside Department of Motor Vehicles offices, grocery stores and other high-traffic spots in the valley, have been the target of a first-of-its-kind effort in Nevada. The petition-blocking group has deployed its own workers at the same locations to hand out leaflets encouraging people to "Read the Fine Print and Decline to Sign!"

TASC's backers, in their lawsuit, allege that the petition-blockers, who they call "hired thugs," did more than hand out leaflets.

The lawsuit accuses the blockers of "illegally impeding and preventing" signatures from being

gathered "by intimidation, threats, coercion, violence, restraint, and/or undue influence."

As someone was signing the TASC petition, the lawsuit alleges, blockers approached TASC signature-gatherer Nichole Dickens and put their own papers on top of her clipboard. The blockers stood very close to the signer, talking loudly over Dickens, "thus confusing and intimidating the potential signer," who responded by walking away, the lawsuit alleges.

The lawsuit said such actions are illegal under a Nevada statute that prohibits "intimidation of voters" and that specifically mentions petitions.

"Whether or not we make it (onto the ballot) is not the issue," TASC's attorney, Joel Hansen, said.. "The issue is, can petitioners gather in peace, or do they have to be intimidated and harassed?"

The lawsuit seeks a restraining order against the petition-blockers and a six-week extension of the June 20 petition deadline for TASC to make up for the time the lawsuit said the signature-gathering effort has been impeded.

It is scheduled for a Thursday hearing in Clark County District Court.

TASC also filed a complaint with the secretary of state's office calling for criminal charges to be filed against the petition-blockers.

The case echoes another case in which Hansen was involved. Two years ago, Hansen was the lawyer for Nevadans for Sound Government, which sued government entities including the DMV and the University of Nevada for preventing petitioners from gathering signatures on public property.

A judge ruled in the group's favor and gave an extension to the petitions, which aimed to repeal the 2003 tax increase and prohibit public workers from serving in the Legislature. But the two initiatives still did not make the ballot.

"This time it's not government interference, it's government employees' unions," Hansen said. "They are only going after our petition because they don't want this petition (TASC) to succeed."

Adney said: "Now we know the lengths to which the politically privileged will go to try to stop this. It scares them to death. All these unions have a vested interest in growing government, raising taxes and increasing spending."

Adney said the blockers' efforts had caused petitioners to become discouraged and gather fewer signatures or quit, meaning TASC had to spend more money on its signature-gathering.

Thompson said the accusations against Nevadans for Nevada, a coalition that includes several unions including teachers, police and firefighters, were implausible.

He said the group's workers were trained according to a strict set of guidelines that prohibit intimidation.

According to a memorandum provided by the group, the petition "educators" are specifically told not to block anyone's path, follow people or vehicles or "engage in harassing, threatening or abusive conduct."

The memo said, "Communications that are respectful will be more effective in carrying the message."

Thompson said his workers' only objective was to give people the facts before they signed the petition.

The union, which previously filed a lawsuit challenging the way TASC is explained on petitions, contends the fine print of the lengthy proposed constitutional amendment contains hidden provisions that people would not like if they knew about them.

"This is an important public policy issue," Thompson said. "Somebody should be saying, 'Hey, take a look at this before you sign.'"

APPENDIX 7

Jun. 09, 2006
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Judge chides ballot groups

Petition backers, foes agree to rules

A group of petition circulators and their opponents agreed to abide by a set of ground rules Thursday after a judge lectured them about First Amendment rights and common courtesy.

"What we have to do is we all have to get along, and we cannot have people harassing each other," District Judge Sally Loehrer told the parties during an afternoon hearing.

The matter came before Loehrer after the Committee for Tax and Spending Control filed a lawsuit Tuesday against a union-backed group called Nevadans for Nevada.

TASC, which is gathering signatures for a ballot question designed to limit government spending, alleged the opposing group had used intimidating tactics to deter voters from signing its petition.

Petition circulators have been working outside Department of Motor Vehicles offices, grocery stores and other high-traffic spots in the valley, and Nevadans for Nevada has deployed its own workers at the same locations to hand out leaflets

encouraging people to "Read the Fine Print and Decline to Sign!"

TASC's lawsuit sought a restraining order against the petition-blocking group, which denied engaging in harassment, and a six-week extension of the June 20 petition deadline.

TASC needs 83,156 valid voter signatures to get its question on the November ballot.

Loehrer refused to grant the extension request and said TASC had waited too long to bring the matter to court.

During Thursday's hearing, representatives of both groups agreed to abide by the following rules, which Loehrer incorporated into a court order:

• Neither the petition circulators nor their opponents may yell or use bullhorns.

• No representative of either group may touch the opposing group's supplies or agents.

• Neither group may have more than four workers at any location.

• No more than two representatives of either group may approach a voter at one time.

• If representatives of one group approach a voter first, representatives of the other group must remain at arm's length and not interrupt their conversation.

"Common courtesy says that when one person is speaking to another, another doesn't come up and butt in," Loehrer said.

Attorney Richard McCracken, who represents Nevadans for Nevada, initially opposed the so-called "first-in-time, first-in-right" rule.

"There's no constitutional requirement that one party stay silent because the other is speaking," the lawyer said.

He said the petition opponents need to approach voters before they sign their names, but Loehrer said the opponents can provide the voters with a form authorizing the removal of their signatures and deliver it to the Clark County clerk's office for them.

Gary Peck, executive director of the American Civil Liberties Union of Nevada, observed the hearing and said a court-ordered "first-in-time, first-in-right" rule would have been unconstitutional.

"The First Amendment doesn't say you're free to speak your mind unless you're being rude," Peck said.

But he said the parties can agree to play by a set of rules, as they did at Thursday's hearing.

Bob Adney, TASC's executive director, said that he thinks the new rules will allow his group to gather the necessary signatures by the deadline.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
SEP 17 2008
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No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTIONS COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF JURISDICTIONAL STATMENT OF APPELLANT CITIZENS UNITED

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
INTRODUCTION	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. The Movie Involves Core Political Speech Which Cannot Be Prohibited or Excessively Burdened	7
II. The FEC May Not Regulate the Speech Involved In a Feature-Length Movie as a Broadcast Campaign Ad	11
III. This Case Presents Crucial, Urgent Questions of Law Regarding Fundamental Free Speech Rights Which this Court Should Resolve Expeditiously	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES	Page
Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982)	12
Boos v. Barry, 485 U.S. 312 (1988)	7, 8
Buckley v. Valeo, 424 U.S. 1 (1976)	8, 9, 10
Davis v. FEC, 128 S. Ct. 2759 (2008)	8
Jenkins v. Georgia, 418 U.S. 153 (1974)	12
FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007)	7, 8, 9, 10, 11
McConnell v. FEC, 540 U.S. 93 (2003)	6, 8, 9, 11, 13
McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)	7, 8
North Carolina Right to Life v. Leake, 525 F. 3d 274 (4th Cir. 2008)	9

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INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the right of Freedom of Speech under the First Amendment.

All parties consented to the filing of this brief, and were timely notified.

INTRODUCTION

This case involves the production, advertising, display, and broadcast of a movie about a major political figure — Hillary Clinton. The movie includes a mix of facts and opinion about Ms. Clinton. The movie and the expenditures behind it are not part of any political campaign, or coordinated in any way with any political campaign. The movie does not urge viewers to vote for or against Ms. Clinton.

The movie is the cinematic equivalent of an opinion commentary in a newspaper or magazine, or a book presenting political opinions. As such, it is core political speech entitled to the full protection of the First Amendment. It cannot be prohibited during any election period, or at any other time. Nor can its promotion be excessively burdened by regulatory requirements.

In seeking to prohibit the movie and burden its promotion, the Federal Elections Commission has strayed outside its constitutionally permissible zone of authority, which is to regulate campaign speech. Where the movie is not part of any campaign, nor coordinated in any way with any campaign, and does not urge viewers to vote for or against any candidate, the justification for allowing FEC regulation of campaign speech, preventing corruption or the appearance of corruption, does not apply. The FEC then has no constitutional authority to regulate such speech in contravention of the First Amendment.

The value that the First Amendment protects is freedom of speech, long recognized as a fundamental foundation of our democracy. The First Amendment places that value on a pedestal above competing values. The regulation at issue in this case ignores that pedestal, and the fundamental policy embodied in the First Amendment. That cannot be accepted as a matter of constitutional law.

These legal issues could not be more important and fundamental to our democracy. Therefore, it is urgent and critical for the Court to note probable jurisdiction in this case and resolve the legal questions it presents.

STATEMENT OF THE CASE

Appellant Citizens United is a non-profit, 501(c)(4) corporation founded in 1988. It was started by citizens who wanted to communicate and advance their viewpoint to the general public, and they have done so over the years through movies and other communications. Some of its movies have competed for and won awards from the motion picture industry and others.

One of its recent projects has been *Hillary: The Movie* ("Movie"), a feature-length, documentary film which presents facts and opinion regarding 2008 Presidential candidate Hillary Clinton. The Movie was planned for release in January, 2008, with full standard modern promotional efforts, including a website, broadcast advertising, a compendium book detailing the Movie, theaters booked for screenings, and DVDs to be sold by prominent retailers. Citizens United also received an offer for the broadcast of the Movie on television.

Citizens United has no connection with any candidate, campaign, campaign committee, political committee or political party. No aspect of the production and promotion of the Movie was coordinated with any such political entity either. Moreover, the Movie does not expressly advocate the election or defeat of Hillary Clinton for any office, or the election or defeat of any other candidate. It does not contain an appeal to vote for or against Hillary Clinton.

But under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Movie would be considered an "electioneering communication" because it mentioned a federal presidential candidate and it would be screened during the 30-day periods before the prima-

ries, caucuses and conventions occurring throughout 2008, and during the 60 days before the 2008 general election. The broadcast ads for the movie would also be electioneering communications for these same reasons.

Consequently, the Federal Elections Commission (FEC) took the position that the Movie is prohibited under the BCRA until the 2008 election was over. Moreover, even ads promoting the Movie would be subject to regulation requiring Citizens United to publicly disclose its donors, which would likely reduce the number of donors and the amounts donated. Citizens United would also be required to report the ads in FEC filings as campaign speech when they are not. Mandatory FEC disclaimers would also have to be included in the ads.

Citizens United filed its complaint challenging the constitutionality of the application of these regulatory requirements to the Movie and its promotion on December 13, 2007. The District Court upheld the FEC, finding that the Movie was a prohibited electioneering communication. Citizens United noticed this appeal on July 24, 2008.

SUMMARY OF ARGUMENT

Appellant Citizens United has produced a movie that communicates facts and opinion regarding a top candidate for President of the United States. As such, it involves core political speech entitled to the highest protection under the First Amendment.

The Movie is not unambiguously related to the campaign of any candidate, or operationally related to any campaign or candidate in any way. The Movie does not contain an appeal to vote for or against

any candidate. Consequently, the Movie does not implicate the compelling state interest of preventing corruption or the appearance of corruption in our democratic system. Therefore, under the well-established precedents of this Court, the Movie cannot be prohibited, and its promotion cannot be excessively burdened by regulation under the BCRA, as held by the FEC and the court below. Such regulation of the core political speech involved in the Movie and its promotion cannot survive strict scrutiny for the reasons above.

The FEC is now asserting regulatory powers well beyond constitutional bounds, and its regulatory excesses regarding the most critical and fundamental freedom of core political speech need to be reined in.

The focus of Congress in enacting the BCRA, and of this Court in *McConnell* mostly upholding the BCRA, was on the speech involved in broadcast campaign ads, not feature length movies. Feature-length, documentary movies independent of any campaign do not involve the same issues of potential corruption or the appearance of corruption as presented by the financing of campaign speech in broadcast ads. The speech involved in feature length films has enjoyed the same constitutional protection as the speech involved in books. This Court should maintain that equivalent protection, and not read the regulatory restrictions of the BCRA as applying to feature-length, documentary films as in this case.

Because of the fundamental importance of the freedom of core political speech involved, this case presents the most weighty and substantial of legal questions. For these reasons, it is urgent for this Court to note probable jurisdiction in this case and resolve these questions.

ARGUMENT

I. The Movie Involves Core Political Speech Which Cannot Be Prohibited or Excessively Burdened.

The Movie communicates facts and strongly held opinions about a candidate for President who has long been highly controversial among the public. It is the cinematic equivalent of an opinion commentary in a newspaper or magazine, or a book presenting political opinions.

The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *See, e.g., McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995); *Boos v. Barry,* 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life,* 127 S. Ct. 2652 (2007). As the Court said in *McIntyre,*

> "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."

514 U.S. at 347.

Yet, the FEC claims the authority to ban the movie during the 2008 election season, exactly the period when the right to such speech should be the most urgently protected. It also claims the authority to burden promotion of the film to the general public with excessive regulatory requirements.

The FEC claims this authority based on the BCRA. But that Act granted the FEC authority to regulate only campaign speech. In this case, the Movie and

the expenditures behind it are not part of any campaign, or coordinated with any campaign in any way. Appellant Citizens United has been producing such political movies for years, to advance its message and cause on a broad range of different topics. Moreover, the Movie does not expressly advocate the election or defeat of Hillary Clinton for any public office, or that viewers should vote for or against her for any office.

Consequently, the Movie does not involve campaign speech. Rather, it involves core political speech entitled to the maximum protection under the First Amendment. That protection does not allow the Movie to be prohibited, or excessively burdened by regulation.

Regulation of campaign speech under the BCRA was upheld on the grounds that preventing corruption or the appearance of corruption in our democracy was a compelling state interest. *McConnell v. FEC,* 540 U.S. 93 (2003); *Wisconsin Right to Life, supra; Davis v. FEC,* 128 S. Ct. 2759 (2008). *See also Buckley v. Valeo,* 424 U.S. 1 (1976). But precisely because the Movie and its financing are not part of any campaign, nor coordinated with any campaign, nor does the Movie urge viewers to vote for or against any candidate, the Movie and its financing do not implicate this compelling state interest. The Movie is independently financed outside of any campaign, and is consequently entitled to the maximum protections of any other core political speech.

Any speech falling under the First Amendment is entitled to the protections of strict scrutiny analysis. *McIntyre, supra; Boos, supra; Wisconsin Right to Life, supra.* Under that analysis, any restriction on free speech must be narrowly tailored to serve a compel-

ling state interest. *Id.* Precisely because the Movie and its expenditures do not involve campaign speech, but, rather, independently financed core political speech, the restrictions the FEC seeks to impose on it do not serve the compelling state interest of preventing corruption or the appearance of corruption in our democracy. Allowing FEC restrictions on speech to apply outside the strictly defined realm of campaign speech is not narrowly tailoring those restrictions to serve a compelling state interest.

For these reasons, the regulatory restrictions the FEC seeks to impose on the Movie and its promotion fail strict scrutiny. Consequently, they are unconstitutional under the First Amendment as applied to the Movie and its promotion.

The FEC would remain within the bounds of the Constitution if it would just comply with the guidelines established by the directly applicable precedents of this Court. The FEC can impose its regulatory requirements only on campaign speech, which is speech that is "unambiguously related to the campaign of a particular federal candidate." *Buckley v. Valeo,* 424 U.S. 1, 80 (1976). As the court said in *North Carolina Right to Life v. Leake,* 525 F. 3d 274, 281 (4th Cir. 2008), "after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are 'unambigiously related to the campaign of a particular . . . candidate.'" The FEC cannot regulate political speech that is outside this definition, which is fully protected by the First Amendment. *Wisconsin Right to Life, supra; McConnell, supra.* Moreover, as the Supreme Court has said, "the benefit of any doubt [goes] to protecting rather than stifling speech." *Wisconsin Right to Life, supra,* at 2667.

Moreover, the FEC can regulate speech only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisconsin Right to Life, supra,* at 2667. *See also, Buckley, supra,* at 44, 80 (Created the express advocacy test, limiting regulation to communications that contain explicit words expressly advocating the election or defeat of a clearly identified candidate). If the speech "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," it is protected from FEC regulation under the First Amendment. *Wisconsin Right to Life, supra,* at 2670. "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *Id.* at 2669.

But the FEC, and the Court below, did not apply these guidelines in this case. Prohibition of the Movie, and regulatory burdens on its promotion, were upheld even though it is not unambiguously related to the campaign of any federal candidate, and it does not appeal to viewers to vote for or against any candidate. Consequently, the application of these FEC regulations to Citizens United and its Movie is unconstitutional as discussed above.

Indeed, instead of limiting its regulatory authority to the guidelines established in the Supreme Court precedents above, the FEC asserts that its regulatory authority "extends beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues." FEC SJ Mem. (Doc. 55) at 22; Opp'n to Mot. for Prelim. Inj. (Doc. 18) at 19. In asserting this authority, as it does in this case, the FEC is seeking powers well beyond constitutional bounds. Regulatory burdens on political speech beyond

candidate elections cannot pass strict scrutiny for the reasons discussed above.

The FEC, in fact, is now following a practice, exemplified in this case, of arguing that the upholding of its regulatory authority against a facial challenge in *McConnell* precludes all as applied challenges to its regulatory burdens as in the present case. It persists in this practice, and convinced the court below to follow this logic, even though it is contrary to the express language of *McConnell*, and the same argument was rejected by this Court in *Wisconsin Right to Life*. In that case, the Court went on to uphold the as applied challenge of petitioner to the FEC's regulatory burdens on its political speech.

We respectfully submit that this Court needs to enforce its well grounded precedents protecting the core freedoms of the First Amendment so essential to the functioning of our democracy, and rein in the regulatory excesses of the FEC.

II. The FEC May Not Regulate the Speech Involved In a Feature-Length Movie as a Broadcast Campaign Ad.

This Court in *McConnell* considered the regulatory burdens of the BCRA on the speech involved in broadcast campaign ads, not feature length movies. The record in *McConnell* shows that this was the focus of Congress in enacting the BCRA as well.

Feature-length movies independent of any campaign do not involve the same issues of potential corruption or the appearance of corruption as presented by the financing of campaign speech in broadcast ads, which was the focus of the BCRA. Consequently, such movies do not involve the same compelling state

interest that justifies the regulation of broadcast campaign ads

The speech involved in feature length films has enjoyed the same constitutional protection as the speech involved in books. *See Jenkins v. Georgia,* 418 U.S. 153 (1974); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico,* 457 U.S. 853 (1982). We submit that this Court should maintain that equivalent protection, and not read the regulatory restrictions of the BCRA as applying to feature-length films. If Congress decides in the future that such regulatory restrictions should apply to feature-length movies, it can say so expressly in a statute. This Court can then evaluate whether those restrictions pass constitutional muster in the case of feature length films.

The Movie at issue in the present case, therefore, would then be free of the regulatory burdens the FEC seeks to impose on it, as would all other feature length films.

III. This Case Presents Crucial, Urgent Questions of Law Regarding Fundamental Free Speech Rights Which this Court Should Resolve Expeditiously.

This case involves the most basic and fundamental free speech rights, core political speech. Citizens need to understand what their rights are and what permissible restrictions they may face on their participation in the political debate. The same is true for candidates and their campaign associates.

Indeed, even the FEC seems confused as to the limits on its regulatory authority and the degree to which it can burden or even prohibit core political speech.

We respectfully submit that this Court needs to enforce its clear precedents regarding these most fundamental of constitutional rights. It needs to ensure maximum freedom to engage in core political speech, and maximum protection for this right. The constitutionally mandated limits on the FEC's powers need to be reiterated, and regulatory excesses regarding these most basic constitutional rights need to be stopped.

Among the specific substantial legal questions presented by this case that need to be resolved are: Can a feature length movie that is not unambiguously related to the campaign of any candidate, and that does not contain an appeal to vote for or against any candidate, be prohibited from screening or broadcast? Can broadcast ads promoting such a movie be subject to disclosure requirements and other burdensome regulation on speech? Can a feature length, documentary movie that is not unambiguously related to the campaign of any candidate, and that does not contain an appeal to vote for or against any candidate, be subject to regulation under the BCRA intended for broadcast campaign ads? Can the FEC assert its regulatory authority beyond speech about candidate elections to encompass activity that attempts to sway public opinion on issues? Did this Court's decision in *McConnell* addressing facial challenges to the BCRA foreclose all as applied challenges to the BCRA's regulatory burdens on freedom of speech, as the FEC is asserting in the federal courts, including the court below?

Because of the fundamental importance of the freedom of core political speech involved, this case presents the most weighty and substantial of legal questions. We respectfully submit that for these

reasons it is urgent for the Court to accept jurisdiction in this case and resolve these questions.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction, and review the decision of the court below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTIONS COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANT CITIZENS UNITED

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Table of Contents

Table of Authorities ii

Interest of the Amicus Curiae 1

Introduction 2

Statement of the Case 4

Summary of Argument 7

Argument 9

I. **THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT DOES NOT INVOLVE EXPRESS ADVOCACY OR ITS FUNCTIONAL EQUIVALENT** 9

II. **THE BCRA RESTRICTIONS CANNOT APPLYTO THE MOVIE BECAUSE IT IS FINANCED BY INDIVIDUAL CONTRIBUTORS SEEKING TO ADVANCE THEIR VIEWPOINT RATHER THAN COMMERCIAL INTERESTS** 12

III. **THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT IS ONLY BROADCAST TO INDIVIDUALS EXERCISING THEIR OWN FIRST AMENDMENT RIGHTS TO CHOOSE TO SEE IT** 14

IV. **THE ONLY RESTRICTION THAT IS SUFFICIENTLY NARROWLY TAILORED TO PROTECT VITAL CORE POLITICAL SPEECH IS DISCLOSURE OF CAMPAIGN DONATIONS AND AMOUNTS** 18

CONCLUSION 20

Table of Authorities

Cases

Arizona Right to Life Political Action Committee v. Bayless, 320 F.3d 1002 (9th Cir. 2003).....19

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).....13,19

Banks v. Wolfe County Bd. of Educ. 330 F.3d 888 (6th Cir. 2003).....16

Boos v. Barry, 485 U.S. 312 (1988).....10

Buckley v. Valeo, 424 U.S. 1 (1976).....10,11,12

Clement v. California Dept. of Corrections, 364 F. 3d 1148 (9th Cir. 2004).....16

Coral Springs Street Systems, Inc. v. City of Sunrise, 371 F.3d 1320 (11th Cir. 2004).....10,19

Day v. Holohan, 34 F.3d 1356 (8th Cir. 1994).....18

de la O v. Housing Authority of City of El Paso, 417 F.3d 495 (5th Cir.).....16

FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986).....10,11,13

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985).....12

FEC v. Wisconsin Right to Life, 127 S.Ct. 2652 (2007).....10,11,12

Iowa Right to Life Committee, Inc. v. Williams,

187 F.3d 963 (8th Cir. 1999).....10,18

Johnson v. County of Los Angeles Fire Dept.,
865 F.Supp. 1430 (C.D.Cal. 1994).....16

Kreimer v. Bureau of Police,
958 F.2d 1242 (3rd Cir. 1992).....15

McConnell v. FEC, 540 U.S. 93 (2003).....12

McConnell v. FEC, 251 F. Supp. 2d. 176 (D.D.C. 2003)....15

McIntyre v. Ohio Elections Commission,
514 U.S. 334 (1995).....10,11

Neinast v. Board of Trustees of Columbus Metropolitan Library, 346 F. 3d 585 (6th Cir. 2003).....16

Pacific Gas and Elec. Co. v. Public Utilities Com'n of California, 475 U.S. 1 (1986).....15

Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000).....19

Phelan v. Laramie County Community College Bd. of Trustees, 235 F.3d 1243 (11th Cir.).....19

Republican Party of Minnesota v. White,
536 U.S. 765 (2002).....10,18

Rossignol v. Voorhaar, 316 F.3d 516 (4th Cir. 2003).....15,18

U.S. v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000).....15

U.S. West, Inc. v. F.C.C., 182 F.3d 1224 (10th Cir. 1999)...16

Wiggins v. Lowndes County,

363 F.3d 387 (5th Cir. 2004).....10,19

Willis v. Town of Marshall, 426 F.3d 251 (4th Cir. 2005)....16

Statutes

Bipartisan Campaign Reform Act of 2002 (BCRA).....*passim*

Other Authorities

Kurt Vonnegut, "Harrison Bergeron," *Welcome to the Monkey House* (New York: Dell Publishing, 1950).....19

INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a non-partisan, non-profit legal/educational policy organization dedicated to defending all constitutional rights, not just those which might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; Pepperdine Law School Dean, Kenneth W. Starr; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management, J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that *all* constitutional rights are fully protected, not just those that may advance a particular ideology. Those rights include Freedom of Speech under the First Amendment.

All parties consented to the filing of this brief, and were timely notified.

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This case involves core political speech protected by the First Amendment, long recognized as a fundamental foundation of our democracy. Such core political speech enjoys the maximum possible protection under our Constitution. Yet, a federal agency claims the legal authority to prohibit the broadcast of such core political speech. We submit that this Court should redouble its vigilance in protecting the fundamental freedom in this case so essential to our very democracy and self-governance, and our very nature as a free people.

At issue in this case is the production, advertising, display and broadcast of a feature-length (90 minutes), documentary film about a major political figure running for President over much of the past year – Hillary Clinton. Protection of core political speech regarding this subject consequently could not be more vital during this time.

The movie includes a mix of facts and opinion regarding Mrs. Clinton, both constitutionally protected. In particular, the movie primarily communicates facts regarding the conduct of Mrs. Clinton during past political campaigns, during the tenure of her husband as President, and during her service as a U.S. Senator from New York. The truthfulness of these facts has not been challenged. The communication of such facts is a valuable contribution to the political process and the democratic selection of the leader of our nation, regardless of one's opinion about the meaning and significance of such facts.

The movie is the cinematic equivalent of a book presenting a biography of a leading political figure, with both factual analysis and opinion. The author may openly express a political ideology or viewpoint, but that does not reduce constitutional protection for the book.

The movie and the expenditures behind it are not part of any political campaign, or coordinated in any way with any political campaign. The movie does not urge viewers to vote for or against Ms. Clinton. The movie was financed entirely by a non-profit, non-partisan, ideological corporation, with funds raised overwhelmingly from individuals across the country who share the organization's ideological perspective. The history of the corporation and its financing reflects citizens coming together to communicate their views to the general public, not commercial, special interests seeking to advance narrow financial goals.

We respectfully submit that this Court cannot allow the government to prohibit the broadcast of such core political speech during any election period, or at any other time, nor excessively burden its promotion by regulatory requirements. In seeking to prohibit broadcast of the movie and burden its promotion, the Federal Elections Commission (FEC) has strayed outside its constitutionally permissible zone of authority, which is to regulate campaign speech. As we will discuss below, the justification for allowing FEC regulation of campaign speech, preventing corruption or the appearance of corruption, does not apply to the core political speech at issue in this case. The FEC then has no constitutional authority to regulate such speech in contravention of the First Amendment.

To maintain the full constitutional protection that such core political speech deserves, this Court should reverse the court below and establish clear bright line standards that would prevent abuse of such political speech in the future.

STATEMENT OF THE CASE

Appellant Citizens United is a non-profit, 501(c)(4) corporation founded in 1988. It was started by citizens who want to communicate and advance their viewpoint to the general public, and they have done so over the years through movies and other communications.

Funding for the corporation is raised predominantly from individuals across the country who share and want to advance the organization's ideological message. J.A. 244A, 251a-252a. A small portion of its funding comes from for-profit corporations. *Id.*

Citizens United has previously produced movies on the War on Terror, illegal immigration, the United Nations, and religion in public life. J.A. 11a-12a. Movie theaters across the country have shown these movies, and national retail chains have sold the DVD versions. J.A. 12a. One of these movies, *Rediscovering God in America,* ranked as the top selling historical documentary on Amazon.com for a period. *Id.*

In 2007, Citizens United produced *Hillary: The Movie* ("Movie"), a feature length (90 minutes) documentary. J.A. 12a-13a. Financing for the production and advertising budgets was devoted from the corporation's general treasury. Individuals and other non-corporate donors contributed over $1 million specifically for the Movie. J.A. 244a, 251a-252a. Just two contributions, totaling $2,000, came from for-profit corporations, less than 0.2% of the total. J.A. 252a.

The Movie focuses primarily on presenting the facts regarding five prominent episodes in Senator Clinton's life:

--Her role in the firing of the staff of the White House Travel Office, apparently to provide contract opportunities to

cronies, with the office director fired after 30 years of service criminally prosecuted by the Clinton Justice Department, but acquitted in full, J.A. 43a-54a;

--Her role in official retaliation against a woman who accused President Clinton of sexual harassmen, J.A. 57a;

-- Her role in violations of federal campaign finance laws during her Senate campaign and her husband's Presidential campaigns, J.A. 65a-87a;

--Her sometimes inconsistent record and views on the issues of health care, job creation, and national security, showing in regard to the latter her shift from voting to authorize the Iraq war to opposing the war once the Democrat Presidential primaries started, J.A. 90a-112a;

--President Clinton's pardon of a Puerto Rican independence activist who murdered four people and wounded 50 others in a 1975 terrorist bombing in New York City, at the same time that Mrs. Clinton was seeking endorsement from Puerto Rican community activists for her 2000 Senate campaign, J.A. 130a-142a.

These are important, substantive matters and communicating the facts regarding them represents a valuable contribution to the public debate.

Citizens United has no connection with any candidate, campaign, campaign committee, political committee or political party. No aspect of the production and promotion of the Movie was coordinated with any such political entity either. Moreover, the Movie does not expressly advocate the election or defeat of Hillary Clinton for any office, or the election or defeat of any other candidate. J.A. 13a. It does not contain an appeal to vote for or against Hillary Clinton. *Id.*

The Movie was planned for release in January, 2008, with full standard modern promotional efforts, including a website, broadcast advertising, a compendium book detailing the Movie, theaters booked for screenings, and DVDs to be sold by prominent retailers. J.A. 13a, 212a-213a. Citizens United also received an offer to make the Movie available to households subscribing to digital cable television through a service called Video on Demand. J.A. 255a. The Movie would have been listed as one of many movie options on the service, under an *Elections '08* heading covering political movies. J.A. 258a. To view the Movie, the cable subscriber would have to specifically order it, and a compressed data electronic signal including the Movie would be sent only to that subscriber's TV for viewing.

But under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Movie would be considered an "electioneering communication" because it mentioned a federal presidential candidate and it would be broadcast during the 30-day periods before the primaries, caucuses and conventions occurring throughout 2008, and during the 60 days before the 2008 general election. The broadcast ads for the Movie would also be electioneering communications for these same reasons.

Consequently, the FEC took the position that broadcast of the Movie was prohibited under the BCRA until the 2008 election was over. Moreover, even ads promoting the Movie would be subject to regulation requiring Citizens United to publicly disclose its donors, which would likely reduce the number of donors and the amounts donated. Citizens United would also be required to report the ads in FEC filings as campaign speech when they are not. Mandatory FEC disclaimers would also have to be included in the ads. J.A. 18a-19a.

Citizens United filed its complaint challenging the constitutionality of the application of these regulatory requirements to the Movie and its promotion on December 13, 2007. The District Court upheld the FEC, finding that the Movie was a prohibited electioneering communication. Citizens United noticed this appeal on July 24, 2008. This Court accepted jurisdiction on

SUMMARY OF ARGUMENT

Appellant Citizens United has produced a movie that communicates facts and opinion regarding a top candidate for President of the United States. As such, it involves core political speech entitled to the highest protection under the First Amendment. Such speech cannot be subject to any restriction unless the restriction is justified by a compelling interest and it is narrowly tailored to the least restrictive means to serve that interest, as required by the standard of strict scrutiny.

The compelling interest that has been recognized as justifying the restrictions of the BCRA has been to prevent corruption or the appearance of corruption. But this Court has also recognized that to protect core political speech, such restrictions must be narrowly applied only to express advocacy or the functional equivalent of express advocacy. The Movie at issue in this case does not involve such advocacy.

The Movie does not not expressly advocate the election or defeat of Hillary Clinton for any office, or urge viewers to vote for or against her. It primarily recounts the factual history of critical episodes in Hillary Clinton's past, providing important information relevant to the public debate in an election season.

Moreover, the Movie does not involve the compelling interest against corruption because it was overwhelmingly financed by individual contributions from donors motivated to advance their ideological views, not commercial interests seeking a *quid pro quo* for their financial benefit. None of Hillary Clinton's Democratic presidential primary rivals would feel obligated to reward the ideologically conservative individual donors to the Movie with any favors because of the Movie and its broadcast.

In addition, the compelling interest in preventing corruption does not apply here because the feature length Movie was distributed and broadcast through DVDs, movie theater screenings, and Video on Demand broadcasts. The viewers consequently must individually each select and pay to see the Movie, and choose to devote the 90 minutes of time to watch it. These viewers each have their own constitutionally protected free speech rights in maintaining the freedom to choose what political communications to see and hear. There is no corruption interest in preventing these viewers from exercising their own free speech rights to make these choices. This is quite different from the broadcast of short political ads that *interrupt* other broadcasts that the viewers have chosen to see, where they are not exercising their own free speech rights in choosing to endure such brief interruptions.

Finally, this Court should revisit its precedents regarding the regulation of core political speech involved in campaign speech, and conclude that the only restriction that is sufficiently narrowly tailored to protect the fundamental interest in the freedom of such speech is to require the disclosure of the identity of each campaign donor and the amounts donated.

ARGUMENT

I. THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT DOES NOT INVOLVE EXPRESS ADVOCACY OR ITS FUNCTIONAL EQUIVALENT.

Appellant Citizens United is a non-profit, 501(c)(4) corporation founded in 1988 by citizens who want to communicate and advance their ideological viewpoints to the general public. In 2007, Citizens United financed from its own corporate treasury the production of the Movie at issue in this case, a feature-length (90 minutes), documentary film about a major political figure running for President over much of the past year – Hillary Clinton.

The Movie includes a mix of facts and opinion regarding Mrs. Clinton. In particular, the movie primarily communicates facts regarding the conduct of Mrs. Clinton during past political campaigns, during the tenure of her husband as President, and during her service as a U.S. Senator from New York. The truthfulness of these facts has not been challenged. The communication of such facts is a valuable contribution to the political process and the democratic selection of the leader of our nation, regardless of one's opinion about the meaning and significance of such facts.

The Movie is the cinematic equivalent of a book presenting a biography of a leading political figure, with both factual analysis and opinion. The author may openly express a political ideology or viewpoint, but that does not reduce constitutional protection for the book.

The Movie was planned for release in January, 2008, with full standard modern promotional efforts, including a

website, broadcast advertising, a compendium book detailing the Movie, theaters booked for screenings, and DVDs to be sold by prominent retailers. Citizens United also received an offer to make the Movie available to households subscribing to digital cable television through a service called Video on Demand.

The Movie is consequently core political speech fully protected under the First Amendment. The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *E.g., Buckley v. Valeo,* 424 U.S. 1 (1976); *FEC v. Mass. Citizens for Life,* 479 U.S. 238 (1986); *FEC v. Wisconsin Right to Life,* 127 S. Ct. 2652 (2007)(*WRTLII)*; *Republican Party of Minnesota v. White,* 536 U.S. 765 (2002)(Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment Freedoms); *McIntyre v. Ohio Elections Commission,* 514 U.S. 334 (1995); *Boos v. Barry,* 485 U.S. 312 (1988); *Iowa Right to Life Committee, Inc. v. Williams,* 187 F.3d 963 (8th Cir. 1999)(Discussion of public candidates and debate on the qualifications of candidates are integral to the Federal Constitution, and the First Amendment affords the broadest protection to such political expression in order to assure the unfettered exchange of ideas); *Coral Springs Street Systems, Inc. v. City of Sunrise,* 371 F.3d 1320 (11th Cir. 2004)(Political speech enjoys the highest level of First Amendment protection); *Wiggins v. Lowndes County,* 363 F.3d 387 (5th Cir. 2004)(Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment).

Any restriction on such speech must satisfy the standard of strict scrutiny, which requires that the restriction must serve a compelling interest and must be narrowly

tailored to achieve that interest. *WRTLII*("the *Government* must prove that [the restriction] furthers a compelling interest and is narrowly tailored to achieve that interest," 127 S. Ct. at 2664)(a court must "ensure that a compelling interest supports *each application* of a statute restricting speech," *Id.* at 2671); *Buckley; Mass. Citizens for Life; McIntyre.*

In order to uphold the protection to core political speech that it deserves, this Court has held that the restrictions of the BCRA could only apply to express advocacy or the functional equivalent of express advocacy. *WRTLII; Buckley.* Chief Justice John Roberts wrote for the Court in *WRTLII,* "[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667.

The Movie at issue in this case does not involve express advocacy or the functional equivalent of express advocacy. Again, the Movie does not not expressly advocate the election or defeat of Hillary Clinton for any office, or urge viewers to vote for or against her. Contrary to the decision of the court below, while viewers may find that the facts presented in the movie about Hillary Clinton's past conduct may influence their vote and political support, that is no basis for imposing restrictions on such valid and vital discussion of Clinton's record. Quite to the contrary, that only shows how important maintaining the protection of such speech is. As this Court explained in *WRTLII,* such speech is protected "advocacy [that] conveys information and educates." 127 S. Ct. at 2667. If after "voters hear the information" they "choose—uninvited by the [Movie]—to factor it into their voting decisions," that does not transform it into express advocacy that may be regulated or prohibited. *Id.*

Moreover, the Movie and the expenditures behind it are not part of any political campaign, or coordinated in any way with any political campaign. Citizens United has no connection with any candidate, campaign, campaign committee, political committee or political party. No aspect of the production and promotion of the Movie was coordinated with any such political entity either.

Consequently, the FEC cannot prohibit broadcast of the Movie at any time. Moreover, since the FEC has already held that the broadcast advertising developed by Citizens United does not involve express advocacy or its equivalent, the FEC cannot impose the BCRA's burdens on that advertising either.

II. THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT IS FINANCED BY INDIVIDUAL CONTRIBUTORS SEEKING TO ADVANCE THEIR VIEWPOINT RATHER THAN COMMERCIAL INTERESTS.

This Court has found preventing corruption or the appearance of corruption as a compelling government interest justifying some restrictions on core political speech. *WRTLII; Buckley; McConnell v. FEC*, 540 U.S. 93 (2003). As the Court said in *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985),

> "The only legitimate and compelling government interests thus far identified for restricting campaign finances" [are] "preventing corruption or the appearance of corruption. [The] hallmark [of such corruption] is the financial *quid pro quo*: dollars for political favors."

470 U.S. at 496-497.

Citizens United, which financed the production, promotion and potential broadcast of the Movie at issue in this case, is a non-profit, non-partisan, ideological corporation, with funds raised overwhelmingly from individuals across the country who share and want to advance the organization's ideological perspective and message. J.A. 244A, 251a-252a. Only a small portion of its funding comes from for-profit corporations. *Id.* The history of the corporation and its financing reflects citizens coming together to communicate their views to the general public, not commercial, special interests seeking to advance narrow, self-interested, financial goals.

Individuals and other non-corporate donors contributed over $1 million to Citizens United specifically for the Movie. J.A. 244a, 251a-252a. Just two contributions, totaling $2,000, came from for-profit corporations, less than 0.2% of the total. J.A. 252a.

The compelling interest against corruption or the appearance of corruption does not apply here because the individual donors overwhelmingly financing the Movie transparently are not looking for political favors in return. Rather, they are looking to advance their conservative viewpoint and message. *Mass. Citizens for Life.* Moreover, Hillary Clinton's Democratic primary Presidential rivals would not feel obligated in any way to serve the interests of such conservative individual donors.

These facts are quite the opposite of the facts in *Austin v. Mich. State Chamber of Commerce,* 494 U.S. 652 (1990), where the organization was the Michigan Chamber of Commerce, composed of and financed entirely of for profit corporations, and precisely looking for political favors, or at least favorable policies, that would exactly advance their commercial financial interests.

Consequently, there is no compelling interest in this case that would justify the FEC in prohibiting broadcast of the Movie at any time, or burdening the speech in the Movie's broadcast advertising with BCRA regulation.

III. THE BCRA RESTRICTIONS CANNOT APPLY TO THE MOVIE BECAUSE IT IS ONLY BROADCAST TO INDIVIDUALS EXERCISING THEIR OWN FIRST AMENDMENT RIGHTS TO CHOOSE TO SEE IT.

To see the Movie, individual viewers would have to seek it out, separately pay for it, and choose to devote the 90 minutes of time necessary to watch it.

If they were going to watch it in a movie theater, they would have to research what theaters were showing it and when, go to the theater, pay to get in, and choose to sit through it for 90 minutes to get its message.

If they were going to watch it on DVD, they would have to research where they could buy it, go there, whether online or in a store, pay for it, and again choose to sit through it for 90 minutes to get its message.

If they were going to watch it through Video on Demand on their cable TV service, they would have to search through the Video on Demand lists of available movies, select the Movie, pay any additional fee for it in addition to the fee they are paying for the cable TV service, and again choose to sit through it for 90 minutes to get its message. The Movie is only broadcast to an individual viewer's TV by electronic signal when the viewer specifically requests the signal bearing the Movie. This is functionally indistinguishable from choosing to watch the Movie on

DVD. Indeed, this is functionally indistinguishable from downloading video content from the Internet to watch, which the District Court in *McConnell* found to be a "form[] of media...completely different [from] television and radio advertising." *McConnell v. FEC*, 251 F. Supp. 2d. 176, 571 (D.D.C. 2003).

These are the only means for any viewer to watch the Movie, for the Movie was only distributed through these three alternatives -- theater screenings, DVD, and Video on Demand cable broadcasts. This is quite different from the viewers of 30 and 60 second political ads on free broadcast TV or even on standard cable TV. Viewers of those ads do not choose them for viewing. Rather, the ads *interrupt* other broadcasts that the viewers have chosen to watch, and the viewers generally sit through the ads because they are short interruptions of the chosen broadcasts. The viewers also devote no significant time commitment to watch these short political ads.

Viewers of the Movie through the means described above hold their own constitutionally protected, freedom of speech rights to watch and to listen to the Movie and its speech. *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000)(Under First Amendment's free speech clause, the citizen is entitled to seek out or reject certain ideas or influences without government interference or control); *Pacific Gas and Elec. Co. v. Public Utilities Com'n of California*, 475 U.S. 1 (1986)(Constitutional guarantee of free speech serves significant societal interests wholly apart from speaker's interest in self-expression; First Amendment also protects the public's interest in receiving information); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3rd Cir. 1992)(Speech component of First Amendment includes freedom to receive speech); *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir.), *cert. denied* 540 U.S. 822 (2003)(First Amendment protects both a speaker's right to communicate

information and ideas to a broad audience and the intended recipients' right to receive that information and those ideas); *Willis v. Town of Marshall,* 426 F.3d 251 (4th Cir. 2005) (First Amendment protects right to receive speech of others); *de la O v. Housing Authority of City of El Paso,* 417 F.3d 495 (5th Cir.) *cert. denied* 126 S. Ct. 808 (2005)(Right to receive information is as equally protected under the First Amendment as is right to convey it); *Banks v. Wolfe County Bd. of Educ.* 330 F.3d 888 (6th Cir. 2003)(The First Amendment is concerned not only with a speaker's interest in speaking, but also with the public's interest in receiving information); *Neinast v. Board of Trustees of Columbus Metropolitan Library,* 346 F. 3d 585 (6th Cir.) *cert. denied* 541 U.S. 990 (2003)(First Amendment protects the right to receive information); *Clement v. California Dept. of Corrections,* 364 F. 3d 1148 (9th Cir. 2004)(First Amendment embraces the right to distribute literature, and necessarily protects the right to receive it; First Amendment right to receive publication is a fundamental right); *U.S. West, Inc. v. F.C.C.,* 182 F.3d 1224 (10th Cir.) *cert. denied* 530 U.S. 1213 (1999)(The two components of effective speech are a speaker and an audience, and a restriction on either of these components is a restriction on speech); *Johnson v. County of Los Angeles Fire Dept.,* 865 F.Supp. 1430 (C.D.Cal. 1994) (Freedom of expression includes right to receive as well as right to communicate ideas).

There is no compelling interest in restricting the freedom of speech rights of viewers to watch and to listen to the Movie and its speech, whether preventing corruption or the appearance of corruption or anything else. There is no potential for corruption when individuals seek out, select, pay for, and commit themselves to watch the Movie, thereby receiving the information and facts conveyed in the Movie. These viewers are not buying influence with the Democratic Presidential primary rivals of Hillary Clinton. They are merely seeking out and obtaining information they think is

relevant to the political process and debate, which is constitutionally protected conduct.

When the broadcast or distribution of the Movie is limited to these viewers, as through the above means, prohibiting such broadcast or distribution would violate the free speech rights of these viewers to watch and to listen, without justification. Moreover, when the Movie broadcast is limited to those who are seeking out the message and information presented by the Movie, the potential for corruption by the producer of the Movie is sharply constrained. The producer is then only communicating to those who are already seeking out the message and information, rather than the general public, which is not nearly as likely to win influence or political favors in return. When the free speech rights of the viewers are weighed in with the free speech rights of the producers in this situation, along with the more limited opportunity for corruption, the balance overwhelmingly favors freedom of speech, rather than a speculative interest in preventing corruption. The FEC would then not have the constitutional authority to prohibit broadcast of the Movie through Video on Demand, or screening of the Movie in theaters, or distribution for viewing through DVDs.

But even broadcast on general cable TV or even free TV of a feature length documentary film still retains quite similar self-selection and choice aspects for the viewers as for the broadcast and distribution of the Movie through the above means. The viewers still must seek out when the Movie is going to be broadcast, and choose to devote themselves to sitting through it for 90 minutes to obtain the information and hear the message the Movie provides. They only do not have to pay separately for it. This is still quite different from short political ads that *interrupt* broadcasts that the viewers have chosen to see, which does not involve a

real choice by the viewer to watch the ad, but just a toleration of the interruption.

This is why the BCRA should not be allowed to apply constitutionally to feature length films, which are the cinematic equivalent of books, rather than short political ads, which were the actual focus of the legislation in the first place.

IV. THE ONLY RESTRICTION THAT IS SUFFICIENTLY NARROWLY TAILORED TO PROTECT VITAL CORE POLITICAL SPEECH IS DISCLOSURE OF CAMPAIGN DONATIONS AND AMOUNTS.

The core political speech protected by the First Amendment has long been recognized as a fundamental foundation of our democracy. This freedom is essential to our very democracy and self-governance, and self-defining to our very nature as a free people. That is why such core political speech is meant to enjoy the maximum possible protection under our Constitution. *Republican Party of Minnesota, supra* (Debate on the qualifications of candidates is at the core of the electoral process and of the First Amendment freedoms); *Rossignal, supra* (4th Cir.)(First Amendment affords the broadest free speech protection to political expression in order to assure the unfettered exchange of ideas, since in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential); *Day v. Holohan,* 34 F.3d 1356 (8th Cir.), *cert. denied* 513 U.S. 1127 (1994)(Discussion of public issues and debate on the qualifications of political candidates is integral to the operation of our democratic system of government; the First Amendment affords the broadest protection to such political expression); *Iowa Right to Life Committee, Inc., supra* (Discussion of public issues and debate on the qualifications

of candidates are integral to the Federal Constitution, and the First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas); *Arizona Right to Life Political Action Committee v. Bayless,* 320 F.3d 1002 (9th Cir. 2003)(The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open); *Perry v. Bartlett,* 231 F.3d 155 (4th Cir.) *cert. denied* 532 U.S. 905 (2000)(First Amendment affords the broadest protection to political expression to assure unfettered interchange of ideas to bring about political and social changes desired by he people); *Wiggins, supra* (5th Cir.)(Political speech regarding a public election lies at the core of matters of public concern protected by the First Amendment); *Coral Springs Street Systems, supra* (11th Cir.)(Political speech enjoys the highest level of First Amendment protection); *Phelan v. Laramie County Community College Bd. of Trustees,* 235 F.3d 1243 (11th Cir.) *cert. denied* 532 U.S. 1020 (2000)(Under First Amendment, political speech is entitled to the broadest protection).

But are these grand statements of principle still even valid law? In *Austin, supra,* this Court approved restrictions on freedom of political speech to promote the chimera of equality of speech rather than freedom of speech. Promoting equality as a compelling interest over freedom will result in more and more severe restrictions on freedom in chasing the rainbow of equality. Kurt Vonnegut, "Harrison Bergeron," *Welcome to the Monkey House* (New York: Dell Publishing, 1950). That is not what our founders intended in the First Amendment.

Moreover, the concept of the "functional equivalent" of express advocacy is also rather slippery, and not a firm foundation on which to place such a fundamental right as freedom of speech. Allowing freedom of political speech to

be restricted based on such a malleable concept does not seem to live up to the grandness of the principles stated in the cases cited above.

We respectfully submit that implementing those grand statements of principle requires a renewed focus on freedom with a standard holding that the only restriction on core political speech that is sufficiently narrowly tailored to maintain the central role that such speech is supposed to hold in our jurisprudence would be a simple requirement that all political campaign donations be rapidly disclosed as to the identity of the donor and amount of the contribution. This requirement would apply to all contributions to political campaigns, parties, and independent expenditures coordinated with campaigns or involving express advocacy. Voters can then decide for themselves what involves corruption or the appearance of corruption, and vote accordingly. The BCRA itself would no longer be necessary or constitutional under this standard. The same would be true for any contribution limits, which are simply limits on freedom of speech.

CONCLUSION

For all of the foregoing reasons, *amicus curaie* American Civil Rights Union respectfully submits that this Court should reverse the decision of the court below, and grant the preliminary injunction requested by Citizens United.

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AMICUS CURIAE BRIEF

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CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF AMICUS CURIAE THE CATO INSTITUTE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. The First Amendment Protects Contributors' Freedom of Anonymous Expressive Association 3

A. The First Amendment right of association secures contributors' enumerated freedoms of speech, assembly, and petition. 3

B. Freedom of association includes the right to control an association's character and message. 6

C. The First Amendment protects the right of anonymous association. 10

II. BCRA Section 201's Compelled Disclosure Requirements Infringe Contributors' Freedom of Anonymous Expressive Association, Warranting Strict Scrutiny 16

A. Disclosure provisions that burden associational rights are subject to strict scrutiny 17

B. BCRA's compelled disclosure provisions are subject to strict scrutiny here because, by burdening expressive association, they also burden political speech—the "core" of First Amendment protection..... 20

C. Lower courts need unambiguous direction that disclosure provisions infringing freedom of expressive association must survive strict scrutiny... 25

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page(s)

Cases:

ACLU v. Heller,
378 F.3d 979 (9th Cir. 2004) 15-16

AFL-CIO v. FEC,
333 F.3d 168 (D.C. Cir. 2003) 20

Austin v. Mich. Chamber of Commerce,
494 U.S. 652 (1990) 24

Bates v. City of Little Rock,
361 U.S. 516 (1960) 17, 19

Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,
481 U.S. 537 (1987) 24

Boy Scouts of Am. v. Dale,
530 U.S. 640 (2000) 8-9, 10, 19

Brown v. Socialist Workers '74 Campaign Comm.,
459 U.S. 89 (1982) 13

Buckley v. Am. Constitutional Law Found.,
525 U.S. 182 (1999) 13

Buckley v. Valeo,
424 U.S. 1 (1976) (per curiam) ..... passim

Cal. Bankers Ass'n v. Shultz,
416 U.S. 21 (1974) 18

Cal. Democratic Party v. Jones,
530 U.S. 567 (2000) 6-7, 8

Citizens Against Rent Control/Fair Hous. Coal. v. City of Berkeley,
454 U.S. 290 (1981) 3, 4

Citizens for Responsible Gov't State PAC v. Davidson,
236 F.3d 1174 (10th Cir. 2000) 25-26

Davis v. FEC,
128 S. Ct. 2759 (2008) 17

Democratic Party v. Wisconsin ex rel. La Follette,
450 U.S. 107 (1981) 5, 8

FEC v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986) 18, 24

FEC v. Wisc. Right to Life, Inc.,
127 S. Ct. 2652 (2007) 24-25

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 20

Gibson v. Fla. Legislative Investigation Comm.,
372 U.S. 539 (1963) 6, 10-11, 17

Healy v. James,
408 U.S. 169 (1972) 3, 4, 6

Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.,
515 U.S. 557 (1995) 9

McConnell v. FEC,
540 U.S. 93 (2003) 12, 14, 26

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) ..... passim

Minn. State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984) 11

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958) ..... passim

Nat'l Ass'n of Mfrs. v. Taylor,
549 F. Supp. 2d 33 (D.D.C. 2008) 26

N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake,
524 F.3d 427 (4th Cir. 2008) 25

Peterson v. Nat'l Telecomms. & Info. Admin.,
478 F.3d 626 (4th Cir. 2007) 15

Ray v. Blair,
343 U.S. 214 (1952) 8

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 9, 19

Shelton v. Tucker,
364 U.S. 479 (1960) 4-5, 6

Talley v. California,
362 U.S. 60 (1960) 12

Tashjian v. Republican Party,
479 U.S. 208 (1986) 7

United States v. Rumely,
345 U.S. 41 (1953) 20-21

Wash. State Grange v. Wash. State Republican Party,
128 S. Ct. 1184 (2008) 7

Regulations:

11 C.F.R. § 104.20(b)-(c) 23-24

Other Authorities:

Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821 (2002) 3-4

Fed. Election Comm'n Ad. Op. 1990-13 13

Dick M. Carpenter II, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM (Institute for Justice, Mar. 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf (last visited Jan. 13, 2009) 21-23

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Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002) 4, 5

William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1 (2003) 21

Steve Simpson, *If You Wanna Speak, You Better Have a Lawyer*, NAT'L REVIEW ONLINE (Mar. 27, 2007) 23

Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW (1978) 8

Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988) 4

INTEREST OF THE AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for political speech and activity, which lies at the very heart of the First Amendment.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Freedom of association is an important independent right under the First Amendment—securing and enabling the Amendment's enumerated rights—and it includes the right to associate anonymously and to control a group's character and message free from government intervention. As applied to groups engaging in political speech, compelled disclosure of contributors' identities infringes their freedom of expressive association, a burden often no less severe than direct restraint on the group's speech. Government curtailment of private expressive association is thus subject to strict constitutional scrutiny. Where that curtailment also inherently burdens the group's political speech, it must survive strict scrutiny or else be held unconstitutional. The district court failed to afford sufficient value to the associational rights of Citizens United contributors and, accordingly, failed to scrutinize appropriately BCRA section 201's unjustified infringement on those rights. The district court's judgment should be reversed.

ARGUMENT

I. The First Amendment Protects Contributors' Freedom of Anonymous Expressive Association.

A. The First Amendment right of association secures contributors' enumerated freedoms of speech, assembly, and petition.

Freedom of association is an important First Amendment right, securing and rendering meaningful the enumerated freedoms of speech, assembly, and petition. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981). And while the concept of freedom of association "is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972). Such primary rights are therefore crucial to the rights of individuals to associate freely with one another, and it is no surprise that the first cases to recognize associational rights "reflected ancillary associational concerns—for example, defending the right of the NAACP to hire a lawyer, and to 'do business' in the Southern States without having to disclose its membership lists." Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of*

Association, 35 U.C. DAVIS L. REV. 821, 837 (2002).[2] Another scholar explains, "Freedom of association at its core is a political right, a right of self-governance. Associations empower citizens to exert political influence and to keep government in check." Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 647 (2002).

In *NAACP v. Alabama ex rel. Patterson*, this Court recognized, "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . [and there is a] close nexus between the freedoms of speech and assembly." 357 U.S. 449, 460 (1958). Immunity from state scrutiny of the NAACP's membership lists was "so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection of the Fourteenth Amendment." *Id.* at 466.

The Court echoed these concerns in *Citizens Against Rent Control*, noting that through "collective effort individuals can make their views known, when individually, their voices would be faint or lost." 454 U.S. at 294. In *Healy*, a Connecticut college could not prohibit the use of campus facilities to Students for a Democratic Society without infringing the members' associational rights. 408 U.S. at 194. And in *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court invalidated a

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[2] *See also* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1010 (2d ed. 1988) (This Court "has repeatedly described" freedom of association "as among the preferred rights derived by implication from the first amendment's guarantees of speech, press, petition, and assembly.").

state statute requiring teachers to file an annual affidavit listing every organization to which the teacher belonged or contributed during the preceding five years. Finally, associational rights are important to political parties because they permit like-minded individuals to band together to address concerns with the government. *See, e.g.*, *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). Collectively, these cases stand for the principle that "freedom of association is a necessary precondition to free speech. It is therefore protected in order to safeguard First Amendment speech interests." Mazzone, 77 WASH. L. REV. at 650.

Despite the strong ties to freedom of speech in particular, it is easy to see how freedom of association is joined to rights other than free speech: citizens cannot freely practice their religion, petition the government, operate a free press, or assemble without a robust right to associate with other citizens. Indeed, "in the early Republic it was against the right of assembly and petition that associations were understood. On that score, consistent with the assembly and petition clause, freedom of association is protected under the First Amendment because associations represent instances of popular sovereignty." *Id.* at 647.

No matter the primary First Amendment principle at stake, what becomes clear from the Court's jurisprudence on associational rights is that governmental forces often attempt to infringe other First Amendment freedoms by using the back-door channel of regulating association. This can be accomplished by prohibitively raising the entry bar for

burgeoning groups by saddling them with cumbersome regulatory requirements, or by deterring members from associating in the first place by denying their right to associate privately. *Healy* is in the first category, while *NAACP* and *Shelton* are in the second. BCRA Section 201 implicates both categories.

All such attempts to abridge rights should be rejected. For purposes of this case, "associational rights" in the absence of robust rights to engage in political speech, *anonymous* political speech, and *anonymous* association are "rights" in name only, and vice versa. And lest the breadth of the rule be overlooked, "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP*, 357 U.S. at 460-61. In short, freedom of association is "highly prized, and need[s] breathing space to survive." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963).

B. Freedom of association includes the right to control an association's character and message.

The Court recently has reiterated the foundational principles of its associational rights jurisprudence. One particularly robust forum for the application of these principles has been a series of cases addressing the associational rights of political parties in the context of state primary election laws. In *California Democratic Party v. Jones*, 530 U.S. 567 (2000), for instance, this Court held that California could not,

consistent with the First Amendment, use a "blanket"[3] primary to determine a political party's nominee for the general election. Examining the associational rights and state interests involved, the Court found a "severe and unnecessary" burden on the rights of political association. *Id.* at 586.

It is axiomatic that "[t]he freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986). This Court has gone farther and deeper, however, in tying the associational right to something fundamental not only in our Constitution, but also in our Republic:

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. . . . Consistent with this tradition, the Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs . . . .'"

Cal. Democratic Party, 530 U.S. at 574 (quoting *Tashjian*, 479 U.S. at 214-15).

These cases thus capture the instrumental role of associational rights in undergirding other Constitutional rights and democratic processes. They

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[3] In a blanket primary election, any voter may vote for any candidate, regardless of the voters' political affiliation. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1187 n.1 (2008).

are, however, equally important in establishing the prerequisites for the effective and meaningful exercise of associational rights in the first instance. In *Wisconsin ex rel. La Follette*, this Court held, "The freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." 450 U.S. at 122 (internal quotation marks omitted). This is so because "'[f]reedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Id.* at 122 n.22 (quoting Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 791 (1978)). Simply put, "a corollary of the right to associate is the right not to associate." *Cal. Democratic Party*, 530 U.S. at 574.

In addition to affirming the foundational principles of the Court's associational rights jurisprudence, these cases further articulate a right, not only affirmatively to associate, but also defensively to define, confine, and control the association as necessary to preserve its character, purpose, and effectiveness. *See, e.g., Ray v. Blair*, 343 U.S. 214, 221-22 (1952) (political parties may protect themselves from "intrusion by those with adverse political principles"). In so doing, these cases dovetail with key pronouncements in the Court's expressive association jurisprudence.

In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court held that applying New Jersey's public accommodations law to require the Boy Scouts to admit Dale, an adult whose position as assistant

scoutmaster of a New Jersey troop was revoked when the Boy Scouts learned that he is an avowed homosexual and gay rights activist, violated the Boy Scouts' First Amendment right of expressive association. The Court noted that a group's First Amendment right of expressive association could be unconstitutionally burdened in many ways, including unwanted "intrusion into the internal structure or affairs of an association" such as a "regulation that forces the group to accept members it does not desire." *Id.* at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). The Court concluded that Dale's presence as an assistant scoutmaster interfered with the Scout's "choice not to propound a view contrary to its beliefs," thereby "affect[ing] in a significant way the group's ability to advocate public or private viewpoints." *Id.* at 648, 653.[4] Under *Dale*, there are no requirements that the group associate for the purpose of disseminating a certain message in order to be protected, nor for every member of the group to agree on every view for the group's policy to be "expressive association." *Id.* at 655.

The Court's jurisprudence traces a vivid evolution from establishing the foundations for an associational right, to articulating a formidable associational interest in controlling its membership and message as

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[4] The Court relied in part on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 574-75 (1995) (holding a parade's exclusion of a homosexual group from marching behind their banner constitutionally protected because the decision to exclude "boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control").

against competing state interests. Where a group of people have associated to express or amplify political speech, as Citizens United has, this interest in controlling their group and its message is a significant foundation for their right to express that message anonymously. Furthermore, this Court has stated, "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression." *Dale*, 530 U.S. at 653.

C. The First Amendment protects the right of anonymous association.

The freedom to associate is meaningless without a corresponding right to associate anonymously, whether as members of a group, participants in a joint venture, or contributors to a documentary film project. This Court repeatedly has recognized the undeniable "deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *NAACP*, 357 U.S. at 466. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . a restraint on freedom of association . . . [and] [t]his Court has recognized the vital relationship between freedom to associate and privacy in one's associations." *Id.* at 462.

Moreover, a general right to anonymous association is inextricably intertwined with the specific right to *speak* anonymously, especially within groups. "A coming together is often necessary for communication—for those who listen as well as for those who speak." *Gibson*, 372 U.S. at 564 (Douglas,

J., concurring). And "[j]oining a group is often as vital to freedom of expression as utterance itself." *Id.* at 565; *see also Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 309 (1984) ("[T]his Court has recognized that the right to forward views might become a practical nullity if Government prohibited persons from banding together to make their voices heard. Thus, the First Amendment protects freedom of association because it makes the right to express one's views meaningful."). Expressive association in groups, like Citizens United, discussing political issues and qualifications of public officials, thus directly serves and enables political speech that "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *see also Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) ("First Amendment affords the broadest protection to such political expression").

Given these cherished principles, it is unsurprising that anonymous speech—whether by individuals or groups—is so highly valued in America's marketplace of ideas. The "historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). Furthermore, "the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry," and thus a speaker's "decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First

Amendment." *Id.* at 342; *see also McConnell v. FEC*, 540 U.S. 93, 275-76 (2003) (Thomas, J., concurring) (same); *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.").

As the Court explained in *McIntyre*, great works of literature frequently have been produced by authors writing under assumed names, and "[d]espite readers' curiosity and the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity." 514 U.S at 341. Indeed, "even the arguments favoring the ratification of the Constitution advanced in the Federalist Papers were published under fictitious names." *Id.* at 342.

The freedom to publish anonymously clearly extends beyond works of a strictly literary nature. In *Talley*, for instance, this Court held that the First Amendment protects the distribution of unsigned handbills urging readers to boycott merchants who were engaging in discriminatory employment practices. *See Talley*, 362 U.S. at 65. In *Buckley v. Valeo*, it further recognized that, under certain circumstances, the disclosure requirements of the Federal Election Campaign Act of 1971 could not be applied to minor political parties, because the threat to First Amendment rights would outweigh the insubstantial interest in disclosure by that entity. 424

U.S. at 71. Asserting that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim," the Court concluded that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. The Court affirmed this standard in *Brown v. Socialist Workers '74 Campaign Committee*, exempting the Socialist Workers Party from California state campaign disclosure requirements, and clarifying that the exemption included the disclosure of the names of recipients of disbursements as well as the names of the party's contributors. 459 U.S. 89, 95 (1982). *See also* Fed. Election Comm'n Ad. Op. 1990-13 (renewing Socialist Workers Party's eligibility for reporting exemptions and recounting history of such grants). *Cf. Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 198-200 (1999) (holding that a state badge requirement for petition circulators chilled speech because it exposed circulators to "the recrimination and retaliation that bearers of petitions on 'volatile' issues sometimes encounter").

Although much of the well-known precedent on this topic focuses on groups that apparently fear violence or reprisal, there are multiple valid reasons why speakers or writers may decline to disclose their identities; protected anonymity ought not depend on fear of reprisal.[5] Indeed, "[t]he decision in favor of

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[5] The Court previously suggested that "threats, harassment, or reprisals" could be sufficient to outweigh the asserted

anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, *or merely by a desire to preserve as much of one's privacy as possible.*" *McIntyre*, 514 U.S. at 341-42 (emphasis added). As this Court has explained:

> On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where the identity of the speaker is an important component of many attempts to persuade, the most effective advocates have sometimes opted for anonymity.

Id. at 342-43.

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governmental interests supporting BCRA Section 201 when subjected to as-applied constitutional scrutiny. *McConnell*, 540 U.S. at 198. It has not, however, held that violence or reprisal is *required* to demonstrate the initial burden on freedom of association that triggers constitutional scrutiny in the first instance. Whether that burden is unconstitutional depends on the governmental interest against which it is weighed, and while probable reprisal may be required to overcome certain government interests it might be far more than is required to overcome others. Because the FEC can demonstrate no government interest served by disclosing contributors to Citizens United—a group neither engaged in express advocacy nor its functional equivalent—a burden far less draconian than violence or reprisal is sufficient to render BCRA Section 201 unconstitutional as applied here.

There are few arenas in which this maxim holds truer than politics and governmental affairs. Citizens are inclined to adopt or reject opinions due in large part to the speaker delivering the message: Keith Olbermann's opinions are unlikely to sway conservatives, as Rush Limbaugh's are unlikely to sway liberals. Likewise, it is entirely foreseeable that a well-known but highly controversial individual may have something valuable to say—but is unable to communicate effectively, other than anonymously, because of his reputation.

Citizens United contributors may well believe that their message is best delivered by the group, without identifying individuals who contributed. They may fear reprisal. They may simply prefer to maintain privacy for themselves and their families, or believe their message will be more readily consumed without disclosure. All of these rationales are protected by the Constitution. In parsing these questions, the Fourth Circuit suggests the best method of determining whether a speaker is entitled to anonymity is to ask whether anonymity served as a "catalyst" for the speech in question. *See Peterson v. Nat'l Telecomms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007). That Citizens United sought a preliminary injunction to maintain its contributors' anonymity answers that question in the affirmative, and the anonymity of their political speech should be protected vigorously.

This Court and several lower courts have implied that the basis for protecting anonymous speech does not apply as clearly to groups as it does to individuals, because a group as a whole somehow lacks the same "'personal' interest in its 'thoughts.'" *ACLU v. Heller*,

378 F.3d 979, 990 (9th Cir. 2004) (quoting *McIntyre*, 514 U.S. at 355). Nonetheless, the fact that *individuals* in a group, or an individual cooperating with a group, "have shared their political thoughts with the members of the group does not mean that they have *no* privacy interest in concealing from the general public their endorsement of those beliefs." *Id.* This observation has particular force when the group is "small enough that [recipients of its message] will associate individual members with the thoughts conveyed. Exposing the identity of the group publishing its views, or of an individual publishing the views of a group, thus infringes to some degree on the privacy interests of the individuals affiliated with the group." *Id.* Here, BCRA specifically compels disclosure of the identities of individual contributors, directly threatening their individual rights to free expressive association.

In sum, Citizens United's contributors have a constitutionally-protected right to expressive association. They also have the right to associate and to speak anonymously. Their reasons for desiring to do so need not be based in fear of reprisal; contributors may simply wish to maintain their privacy. The particular reasoning behind their decision should not determine the bounds of their constitutional freedom.

II. BCRA Section 201's Compelled Disclosure Requirements Infringe Contributors' Freedom of Anonymous Expressive Association, Warranting Strict Scrutiny.

Infringement on freedom of association deserves no less rigorous scrutiny than violations of the

enumerated rights that freedom secures. Accordingly, government action that curtails expressive association—thereby restricting the speech of those seeking to associate—should be subject to the same strict scrutiny as direct burdens on speech.

A. Disclosure provisions that burden associational rights are subject to strict scrutiny.

Because compelled disclosure of contributors' identities "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court in *Buckley* subjected the challenged FECA disclosure provisions to "exacting scrutiny." 424 U.S. at 64 (citing *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) and *Gibson*, 372 U.S. at 546). The Court held that where First Amendment freedoms are at issue, "the subordinating interests of the State must survive exacting scrutiny." *Id.*; *see also Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008) ("[W]e have closely scrutinized disclosure requirements . . . the governmental interest must survive exacting scrutiny.") (quotation omitted). Though using different terminology, exacting scrutiny ultimately equates to the "strictest standard of review." *McIntyre*, 514 U.S. at 348.

In *Buckley*, the Court reiterated, "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny . . . [and] insisted that there be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." 424 U.S. at 64 (footnotes and quotation marks

omitted). This "exacting scrutiny" is "necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Id.* at 65.

Exacting scrutiny both protects and promotes effective advocacy by citizen groups and their members. *See Buckley*, 424 U.S. at 66 ("[G]roup association is protected because it enhances '[e]ffective advocacy.'") (quoting *NAACP*, 357 U.S. at 460). Contributors to such groups have a protected right to associational privacy; a freedom the Court has recognized "may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Id.* (quoting *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring)); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986) (association's contributors are motivated "in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction").

Though using an "exacting scrutiny" label, the Court in *Buckley* adhered to *NAACP*'s "strict test," noting that it "is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." 424 U.S. at 66. The Court's associational rights precedents, both before and after *Buckley*, employ the

traditional strict scrutiny lexicon, establishing that "exacting" scrutiny, in this context, is equivalent to strict scrutiny. *See, e.g.*, *NAACP*, 357 U.S. at 460-61 (government action curtailing freedom of association "is subject to the closest scrutiny"); *Bates*, 361 U.S. at 524 (when compelled disclosure abridges associational freedom "the State may prevail only upon showing a subordinating interest which is compelling"); *Roberts*, 468 U.S. at 623 (infringement on the right of expressive association must "be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"); *Dale*, 530 U.S. at 657-58 (freedom of expressive association must be weighed against "a compelling state interest").

In *Dale*, the Court specifically rejected the appellee's contention that "intermediate" scrutiny was the appropriate standard of review, ultimately finding even the compelling government interest in eliminating discrimination insufficient to justify the law's intrusion on freedom of expressive association. *Id.* Similarly, in *Buckley*, the Court discussed the "least restrictive means" test, yet another indication that exacting scrutiny is tantamount to strict scrutiny. 424 U.S. at 68; *see also id.* at 64 ("significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest"). Finally, in *McIntyre*, the Court directly equated the two standards, clarifying that in applying "'exacting scrutiny,' . . . we uphold the restriction only if it is narrowly tailored to serve an overriding state

interest." 514 U.S. at 347 (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978)). Whether denominated "exacting" or "strict" scrutiny, these precedents establish that BCRA Section 201 is unconstitutional, as applied to Citizens United, unless the FEC can demonstrate that it is narrowly tailored to serve a compelling government interest.[6]

B. BCRA's compelled disclosure provisions are subject to strict scrutiny here because, by burdening expressive association, they also burden political speech—the "core" of First Amendment protection.

The FEC discounts the burdens of disclosure. *See* FEC Mot. Dismiss Affirm at 14-17 (U.S., filed Oct. 17, 2008) ("FEC J.S. Br."); FEC Mem. Supp. Mot. Summ. J. at 25-30 (D.D.C., filed June 6, 2008). But this Court and numerous lower courts have "long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003) (citing *Buckley* and *NAACP*); *see also Buckley*, 424 U.S. at 64 ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."); *United States v. Rumely*, 345 U.S. 41

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[6] Though beyond the scope of this brief, we agree with the Appellant that applying BCRA's disclosure requirements to Citizens United serves no recognized governmental interest, compelling or otherwise, and thus cannot survive any level of constitutional scrutiny. *See* Appellant's Br. at 42-45, 51-56.

(1953) (compelled disclosure of group membership lists infringes members' rights of associational privacy).

BCRA's compelled disclosure provisions inevitably burden the associational rights of groups like Citizens United and its contributors. *See, e.g.*, *Buckley*, 424 U.S. at 68 ("It is undoubtedly true that public disclosure of contributions . . . will deter some individuals who otherwise might contribute."); *NAACP*, 357 U.S. at 463 (compelled disclosure of members' identities "may induce members to withdraw . . . and dissuade others from joining"). In so burdening advocacy groups' expressive association right, the disclosure provisions also inherently burden their political speech—and do so based upon the content of that speech. A recent study by the Institute for Justice quantifies this burden in the campaign finance context, showing how disclosure both chills association and diminishes associational speech. *See* Dick M. Carpenter II, DISCLOSURE COSTS: UNINTENDED CONSEQUENCES OF CAMPAIGN FINANCE REFORM (Institute for Justice, 2007)[7] ("IJ Study").[8]

The IJ Study examined public opinion among 2221 respondents stratified across "six states with ballot

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[7] *Available at* http://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf (last visited Jan. 13, 2009).

[8] The IJ Study is particularly useful because, as has been noted in the academic commentary, "[t]here is very little empirical evidence to determine how often or how much the prospect of disclosure discourages would-be campaign contributors." William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 21 & n.106 (2003) (citing unpublished manuscripts).

issues" in the November 2006 election. IJ Study at 2, 6. The study was conducted across geographically and ideologically diverse states with laws that "require disclosure of issue campaign contributors," including "name, address, contribution amount and name of employer." *Id.* at 6.

The study found that "mandatory disclosure appears to enjoy support among citizens—until the disclosed information includes their own personal information." *Id.* The majority of respondents opposed disclosure when their personal information is made publicly available. *See id.* ("More than 56 percent of respondents opposed disclosure when it includes their name, address and contribution amount."). That number increased even further when the respondent's employer is disclosed. *See id.* ("Opposition rose to more than 71 percent when an employer's name must be disclosed."). "This opposition," the study concludes, "translates into a lower likelihood of becoming involved in political activity through donations, meaning that mandatory disclosure 'chills' citizens' speech and association." *Id.*

The IJ Study shows empirically the chilling effect disclosure has on people's willingness to exercise First Amendment rights of association and speech. For example, nearly 60% of survey respondents agreed that "[i]f by contributing to a ballot issues campaign my name and address were released to the public by the state, I would think twice about donating money." *Id.* at 7, Table 1. "When asked why they would think twice, respondents cited, among other things, privacy and safety concerns, fear of retribution, and the

revelation of their secret vote." *Id.* at 2; *see also* Steve Simpson, *If You Wanna Speak, You Better Have a Lawyer*, NAT'L REVIEW ONLINE (Mar. 27, 2007) ("[C]itizens themselves admit disclosure laws have a chilling effect on their free-speech rights, making them less likely to exercise those rights by contributing to a cause they believe in.").

Moreover, BCRA's disclosure and reporting requirements—complex, time-sensitive, and carrying potential civil and criminal liability—impose additional burdens on groups, like Citizens United, whose speech qualifies under the broad definition of electioneering communications.[9] To comply, groups

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[9] Entities making electioneering communications that aggregate more than $10,000 in the calendar year must file a "24 Hour Notice of Disbursements/Obligations for Electioneering Communications" (FEC Form 9) with the Commission within 24 hours of the disclosure date. *See* 11 C.F.R. § 104.20(b). The form must be received by the Commission by 11:59 p.m. on the day following the disclosure date. *See id.* As the FEC's own guidance proclaims, this 24-hour rule "requires continuous reporting." FEC Electioneering Communications Brochure (updated Apr. 2008), *available at* http://www.fec.gov/pages/brochures/electioneering.shtml (last visited Jan. 13, 2009). Similarly, the reports' required content is burdensome. The Form 9 requires that the entity list: (1) the identity of the person making the disbursement; (2) the identity of any person exercising control over the activities of the person making the disbursement; (3) the identity of the custodian of books and accounts from which the disbursement was made; (4) the amount of each disbursement or amount obligated in excess of $200 during the period covered by the statement, the date of the disbursement, and the person who received the funds; (5) the identity of the candidates mentioned in the communication and the elections in which they are candidates; (6) the disclosure date; and, most pertinent, (7) the name and address of each donor who, since the first day of the

are compelled to dedicate significant time and resources, and thus must "abandon or alter" other First Amendment-protected activities. *See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 548 (1987). That compulsion not only infringes their right of expressive association, *see id.*, but also reduces the quantity and quality of political speech as some groups are forced to divert resources to compliance and other smaller groups are precluded from forming altogether. *See Mass. Citizens for Life*, 479 U.S. at 254 ("Detailed recordkeeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear").

The IJ Study shows that compelled disclosure, by infringing freedom of expressive association, also burdens the underlying expression for which the individuals sought to associate. This content-based burden on political *speech*, "the core of the protection afforded by the First Amendment," *McIntyre*, 514 U.S. at 346, requires that, as applied to advocacy groups like Citizens United, BCRA's disclosure requirements must survive strict scrutiny. *See, e.g., Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990) (a statute that "burdens the exercise of political speech" is constitutional only if "narrowly tailored to serve a compelling state interest"); *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) (when a content-

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preceding calendar year, has donated in the aggregate $1000 or more to the person making the disbursements, or to the segregated bank account if the disbursements were paid exclusively from that bank account. *See* 11 C.F.R. § 104.20(c).

based provision "burdens political speech, it is subject to strict scrutiny").

C. Lower courts need unambiguous direction that disclosure provisions infringing freedom of expressive association must survive strict scrutiny.

Reconciling or distinguishing strict scrutiny and exacting scrutiny has proven problematic for lower courts reviewing compelled disclosure provisions. For example, the Fourth Circuit recently held that North Carolina campaign disclosure provisions were subject to a relaxed standard of scrutiny. *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008) ("Reporting and disclosure requirements in the campaign finance realm must survive exacting scrutiny. The plaintiffs argue that 'exacting scrutiny' in this context is equivalent to strict scrutiny (requiring narrow tailoring to a compelling state interest), but this argument is inconsistent with *Buckley* and subsequent cases."). Examining *Buckley*, the Fourth Circuit erroneously concluded that "the Court did not engage in the type of narrow tailoring analysis that the plaintiffs ask us to apply to the disclosure requirements at issue in this case," ultimately upholding the North Carolina regulations using a less strict standard of review.

By contrast, the Tenth Circuit applied traditional strict scrutiny to a Colorado disclosure law. *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000). After reviewing this Court's freedom of association jurisprudence, the court of

appeals concluded, "Strict scrutiny is employed where the quantum of speech is limited due to restrictions on . . . the anonymity of [ ] supporters [of a candidate or initiative]." *Id.* at 1197 (quotation marks omitted). The court upheld the challenged provisions, but only after finding them "supported by three compelling governmental interests." *Id.*

Most recently, the U.S. District Court for the District of Columbia, regarding lobbying disclosure provisions, specifically equated "exacting scrutiny" with strict scrutiny. *See Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 51-52 (D.D.C. 2008) ("[A]s Defendants correctly argue, neither *Buckley* nor *McConnell* utilized the traditional language of the strict scrutiny standard. However, in other contexts, the Supreme Court has indicated that 'exacting' and 'strict' scrutiny are one and the same."). Quoting *McIntyre*, the court agreed that "'[w]hen a law burdens core political speech, we apply 'exacting scrutiny' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.'" *Id.* at 51. The court upheld the disclosure provision, but only after "appl[ying] strict scrutiny." *Id.* at 52.

The lower federal courts have been inconsistent in reconciling the exacting scrutiny and strict scrutiny standards when reviewing compelled disclosure provisions. This Court should clarify that when such provisions infringe on First Amendment rights of expressive association, as does BCRA Section 201 when applied to Citizens United, strict scrutiny is the appropriate standard of review.

CONCLUSION

BCRA Section 201 is unconstitutional as applied to Citizens United; the district court's judgment should be reversed.

Respectfully submitted,

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Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. INTRODUCTION	4
II. LIKE DISCLOSURE IN CANDIDATE ELECTIONS, ANONYMITY BEYOND ELECTIONS PROTECTS CITIZENS FROM CORRUPT AND ABUSIVE OFFICEHOLDERS	6
III. THE DANGER OF RETRIBUTION IS REAL	9
IV. CONGRESS HAS NO AUTHORITY TO REGULATE POLITICAL SPEECH BEYOND ELECTIONS, AND FURTHERS NO IMPORTANT OR COMPELLING GOVERNMENT INTEREST BY DOING SO	20
A. Congress Has No Authority to Regulate Political Speech Beyond Elections	20
B. The Interests Recognized In *Buckley*, and by Extension *McConnell*, Are Inapplicable To The Disclosure Of Issue Advocacy	22
C. This Case is Not About Electoral Speech, and, Therefore, Not About The Right to Engage in Anonymous Electioneering	24

TABLE OF CONTENTS—Continued

Page

V. THIS COURT HAS ALREADY INVALIDATED CONGRESSIONAL ATTEMPTS TO COMPEL THE DISCLOSURE OF ISSUE ADVOCACY ON CONSTITUTIONAL GROUNDS 28

VI. CITIZENS UNITED NEED NOT DEMONSTRATE THAT IT WILL BE SUBJECT TO THREATS, HARASSMENT, OR REPRISALS BECAUSE THE DISCLOSURE PROVISIONS ARE UNCONSTITUTIONAL AS-APPLIED TO ANY ORGANIZATION ENGAGED IN ISSUE ADVOCACY 30

VII. THE ENFORCEMENT OF OTHER PROVISIONS CAN BE ADDRESSED BY EXISTING MEANS MORE NARROWLY TAILORED THAN MANDATORY PUBLIC DISCLOSURE.. 32

CONCLUSION 36

TABLE OF AUTHORITIES

CASES Page

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 20
Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) 2-3, 30, 31, 32
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 25
Federal Election Comm'n v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997) 11
Federal Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) ..... *passim*
First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 24
McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) ..... *passim*
McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176 (D.D.C. 2003) 22, 34
McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) ..... *passim*
McIntyre v. Ohio Elections Comm'n, 618 N.E.2d 152 (Ohio 1993) 17
NAACP v. Alabama, 357 U.S. 449 (1958) 10, 28
Roth v. United States, 354 U.S. 476 (1957) . 9, 20
Talley v. California, 362 U.S. 60 (1960) ...8, 10, 28
Thomas v. Collins, 323 U.S. 516 (1945) 10
United States v. Harriss, 347 U.S. 612 (1954) 21
United States v. Morrison, 529 U.S. 598 (2000) 22
United States v. Rumely, 345 U.S. 41 (1953) 21

TABLE OF AUTHORITIES—Continued

Page

Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150 (2002) 8, 10
Wisconsin Right to Life, Inc. v. Fed. Election Comm'n, 546 U.S. 410 (2006) 4

CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, § 8 22
U.S. CONST., amend. I 20

STATUTES

Bipartisan Campaign Reform Act of 2002, § 201 ..... *passim*
Bipartisan Campaign Reform Act of 2002, § 203 ..... 4, 27, 29
Bipartisan Campaign Reform Act of 2002, § 311 ..... *passim*
2 U.S.C. § 431(8) 23
2 U.S.C. § 431(9) 23
2 U.S.C. § 434(c) 10, 23
2 U.S.C. § 434(e) 28, 29
2 U.S.C. § 434(f)(3) 31, 34
Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.* 9, 21
26 U.S.C. § 527(j) 11
47 U.S.C. § 315(e)(1)(B)(i)-(iii) 34
47 U.S.C. § 315(e)(2)(C) 34-35
47 U.S.C. § 315(e)(2)(E) 35
47 U.S.C. § 315(e)(2)(G) 35

REGULATIONS

11 C.F.R. § 100.22(b) 11

TABLE OF AUTHORITIES—Continued

	Page
11 C.F.R. § 114.15(b)	6
OTHER	
Richard Abowitz, *Where's the Outrage? Online.*, LAS VEGAS WEEKLY, Jan. 8, 2009 (available at <http://www.lasvegasweekly.com/news/2009/jan/08/wheres-outrage-online/>)	14-15
Rachel Abramowitz, *Film fest director resigns; Richard Raddon steps down over reaction to his support of Prop. 8.*, L.A. TIMES, Nov. 26, 2008, at E1	14
Accountable America, *$100,000 Reward* (available at <http://www.accountableamerica.com/reward>)	19
John Adams, *A Dissertation on the Canon and Feudal Law*, BOSTON GAZETTE (1765) (available in Thomas Paine, *Common* Sense, 99, 108-09 (Edward Larkin ed., Broadview Press 2004))	7
Mary Ann Akers, *Kerry Puts GOP Donor on Defensive*, WASH. POST, Feb. 28, 2007, at A17	11, 12
Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, WASH. POST, July 1, 2007, at B3	12
Jim Carlton, *Gay Activists Boycott Backers of Proposition 8*, WALL ST. J., Dec. 27, 2008, at A3	14
Nicolas Confessore, *Welcome to the Machine*, WASH. MONTHLY, July 1, 2003, at 30	10-11

TABLE OF AUTHORITIES—Continued

Page

Editorial, *Nobles and Knaves*, WASH. TIMES, Nov. 11, 2006, at A12 ..... 15, 16

Editorial, *Political Science*, INVESTORS BUS. DAILY, Nov. 14, 2006, at A12 15-16

Niesha Lofing, *CMT artistic director quits in fallout from Prop. 8 support*, SACRAMENTO BEE, Nov. 12, 2008, (available at <http://www.sacbee.com/1089/story/1391705.html>) 13-14

Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. TIMES, Aug. 8, 2008, at A15 18

Stephen Moore, editorial, *Comfy with K Street*, WALL ST. J., Oct. 20, 2007, at A18 .. 17-18

Peter Perl, *Absolute Truth*, WASH. POST MAGAZINE, May 13, 2001, at W12 11

IN THE

Supreme Court of the United States

No. 08-205

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005, by Bradley A. Smith, professor of law at Capital University Law School and a former chairman of the Federal Election Commission, and Stephen M.

[1] This brief is filed with the written consent of all parties. Appellant filed a letter of consent with this Court, and Appellee consented in writing to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Hoersting, a campaign finance attorney and former general counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF THE ARGUMENT

Like mandatory disclosure in candidate elections, anonymity in issue advocacy protects citizens from corrupt and abusive officeholders, who would punish citizens for opposing their policy preferences. Citizens learn something of the relative merits of a candidate by knowing who supports him; candidates may change positions to reward suppliants once elected. But citizens learn little about the relative merits of a policy issue by knowing which of their fellow citizens supports it—and abusive officeholders learn too much.

Mandatory disclosure always carries costs. Recent history demonstrates that donors for issue advocacy, donors to ballot initiative campaigns, and even contributors to candidate campaigns are subjected to retribution by officials and others that make use, either directly or derivatively, of government-compelled disclosure data.

Where disclosure of political speech furthers compelling interests, as in candidate elections, the burdens disclosure places on political speech may be justified, with limited exception. *See generally Brown*

v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). Where mandatory disclosure does not further compelling interests, as in the case of issue advocacy, the impositions on First Amendment rights are not justifiable. Congress has constitutional authority to regulate elections, not issue advocacy, and mandatory disclosure of issue advocacy would further none of the informational, anti-corruptive, or compliance interests enunciated in *Buckley* and *McConnell*.

In *Buckley*, this Court permitted mandatory disclosure of independent express advocacy of candidates in order to further "informational" (but not anti-corruptive interests). The Court conditioned this disclosure on its being constitutionally narrowed to avoid issue advocacy. *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976). The Government's claim that issue advocacy can now be subject to compelled disclosure to further the same informational interest constitutes a "constitutional 'bait and switch.'" *Federal Election Comm'n v. Wisconsin Right to Life, Inc.* ("*WRTL II*"), 127 S. Ct. 2652, 2673 (2007).

Because the disclosure provisions are unconstitutional as-applied to any speaker engaging in issue advocacy, Citizens United need not demonstrate a "reasonable probability" that its donors will suffer "threats, harassment, and reprisals" under *Brown*.

The political-file requirements of federal communications law require stations to keep detailed and publicly available information on requesters of ad time, including a list of the organization's executive committee. This allows the press to write about who is running the ads, citizens to complain or sue, and the FEC to issue subpoenas.

Because the "Wait," "Pants," and "Questions" ads are not substantially related to elections, the disclaimer requirements in § 311 are unconstitutional as-applied. Doing otherwise would signal, improperly, that the ads are related to elections, which could have implications for other provisions of federal election law, while furthering no interest not easily met by more narrowly tailored means, such as minimal disclaimers under federal communications law.

ARGUMENT

I. INTRODUCTION

In 2006, this Court rejected the assertion that BCRA § 203's funding source restrictions for "electioneering communications" are not susceptible to as-applied challenge. *See generally Wisconsin Right to Life, Inc. v. Fed. Election Comm'n* (*"WRTL I"*), 546 U.S. 410 (2006). In 2007, this Court reviewed an as-applied challenge to § 203, crafted its appeal-to-vote test, and permitted the regulation only of speech that is unambiguously related to a candidate campaign. All other political advertising remained exempt from § 203. *See generally Federal Election Comm'n v. Wisconsin Right to Life, Inc.* (*"WRTL II"*), 127 S. Ct. 2652 (2007). *Amicus* will refer to this exempt speech as "issue advocacy." It must be stressed that the appeal-to-vote test crafted in *WRTL II* does not hinge on an inquiry into either the motives of the speaker or the effect the speech may have on listeners. *Id.* at 2665-66. Thus, *WRTL II* effectively did away with the pernicious concept that some issue-oriented political speech could be labeled "sham" speech by outside observers, and regulated on that basis, while others, whose motives or words were deemed pure by authorities, could speak at will. This Court had no

opportunity in *WRTL II* to review BCRA § 201, 116 Stat. 88, which requires organizations making electioneering communications to report their donations and the names of donors above certain monetary thresholds, or BCRA § 311, 116 Stat. 105, which requires electioneering communications to carry disclaimers. *See generally WRTL II*, 127 S. Ct. 2652.

This Court has already "assumed" that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 206 n.88 (2003), and has "reject[ed] the contention that issue advocacy may be regulated because express election advocacy may be," *WRTL II*, 127 S. Ct. at 2672. Nonetheless, Citizens United's challenge to BCRA §§ 201 and 311 as-applied to advertising the government concedes is beyond the appeal-to-vote test of *WRTL II* is being met by allegations that as-applied challenges are not available. Mot. to Dismiss or Affirm, at 12-14. And, even if as-applied challenges are available, the government seeks to compel the disclosure of issue advocacy, asserting that "its interest in providing information to the public extends beyond speech about candidate elections and encompasses activity that attempts to sway public opinion on issues." Opp'n. to Mot. For Prelim. Inj. (Doc. 18), at 19; *see also* Fed. Election Comm'n's Summ. J. Mem. (Doc. 55), at 22.

Amicus will confine its brief to the mandatory disclosure provisions as-applied to ads that are beyond the appeal-to-vote test of *WRTL II*, will refer generally to §§ 201 and 311 as the "disclosure provisions,"

and will refer to speech beyond the appeal-to-vote test as "issue advocacy."[2]

Amicus will note that the danger in disclosure is in exposing donors and the internal workings of advocacy organizations and is rarely in the public knowing the name of the organization. Organizations and their positions on issues are usually known. The government may have added reasons to wish to know the identity of the organization that is speaking, including the need to establish jurisdiction and serve process in the event of a libel or other claim. But these are matters for federal communications law, not election law. Because the "Wait," "Pants," and "Questions" ads are not substantially related to elections, the disclaimer requirements in § 311 should be invalidated as-applied. Doing otherwise would signal, improperly, that the ads are related to elections without furthering an interest not easily met by more narrowly tailored means.

II. LIKE DISCLOSURE IN CANDIDATE ELECTIONS, ANONYMITY BEYOND ELECTIONS PROTECTS CITIZENS FROM CORRUPT AND ABUSIVE OFFICEHOLDERS

In proposals to disclose issue advocacy, we witness two canons of political law on an apparent collision course: that government corruption is cured by disclosure, and that the right of individuals to speak and associate freely depends upon their ability to do so anonymously. But the conflict is a false one because

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[2] *Amicus* believes that the ads in question would qualify for the Federal Election Commission's regulatory exception for commercial speech at 11 C.F.R. § 114.15(b), but for ease of discussion will refer to the ads as "issue advocacy."

these canons, applied in context, each work toward the same purpose: to protect citizens from corrupt and abusive officeholders. Anonymity in issue speech, like disclosure of candidate speech, advances the overriding government interest at the root of all campaign finance regulation: preventing corruption or its appearance. *Buckley,* 424 U.S. at 25.

Many believe that "[l]iberty cannot be preserved without a general knowledge among the people," just as many believe the disclosure of political speech is beneficial. John Adams, *A Dissertation on the Canon and Feudal Law*, BOSTON GAZETTE (1765) (available in Thomas Paine, *Common* Sense, 99, 108-09 (Edward Larkin ed., Broadview Press 2004)); *Buckley v. Valeo,* 424 U.S. 1, 60 (1976) ("appellants argue that 'narrowly drawn disclosure requirements are the proper solution to ... evils Congress sought to remedy'"). But many miss the import in Adams's full quote: "Liberty cannot be preserved without a general knowledge among the people, who have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge, I mean *the characters and conduct of their rulers.*" Adams, *supra* (emphasis added). Mandatory disclosure is harmful, not beneficial, when used to illuminate the inner workings of non-governmental organizations, or communication by and between citizens about political issues, potentially subjecting those organizations and citizens to both official and unofficial harassment or intimidation. Because mandatory disclosure for issue advocates does not illuminate the characters or conduct of public officials, any public interest in such disclosure is substantially diminished. Mandatory disclosure improperly applied in this way becomes a tool of abuse by government, rather than a tool to prevent abuse of government.

Disclosure regimes for candidate campaign contributions protect citizens from abuse of office by officials who have freewill and can confer benefits on large contributors (and pain on opponents) by passing future legislation. Disclosure regimes for direct lobbying activities, in which paid consultants engage in face-to-face meetings with officeholders, protect citizens in a similar manner. Disclosure of issues speech, however, does not further these goals. Rather, protecting the right to speak and associate anonymously with fellow citizens about issues (not candidate elections), even issues of official action or pending legislation, also protects citizens from abusive officeholders by reducing the officeholder's ability to retaliate against those who would oppose his policy preferences. *See Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 166, 168 (2002) (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) ("'[d]ecision to favor anonymity may be motivated by fear of economic or official retaliation'"); *Talley v. California*, 362 U.S. 60, 64-65 (1960) ("[g]roups and sects ... throughout history have been able to criticize oppressive practices and laws either anonymously or not at all," and "identification and fear of reprisal might deter ... discussions of public matters of importance").

Further, citizens learn something of the relative merits of a candidate by knowing who supports his election. *See Buckley*, 424 U.S. at 66-68 ("[s]ources of a candidate's financial support ... alert the voter to the interests to which a candidate is most likely to be responsive[,] facilitate predictions of future performance in office[,]" and "may discourage those who would use money for improper purposes ... before or after the election"). Citizens learn much about the

legislative process by knowing who is paying consultants to meet with officeholders directly. *See* Lobbying Disclosure Act of 1995, 109 Stat. 691 (codified at 2 U.S.C. § 1601 *et seq.*). Citizens, however, learn little about the relative merits of a policy issue by knowing which of their fellow citizens supports it. Policy issues do not change once enacted; little "informational interest" is furthered, and asserting otherwise is an argument from *ad hominem* that does little to advance debate or knowledge. Abusive officeholders, however, are provided with too much information—the information needed to abuse their official position to retaliate against political opposition. Disclosure regimes for issue advocacy provide abusive officeholders with knowledge of which groups and individuals support which issues, including the monetary intensity of that support. The possibilities for retaliation and intimidation impose too high a cost for too little benefit in our constitutional republic, which depends for its survival upon a vibrant and "unfettered interchange of ideas." *Roth v. United States*, 354 U.S. 476, 484 (1957).

III. THE DANGER OF RETRIBUTION IS REAL

Mandatory disclosure essentially amounts to the government making a list of citizens' political preferences, then making that list publicly available to everyone—your family, your employer, your neighbors, your government, the media, even extremists with a penchant for violence. "[P]ublic disclosure of contributions ... will deter some individuals who otherwise might contribute," and "[d]isclosure may ... expose contributors to harassment or retaliation," requiring that these "burdens ... be weighed carefully against the interests which

Congress has sought to promote." *Buckley,* 424 U.S. at 68. Exacting scrutiny[3] is "necessary even if any deterrent effect on the exercise of First Amendment rights arises, not [only] through direct government action, but indirectly as an unintended ... result of the government's ... requiring disclosure." *Id.* at 65.

The costs of disclosure and its infringements on free speech are often underestimated. Even where disclosure may be justified, as in the case of direct contributions to candidates, there is a real danger of governmental retaliation and citizen intimidation.

For example, the now infamous "K Street Project" used data provided by mandatory campaign-contribution disclosures to "compile a list of the 400 largest

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[3] Since the time of *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court has held that disclosure statutes must be subjected to "exacting scrutiny," *see, e.g., Buckley,* 424 U.S. at 64, which this Court has held is strict scrutiny, *see, e.g., McIntyre,* 514 U.S. at 346, n.10. The *Buckley* Court narrowed the disclosure requirements for independent campaign activity, 2 U.S.C. § 434(c), and in doing so, indicated that the Court "must apply the ... strict standard of scrutiny" it used in *NAACP v. Alabama,* "for the right of associational privacy developed in *NAACP v. Alabama* derives from the rights of the organization's *members* to advocate their personal points of view in the most effective way." *Buckley*, 424 U.S. at 75 (citing *NAACP*, 357 U.S. at 458, 460) (emphasis added). *Amicus* notes that the Court's treatment of political disclosure in *Buckley* is a departure from, or at the outer limit of, its treatment of political disclosure in most of its speech cases, which note that rights of speech and association are furthered in an environment of anonymous speech. *See generally, Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton,* 536 U.S. 150 (2002); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995); *Talley v. California,* 362 U.S. 60 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958); *Thomas v. Collins,* 323 U.S. 516 (1945). This indicates that the Court should be careful not to unduly expand the government's ability to require disclosure in the political realm.

PACs, along with the amounts and percentages given to each party. Lobbyists were invited into [then-Majority Whip Tom] DeLay's office and shown their place in 'friendly' or 'unfriendly' columns." Nicolas Confessore, *Welcome to the Machine,* WASH. MONTHLY, July 1, 2003, at 30. DeLay explained to *The Washington Post*: "If you want to play in our revolution, you have to live by our rules." Peter Perl, *Absolute Truth,* WASH. POST MAGAZINE, May 13, 2001, at W12.

Just under two years ago, Senator John Kerry used 527-disclosure[4] to lean on Swift Boat donor Sam Fox "during [a] Senate Foreign Relations Committee hearing to consider Fox's nomination to be ambassador to Belgium." Mary Ann Akers, *Kerry Puts GOP Donor on Defensive,* WASH. POST, Feb. 28, 2007, at A17. Kerry asked Fox how "the nominee feel[s] about the level of 'personal destruction' in politics these days," and "[w]hy did [Fox] give such a large chunk of money to help Swift Boat?" *Id.* Mr. Fox didn't speak

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[4] Disclosure for Internal Revenue § 527 organizations, *see* 26 U.S.C. § 527(j), is arguably justified because 527 organizations, such as the famed Swift Boat Veterans for Truth, are deemed "political organizations" by the IRS, even though their communications fell well short of the express advocacy defined by this Court in *Buckley*—a necessary predicate to making an "expenditure" under FECA. The Commission used a discredited and unconstitutional definition of express advocacy at 11 CFR § 100.22(b), *see generally Federal Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997), to later convince Swift Boat Veterans to accept civil penalties for failing to register as a "political committee." The FEC believed it could resuscitate the failed definition of express advocacy and redraw the line for "expenditures" because the *McConnell* Court called the express advocacy test "functionally meaningless," even though that Court did not have before it the FECA terms "expenditure" or "political committee" narrowed by *Buckley*.

much about his First Amendment rights of association during the hearing. Rather, he backed down; called Kerry a "hero," and called the political speech of all 527s "disgraceful." *Id.*

Gigi Brienza wrote Presidential primary candidate John Edwards a $500 check after listening to "a moving speech about poverty in America." Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, WASH. POST, July 1, 2007, at B3. Her modest contribution, she wrote, "didn't propel Edwards ... atop the Democratic ticket. It did, however, make me the target of an extremist animal rights organization, a consequence of transparency ... that still makes me wary when I open my mail." *Id.* The security department of her employer, Bristol-Myers Squibb, alerted Brienza (and 100 of her colleagues) that her name, "appeared on a list of 'targets' issued by the radical group Stop Huntingdon Animal Cruelty" ("SHAC") an organization the FBI named a "serious domestic terrorism threat[]" in 2005. *Id.* Brienza's "address was printed [on the target list] under the message: 'Now you know where to find them.'" *Id.* According to Brienza, the FBI confirmed that the information came from mandatory campaign finance lists. *Id.* "If I am moved to write a check" in future elections, Brienza said, "I will limit my contribution to $199.99: the price of privacy in an age of voyeurism and the cost of security in an age of domestic terrorism." *Id.*[5]

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[5] Some websites, such as the popular *Huffington Post*, helpfully supply would be harassers with maps to donors' homes. *See* <http://fundrace.huffingtonpost.com/neighbors.php?type=name&lname=smith&fname=bradley&search=Search>. A site called www.EightMaps.com also exists. Its tag line? "Proposition 8 changed the California state constitution to

Mandatory disclosure in ballot-initiative and referenda campaigns also carries heavy burdens for citizens that would participate, but unlike candidate races, doesn't even further the ability of citizens to monitor the performance of their elected officials. "[T]he invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Buckley*, 424 U.S. at 66 (internal citations omitted).

For example, in the wake of voting on California's controversial Proposition 8 to prohibit same sex marriage, Scott Eckern, formerly the artistic director of the California Musical Theatre was forced to resign "amid controversy over a donation he made to the Proposition 8 campaign." Niesha Lofing, *CMT artistic director quits in fallout from Prop. 8 support*, SACRAMENTO BEE, Nov. 12, 2008 (available at <http://www.sacbee.com/1089/story/1391705.html>). The theatre board "thanked Eckern for '25 years of invaluable service to the organization and the advancement of musical theatre as an art form.'" *Id.* Eckern gave $1,000 to support Proposition 8, "a donation that sparked criticism from theater workers and the gay, lesbian, bisexual and transgender community." *Id.* Eckern "'honestly had no idea' that the contribution would spark such outrage and made the donation ... on his belief [that] the traditional definition of marriage be preserved." *Id.* Eckern said he is "disappointed that my personal convictions have cost me the opportunity to do what I love most ... to

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prohibit same-sex marriage. These are the people who donated in order to pass it."

continue enriching the Sacramento arts and theatre community." *Id.*

In another example, after Proposition 8 passed, dozens of "activists descended on the El Coyote restaurant with signs and placards. They chanted 'Shame on you,' cussed at patrons and began a boycott of the cafe." Jim Carlton, *Gay Activists Boycott Backers of Proposition 8,* WALL ST. J., Dec. 27, 2008, at A3. "The restaurant's crime: A daughter of the owner donated $100 to support Prop 8." *Id.*

Richard Raddon, former director of the Los Angeles Film Festival, resigned after "being at the center of controversy" for giving "$1500 to Proposition 8." Rachel Abramowitz, *Film fest director resigns; Richard Raddon steps down over reaction to his support of Prop. 8.*, L.A. TIMES, Nov. 26, 2008, at E1. Raddon, a Mormon, gave for religious reasons. *Id.* After Raddon's contribution was "made public online," Film Independent was "swamped with criticism from No on 8 supporters," and "in the blogosphere." *Id.* One fellow board member noted, "Someone has lost his job and possibly his livelihood because of privately held religious beliefs." *Id.* Since Proposition 8 has passed, "Hollywood has been debating whether and how to publicly punish those who supported the ... amendment," including boycotts of the "Cinemark theater chain, whose chief executive, Alan Stock, donated $9,999 to 'Yes on 8.'" *Id.*

These are not isolated examples. In the aftermath of Proposition 8, numerous blacklists are now being established, and those establishing them note that the existence of reliable data over the internet makes such lists easier to compile. "Years ago we would never have been able to get a blacklist that fast and quickly," said one opponent of Proposition 8. Richard

Abowitz, *Where's the Outrage? Online.*, LAS VEGAS WEEKLY, Jan. 8, 2009 (available at <http://www.lasvegasweekly.com/news/2009/jan/08/wheres-outrage-online/>). While citizens have a right to organize boycotts that do not violate anti-trust or non-discrimination laws, the government does not have a compelling interest in making political preferences public so that citizens who support the "wrong" side can be subjected to harassment and blacklisting. This harassment emphasizes *Amicus'* point, *see* Section II, *supra*, that, unlike information on donations to candidates, once a ballot initiative has been enacted, mandatory public disclosure of financial donors serves no anti-corruption purpose because it does not allow citizens to evaluate the performance and character of their elected officials. But it does allow for efforts to chill and intimidate speakers in the future.

Even worse, mandatory disclosure for issue advocacy has the danger of intimidating funding and supporters away from issues, not just candidates and campaigns.

For example, in a letter[6] to ExxonMobil CEO Rex Tillerson, Senators Olympia Snowe and Jay Rockfeller "urge[d]" the company to end its support of what the Senators called "climate change denial front groups" like the Competitive Enterprise Institute, and said the company "should repudiate its climate change denial campaign and make public its funding history." Editorial, *Nobles and Knaves*, WASH. TIMES, Nov. 11, 2006, at A12; Editorial, *Political Science*,

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[6] The letter is available at <http://snowe.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=9acba744-802a-23ad-47be-2683985c724e>.

INVESTORS BUS. DAILY, Nov. 14, 2006, at A12. They also "ask[ed]", in a way only the federal government can, that ExxonMobil "acknowledge the dangers and realities of climate change [and] the role of humans in causing or exacerbating it," stating that findings to the contrary are "pseudo science." WASH. TIMES, *supra*. As one editorial page put it, "[i]f [the Senators] are so sure of their facts, why are they trying to shut off debate?" INVESTORS BUS. DAILY, *supra*. Another called this "bullying at its worst—lawmakers don't like what a private organization [like CEI] believes, so they try to ensure that those organizations can't get private funding." WASH. TIMES, *supra*. Both Senators sit on the Senate Commerce Committee, which oversees much business regulation.

Even where this Court has attempted to protect issue advocacy in *WRTL II*, the mandatory disclosure provisions of § 201 have made retribution real. In the wake of *WRTL II*, in an FEC rulemaking codifying the opinion, two national party committees, the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee, urged "[t]he Commission [to] take special care not to narrow the range of disclosure now required from electioneering communications sponsors," saying "[p]arty committees like the DSCC and DCCC have a *real, direct interest* in having access to information of this character, which is essential to their own strategic decision-making." DSCC & DCCC Comments, at 3 (available at <http://fec.gov/pdf/nprm/electioneering_comm/2007/dscc_dccc_eccomment12.pdf>) (emphasis added).

Had the DCCC and DSCC merely noted that this Court did not review § 201 in *WRTL II*, that would be

one thing. But their added position, that they have an "interest" in the mandatory disclosure of issue advocacy, is unfortunate when one considers who the DCCC and DSCC really are: they are the campaign arms of, respectively, of the majority party in the United States House of Representatives and Senate. *See, e.g.*, DCCC Website, *About the DCCC* (available at <http://www.dccc.org/pages/about/>); DSCC Website, About the DSCC (available at <http://www.dscc.org/about>). *Amicus* knows of no case that shows a legitimate or compelling interest in Congressional leaders obtaining disclosure of political issue advocacy to either prevent corruption or its appearance, or to gain the information needed to vote intelligently. Nor is *Amicus* aware of a case that shows an interest in political party committees obtaining disclosure of issue advocacy. Perhaps the DCCC's and DSCC's "real, direct interest" is merely the same "interest" a school-board official had in learning the name of school-levy opponent and grassroots leafletter, Margaret McIntyre, whom one Ohio Supreme Court Justice believed "retaliate[ed] against McIntyre "for her opposition." *See McIntyre v. Ohio Elections Comm'n*, 618 N.E. 2d 152, 157 (Ohio 1993) (Wright, J., dissenting). Indeed, the "interest" of the DSCC and DCCC is not difficult to guess. Consider this from a contemporaneous editorial:

> Meanwhile, Democrats under [former-DCCC Chairman] Rep. Rahm Emanuel and [then-DSCC Chairman] Sen. Schumer have quietly erected their own K Street Project, and employ some of the same strong-arm tactics they once deplored. "I've never felt the squeeze that we're under now to give to Democrats and to hire them," says one telecom industry representative. "They've put out the word that if you have an issue on trade,

> taxes, or regulation, you'd better be a donor and *you'd better not be part of any effort to run ads against our freshmen incumbents.*"

Stephen Moore, editorial, *Comfy with K Street,* WALL ST. J., Oct. 20, 2007, at A18 (emphasis added). Mandatory disclosure of issue advocacy within the electioneering communications windows allows the DCCC and DSCC to know who is speaking out against their members' legislative agenda and facilitates retaliation.

Meanwhile, "[n]early 10,000 of the biggest donors to Republican candidates and causes across the country will probably receive a foreboding 'warning' letter in the mail next week," reported the *New York Times* this past summer, just before the 2008 elections. Michael Luo, *Group Plans Campaign Against G.O.P. Donors,* N.Y. TIMES, Aug. 8, 2008, at A15. "The letter is an opening shot across the bow from an unusual ... group on the left that is poised to engage in hardball tactics to prevent similar groups on the right from getting off the ground this fall." *Id.* The group, the self-styled "Accountable America," is "hoping to create a chilling effect that will dry up contributions"; describing its effort as "'going for the jugular.'" *Id.* What is the warning letter's purpose? "[A]lerting donors who might be considering giving to right-wing groups to a variety of potential dangers, including legal trouble, public exposure, and watchdog groups digging through their lives." *Id.* (The letter is available at <http://graphics8.nytimes.com/packages/pdf/politics/20080808caucus/09caucus.accountableamericawarningletter.pdf>.)

Accountable America also encourages harassment by offering a bounty for any information leading to the successful prosecution of right-leaning donors:

> Accountable America is offering a $100,000 reward for information that is material to either a criminal conviction for committing a felony or a misdemeanor, or a final and unappealed judicial or administrative determination of civil liability that entails the imposition of fines or penalties of at least $10,000, for a violation of federal campaign finance, tax or other statutes or regulations by an organization that operates or purports to operate under Internal Revenue Code Sections 501(c)(4), 501(c)(6) or 527 and *that primarily serves business or ideologically conservative interests.*

See Accountable America, *$100,000 Reward* (available at <http://www.accountableamerica.com/reward>) (emphasis added).

As this short review shows, the potential for both official and unofficial retaliation is growing. The chilling effect it has on speech is real. Government has no anti-corruption or informational interest in disclosure of issue speech. The purpose of disclosure laws, as illustrated by mandatory disclosure of contributions to candidates, is to permit citizens to monitor their government. It is not to permit the government to monitor citizens, or to foster private boycotts and harassment of citizens who engage in political speech through issue advocacy.

IV. CONGRESS HAS NO AUTHORITY TO REGULATE POLITICAL SPEECH BEYOND ELECTIONS, AND FURTHERS NO IMPORTANT OR COMPELLING GOVERNMENT INTEREST BY DOING SO

A. Congress Has No Authority to Regulate Political Speech Beyond Elections

Article I, Section 4 of the Constitution provides Congress the authority to regulate elections to federal office. *See Buckley,* 424 at 14, n.16. Congress has no authority to regulate political speech beyond elections. U.S. CONST., amend. I; *WRTL II,* 127 S. Ct. at 2672-73 (Court "did not suggest" that the corruption interest identified in *Austin v. Mich. Chamber of Commerce,* 494 U.S. 652 (1990), "extended beyond campaign speech"); *Buckley,* 424 U.S. at 80 (disclosure provision "[a]s narrowed ... does not reach all partisan discussion[;] it only requires disclosure of ... expenditures that expressly advocate a[n] election result"). The First Amendment provides the "broadest protection to ... political expression" to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Buckley,* 424 U.S. at 14 (quoting *Roth,* 354 U.S. at 484). This protection extends to "political association," individuals donating to advocates they believe in, "as well as to political expression." *Buckley*, 424 U.S. at 15.

Accordingly, Congress's disclosure provisions for political speech have always been tied to elections. "The first federal disclosure law was enacted in 1910," reaching "political committees and ... organizations operating to influence congressional elec-

tions." *Id.* at 61 (internal citations omitted). The Federal Corrupt Practices Act of 1925 mandated disclosure for "political committees, defined as organizations that accept contributions or make expenditures 'for the purpose of influencing'" a Presidential campaign. *Buckley,* 424 U.S. at 62. Both laws were replaced by provisions in the Federal Election Campaign Act of 1971, as amended, *id.*, and Congress added to them in BCRA, legislation dedicated to the regulation of campaigns for federal office. *See generally McConnell,* 540 U.S. 93.

Similarly, Congress has mandated disclosure of direct, paid lobbying of officials. In *United States v. Harriss,* 347 U.S. 612 (1954), this Court "upheld limited disclosure requirements for lobbyists," because [t]he activities of lobbyists, who have *direct* access to elected representatives, if undisclosed, may well present the appearance of corruption." *McIntyre,* 514 U.S. at 357 n.20 (emphasis added). The Lobbying Disclosure Act of 1995, 2 U.S.C. § 1601 *et seq.* (requiring lobbyists to make detailed disclosures about their direct lobbying efforts), operates to cure the same appearance. The regulated lobbying activities do not include attempts to advocate issues with fellow citizens. Rather they are "'representations made directly to the Congress, its members, or its committees' ... and do[] not reach ... attempts 'to saturate the thinking of the community.'" *United States v. Rumely,* 345 U.S. 41, 47 (1953) (internal citations omitted).

In this case, the parties have agreed that the "Wait," "Pants," and "Questions" ads are not the functional equivalent of express advocacy. Thus the ads are insufficiently related to elections to be regulated. In the absence of constitutional authority,

congressional power is non-existent. *See generally United States v. Morrison,* 529 U.S. 598, 608 (2000) ("Congress' regulatory authority is not without effective bounds"). This is the premise of our Constitution, only the more evident in political speech because of the First Amendment's proscriptions. "*McConnell*'s analysis was grounded in the evidentiary record before the Court," *WRTL II,* 127 S. Ct. at 2664, which was based largely upon "two key studies," *id.*, flawed as they were, finding that ads run near elections are tied to elections. *See McConnell v. Fed. Election Comm'n,* 251 F. Supp. 2d 176, 307, 308 (D.D.C. 2003) (opinion of Henderson, J.). Congress did not attempt to tie the ads to, say, interstate commerce and thus its authority to regulate advertising under the interstate commerce clause. *See* U.S. CONST., art. I, § 8, cl. 3. This Court, having recently determined that ads beyond the appeal-to-vote test of *WRTL II* are not related to elections, *see WRTL II*, 127 S. Ct. at 2667-69, now faces the question of whether Congress has the authority to compel the disclosure of political speech that is beyond candidate elections, nor even about elections at all. Congress does not.

B. The Interests Recognized In *Buckley,* and by Extension *McConnell,* Are Inapplicable To The Disclosure Of Issue Advocacy

There must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information to be disclosed." *Buckley,* 424 U.S. at 65. Mandatory disclosure of speech beyond the appeal-to-vote test enunciated in *WRTL II* lacks a "relevant correlation" or "substantial relation" to

elections and, thus, to government interests recognized by this Court.

The first interest is the "informational interest." *Buckley,* 424 U.S. at 81. Disclosure "provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Id.* at 66-68. The parties to this case have agreed that the three ads in question are not campaign speech. Therefore, compelling Citizens United to disclose the funding of those ads will not provide the public with information as to "where political campaign money comes from," or with information on "how [money] is spent by [a] candidate." *Id.*

The second interest is to "deter actual corruption and [its] appearance ... by exposing large contributions and expenditures to the light of publicity." *Id.* But the terms "contribution" and "expenditure" discussed in *Buckley* derive from FECA. Each subsumes the phrase "made ... for the purpose of influencing an[ ] election," *see* 2 U.S.C. §§ 431(8) & (9), and not for some other purpose. That "critical phrase" was narrowed in *Buckley's* discussion of the disclosure requirements at § 434(c) to express advocacy, which ensured that its reach was unambiguously campaign related. 424 U.S. at 80-81. Candidates and officeholders are not corrupted by issue campaigns. Issue advocacy increases the probability of citizen-to-lawmaker contact, the very goal of a democratic republic. No matter how a citizen first hears about an issue—be it in a Citizens United ad, a *New York Times* editorial, or a conversation with a neighbor—once the citizen engages he does so for reasons of his

own and calls his representative directly to express his opinion.

The third interest in disclosure is to "gather[] the data necessary to detect violations of the contribution limitations." *Buckley*, 424 U.S. at 66-68. In upholding the disclosure of electioneering communications against facial challenge in *McConnell*, however, Justice Kennedy stated that "BCRA § 201 ... does not substantially relate to a valid interest in gathering data about compliance with contribution limits [*Buckley's* third interest] or in deterring corruption [*Buckley's* second interest]." *McConnell*, 540 U.S. at 321 (Kennedy, J. concurring in part and in dissenting in part). Justice Kennedy's holding is all the more accurate when the electioneering communications in question are issue advocacy protected by *WRTL II*. Thus, requiring the names, addresses and dollar commitments of citizens engaged in issue advocacy does not substantially relate to any of the informational, anticorruption, or compliance interests upheld as compelling in *Buckley*. There is no government interest recognized by this Court that is furthered by mandatory disclosure of issue advocacy.

C. This Case is Not About Electoral Speech, and, Therefore, Not About The Right to Engage in Anonymous Electioneering

It would also seem there is no apparent government interest recognized by this Court that is furthered by compelling the disclosure of political speech for or against ballot initiatives or referenda. This issue was discussed but not decided in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792, n.32 (1978). *McIntyre*, 514 U.S. at 353-54 (*Bellotti*'s comments "on the prophylactic effect of requiring the

identification of the source of corporate advertising [for referenda elections]" was "*dicta*").[7] Because candidates—human beings possessing freewill and a potential to be corrupted—are not on the ballot, compelling the disclosure of information on the funding of ballot initiatives or referenda does not "aid voters in evaluating those who seek federal office," *Buckley*, 424 U.S. at 66, and does not deter corruption. And, because this Court has invalidated limits on contributions to ballot-initiative committees as a restraint on the rights of speech and association, *see Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981), disclosure would not aid in the enforcement of contribution limits. *See Buckley*, 424 U.S. at 66-68.

As Chief Justice Rehnquist stated, reviewing another section of BCRA, "[i]n this noncandidate-

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[7] Some suggest that this Court already determined the constitutionality of disclosure in ballot-initiative campaigns in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, (1981), where it said "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing [and], if it is thought wise, legislation can outlaw anonymous contributions." *Id.* at 299-300. The Court, however, did not. In *Citizens Against Rent Control*, the appellants challenged contribution limits to ballot initiative committees in Berkeley ordinance § 602, and did not challenge the disclosure provisions of § 112. Therefore, when the City of Berkeley claimed that the contribution limits must be upheld as a "prophylactic measure to make known the identity of supporters and opponents of ballot measures," *id.* at 298, the Court merely answered that the identities are made known through the disclosure provisions of ordinance § 112, *see id.* at 298-99. This Court had no opportunity to decide whether Berkeley's § 112 was constitutional, or to decide whether the government may compel the disclosure of communications for or against ballot initiatives or referenda. *Id.* at 291-93 (explaining that only the contribution limitations, and not the disclosure requirements, had been challenged).

related context, this goal" of enabling viewers to evaluate the message transmitted "is a far cry from the government interests endorsed in *Buckley*, which were limited to evaluating and preventing corruption of federal candidates." *McConnell*, 540 U.S. at 361-62 (Rehnquist, C.J., dissenting) (reviewing BCRA § 504, which amends federal communications law to require broadcast stations to keep records of requests to purchase airtime for issues of national importance).

Buckley's informational interest—reviewed in the context of candidate campaigns—is not furthered by mandatory disclosure of issue advocacy, even in ballot-initiative or referenda campaigns. What did California's voters learn of the relative merits of gay versus traditional marriage, or of the wording and import of Proposition 8, by knowing that Scott Eckern gave $1,000 to Yes on [Proposition] 8, that Richard Raddon gave $1,500, or even that Alan Stock gave $9,999? *Amicus* suggests the answer is: Nothing. What did those eager to retaliate against the supporters of Prop. 8 learn? Everything they needed to know.

But even if there were reasons supporting mandatory disclosure in ballot-initiative and referenda campaigns, this Court need not decide the question in this case because electoral speech of any kind is not at issue here.

Justice Scalia, dissenting in *McIntyre*, has written that there is no "right" to engage in anonymous electioneering. *McIntyre*, 514 U.S. at 371-385 (Scalia, J., dissenting). To reach this result he addressed three questions: "[w]hether protection of the election process justifies limitations that cannot constitutionally be imposed generally," *id.*, at 378; "[w]hether a 'right to anonymity' is such a prominent value ... that

even protection of the electoral process cannot be purchased at its expense," *id.* at 379; and finally "[w]hether the prohibition of anonymous campaigning is effective in protecting... democratic elections," *id.* at 381. But this case is not about the "right" to speak anonymously in elections; elections are not at issue here.[8]

In contrast with *McIntyre,* this case is about Congress' authority to compel the disclosure of issue advocacy: political speech beyond elections. The answer to this question is implied in Justice Scalia's first question, where he suggests that a measure not substantially related to protecting "the election process ... cannot constitutionally be imposed." *McIntyre,* 514 U.S. at 378 (Scalia, J. dissenting). Thus, even if the Court believes that mandatory disclosure might be appropriate in the context of ballot issues and referenda, it should find in favor of Appellant Citizens United in this case.

Finally, this Court should not hold that advertising protected by the appeal-to-vote test of *WRTL II* is "issue advocacy" as to the source prohibition of § 203, but somehow "electioneering" as to the disclosure provisions of §§ 201 and 311. Such a schizophrenic holding would be a disservice to the citizenry, and would require mandatory disclosure of speech already determined to be unrelated to elections, *see WRTL II, supra,* in contradiction to a long line of

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[8] *Amicus* CCP might relish the opportunity to argue for the right in a future case on the question of disclosure in ballot-initiative or referenda campaigns. *See McIntyre*, 514 U.S. at 371 (1995) (Thomas, J., concurring) ("[W]eight of the historical evidence" indicates that "the Framers understood the First Amendment to protect an author's right to express his thoughts on political candidates or issues in anonymous fashion").

cases including *Talley v. California*, 362 U.S. 60 (1960), and *NAACP v. Alabama*, 357 U.S. 449 (1958).

V. THIS COURT HAS ALREADY INVALIDATED CONGRESSIONAL ATTEMPTS TO COMPEL THE DISCLOSURE OF ISSUE ADVOCACY ON CONSTITUTIONAL GROUNDS

Furthermore, this Court will not write on a blank slate. In *Buckley*, this Court narrowed the statutory definition of "political committee" to avoid *vagueness* and an *impermissible* intrusion into issue discussion. 424 U.S. at 79.[9] But the Court also narrowed the definition of "expenditure" in the Act's disclosure requirements for independent speakers to cure *overbreadth* and thus to prevent an *unconstitutional* intrusion into issue discussion.

> But when the maker of the expenditure is ... an individual other than a candidate or a group other than a political committee[] the *relation of the information sought to the purposes of the Act may be too remote.* To insure that the reach of § 434(e) is *not impermissibly broad,* we construe "expenditure" for purposes of that section ... to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. *This reading is*

[9] The *Buckley* Court in protecting issue advocacy from disclosure was well aware that express advocacy and issue advocacy both have an "effect" on elections, and saw this fact as little reason to curtail issue advocacy. 424 U.S. at 42 ("the distinction between discussion of issues and candidates and advocacy of election or defeat ... may often dissolve in practical application. Candidates ... are intimately tied to public issues[,] campaign on the basis of their positions on ... issues, [and the] campaigns themselves generate issues of public interest").

> *directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.*

Buckley, 424 U.S. at 79-80 (emphasis added). The Court noted that only through narrowing could the provision "bear[] a sufficient relationship to a substantial governmental interest," for § 434(e) would "not reach all partisan discussion" and would "only require[] disclosure of those expenditures that expressly advocate a particular election result." *Id.* at 80 (emphasis added).

Indeed, the *Buckley* Court seemed proud that its narrowing would "increase the fund of information" by "shed[ding] the light of publicity on spending ... that would *not otherwise* be reported because it takes the form of independent expenditures." 424 U.S. at 81 (emphasis added). Chief Justice Roberts, however, has warned of the dangers in a "constitutional 'bait and switch'" when he reviewed the scope of § 203's funding source prohibition. *WRTL II*, 127 S. Ct. at 2673. The potential for "bait and switch" is no less before this Court in its review of the disclosure provisions of § 201. *Buckley* saved the disclosure of independent expenditures from unconstitutionality only by ensuring that disclosure would *not* reach issue advocacy under the government's asserted informational interest. It would be an improper "bait and switch" to now hold that issue advocacy must be disclosed to further the same interest.

VI. CITIZENS UNITED NEED NOT DEMONSTRATE THAT IT WILL BE SUBJECT TO THREATS, HARASSMENT, OR REPRISALS BECAUSE THE DICLOSURE PROVISIONS ARE UNCONSTITUTIONAL AS-APPLIED TO ANY ORGANIZATION ENGAGED IN ISSUE ADVOCACY

If this Court were to uphold mandatory disclosure for issue advocacy, it would require challengers seeking exemptions under *WRTL II* to go forward with evidence that their speech is unrelated to campaigns, and, if successful, to then demonstrate that they would be subject to reprisals for advocating their policy position publicly. Such burdens upon would-be speakers are unworkable given the short time frame issue advocates have to be effective, and unjustified in a system of unfettered information exchange.

But the government believes an as-applied challenge to § 201's disclosure regime can be successful "in a single situation: when an organization's disclosure would result in a 'reasonable probability' of 'threats, harassment, and reprisals' of its members." Fed. Election Comm'n's Summ. J. Mem. (Doc. 55), at 25. But this grudging admission is far too narrow.

In *Brown v. Socialist Workers '74 Campaign Committee,* this Court had to determine whether an otherwise constitutional disclosure requirement, related to elections, could be applied to a political party committee that "historically has been the object of harassment by government officials and private parties." 459 U.S. 87, 88 (1982). The Court affirmed the finding of the district court, following the rationale in *Buckley*. *See generally Brown,* 459 U.S. at 92-102. But §§ 201 and 311 are not otherwise

valid disclosure provisions as-applied to communications beyond the appeal-to-vote test of *WRTL II*. Issue advocacy communications are not related to elections. Therefore, Citizens United need not demonstrate a reasonable probability that it will be subject to threats, harassment, or reprisals by operation of the disclosure provisions. It is enough for Citizens United to demonstrate that the disclosure provisions are unconstitutional as-applied to any organization running political advertising protected by this Court's opinion in *WRTL II*.[10]

Furthermore, there are practical problems with *Brown's* "reasonable probability" inquiry. People such as Gigi Brienza, Scott Eckern, or Richard Raddon did not know at the time they first decided to speak that they would be targeted, nor could they—and it is highly unlikely that any court would have granted their request (or even the request of organizations they donated to) to remain anonymous on the authority of *Brown*. But with the knowledge they could likely be targeted comes questions. Is each donor supposed to march into court and say he or she is likely to face reprisals, or should he wait for the organization to do so on his behalf? If he may proceed on his own, would the proceedings be sealed? Could Gigi Brienza, victim of animal rights activists,

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[10] Some may argue that a "political committee" could be required to disclose its issue advocacy communications. But political committees do not make or report "disbursements for ... electioneering communications" under BCRA. Rather, political committees report all disbursements for communications as "expenditures." The terms "electioneering communication" and "expenditure" are mutually exclusive in BCRA. *See* 2 U.S.C. § 434(f)(3)(B)(ii) (electioneering communication does not include "a communication which constitutes an expenditure or independent expenditure under this Act").

now demonstrate a reasonable probability of threats, harassment, or intimidation? *See Brown*, 459 U.S. 93-94, 98-102. How about the 100 of her colleagues also placed on the "target list"? Can all employees of Bristol-Myers Squibb now make the showing? How about all employees of the pharmaceutical industry?

Have the activities of Accountable America now made it possible for any right-leaning organization to demonstrate a reasonable probability of threats, harassment, and intimidation on behalf of its donors? Surely such a demonstration, if successful, would swallow *Buckley's* rule and undercut disclosure even in candidate elections for whole categories of contributors and donors. This is why such a broad demonstration will never be successful in a district court, and why the purported protection of *Brown* would be no comfort to donors to issue campaigns—and why the threats, harassment, and intimidation from Accountable Americas everywhere would proceed apace, with their targets including donors to issue campaigns.

This Court should resist the temptation to uphold mandatory disclosure for issue advocacy on the belief that *Brown* will provide adequate protection to the chilled donor.

VII. THE ENFORCEMENT OF OTHER PROVISIONS CAN BE ADDRESSED BY EXISTING MEANS MORE NARROWLY TAILORED THAN MANDATORY PUBLIC DISCLOSURE

The danger in disclosure is rarely in the public knowing the name of the organization, and, therefore, not in having advocates place a disclaimer on their advertising. Organizations and their positions on

issues are usually known. Anyone can visit the website of Citizens United and see that it is a conservative organization. Few in the South in the 1950s did not know of the NAACP and its positions on civil rights. It is widely known and readily ascertainable that the Mormon Church supports a traditional definition of marriage. Thus, mandatory disclosure of donors is an intrusion on First Amendment rights of far greater magnitude than a simple requirement that an organization's name appear on its ads.

Additionally, the government may have added reasons to wish to know the identity of the organization that is speaking, including the need to establish jurisdiction and serve process in the event of a libel or other claim resulting from the speech. These interests, however, do not require the compelled disclosure of donors (or details on the inner workings and funding of the organizations), potentially subjecting those donors to official and unofficial harassment and abuse. One reason why people join an organization, in addition to amplifying their collective voices, is to have the organization serve as a mediating shield between them and the public. Although it is true that organizations such as the NAACP or the Mormon Church might face vandalism or retaliation for their political speech, they are better equipped to anticipate and deal with it than are the individual members who make up those organizations.

This is not to say that § 311 is constitutional as-applied to issue advocacy. The government's interest in knowing the identity of the organization that is speaking is a matter of federal communications law, not election law. And this Court should in no way

signal, by upholding § 311 as-applied, that ads beyond the appeal-to-vote test remain within the jurisdiction of federal election law. The ads captured by § 311 would always be conveyed via broadcast, cable, or satellite. *See* 2 U.S.C. § 434(f)(3) (definition of electioneering communication). Federal communications law already requires all broadcast "licensees to maintain, and make available for public inspection ... record[s] of ... request[s] to purchase broadcast time" for any communication that "communicates a message relating to any political matter of national importance." 47 U.S.C. § 315(e)(1)(B)(i)-(iii) (upheld against facial challenge in *McConnell*, 540 U.S. at 238). The political-file requirement extends to any communication reached by BCRA's definition of "electioneering communication" because it captures communications run over cable, satellite, or airwaves on any "[c]andidate," let alone any "issue[s] of public importance." *Id.*

The political-file requirements provide plenty of information for a press and public looking to write, sue, or complain.[11] *See* 47 U.S.C. §§ 315(e)(2)(C)

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[11] There was the suggestion by the government and its *amici* in *McConnell* that the improbable names selected by citizens making "electioneering communications" rendered disclaimers inadequate and justified a full, public disclosure of donors so that the public may know who these groups really are. 540 U.S. at 128-29. The most famous example was the group Republicans for Clean Air, about which the press found in a matter of hours or days—and without benefit of today's political-file requirements of communications law—was sponsored by Sam and Charles Wyly. *Id.* at 128, n.23 (citing McConnell, 251 F. Supp. 2d at 232-33). *Amicus* notes that "Sam [Wyly] founded Green Mountain Energy in 1997," *see* <http://www.charlesandsamwyly.com/business-environment.htm>, "America's largest retailer of cleaner energy to residential and commercial

(must provide date and time communication airs); 315(e)(2)(E) (name of candidate or issue to which communication refers); 315(e)(2)(G) (name of person requesting time, and detailed information on the contact person for such organization, as well as a listing of its executive officers, executive members, or board of directors). The requirements even let the FEC know whom to subpoena.

The ability for any person to file a complaint is preserved by the press's and public's ability to know the makers of electioneering communications, both through the political file requirements of communications law and a disclaimer system more limited than those applicable to federal candidate elections in § 311.

Because the "Wait," "Pants," and "Questions" ads are not substantially related to elections, the disclaimer requirements in § 311 should be invalidated as-applied. Doing otherwise would signal, improperly, that those issue ads are related to elections, and would further no interest not easily met by more narrowly tailored means, such as minimal disclaimers under federal communications law.

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customers," *id.*, making it fair to call him, then as he is now, a Republican for clean air.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08—205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE CENTER FOR POLITICAL ACCOUNTABILITY AND THE CAROL AND LAWRENCE ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. PUBLIC DISCLOSURE IS ESSENTIAL TO AN EFFECTIVE CORPORATE COMPLIANCE PROGRAM 5

A. Federal Law Prohibits Direct Corporate Spending in Connection with a Federal Election 6

B. Distinguishing Prohibited Corporate Election Activity from Protected Speech Requires Care 8

C. To Assure Compliance, a Corporation Must be Aware of Electioneering Communications Paid in Whole or in Part with Corporate Funds 11

II. IN ADDITION TO COMPLIANCE WITH FEDERAL LAW, PUBLIC DISCLOSURE SERVES OTHER IMPORTANT GOVERNMENTAL INTERESTS 14

A. Disclosure Provides the Public with Valuable Information to Assess Corporate Political Involvement 16

B. Disclosure Discourages Use of Corporate Funds for Political Causes Not Approved by Shareholders 21

C. Disclosure Enables Shareholders and Directors to Oversee a Company's Political Involvement 22

CONCLUSION 25

TABLE OF AUTHORITIES

Cases **Page(s)**

Alaska Right to Life Comm. v. Miles, 441 F.3d 773 (9th Cir. 2006) 15

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) ..... passim

Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) 15, 19

Buckley v. Valeo, 424 U.S. 1 (1976) ..... passim

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981) 15, 20

Citizens United v. Federal Election Comm'n, 530 F. Supp. 2d 274 (D.D.C. 2008) 19

Federal Election Comm'n v. Beaumont, 539 U.S. 146 (2003) 3, 6, 14, 22

Federal Election Comm'n v. Citizens Club for Growth, Inc., No. CV 05-1851 (RMU) (D.D.C. filed Sept. 19, 2005) 4

Federal Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) ..... passim

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Federal Election Comm'n v. Wisconsin Right To Life, Inc., 127 S. Ct. 2652 (2007) ..... passim

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McConnell v. Federal Election Comm'n, 251 F. Supp. 2d 176 (D.D.C. 2003) 18, 20

N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2008) 15

NAACP v. Alabama, 357 U.S. 449 (1958) 18

R.I. Affiliate, Am. Civil Liberties Union, Inc. v. Begin, 431 F. Supp. 2d 227 (D.R.I. 2006) 16

Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n, 166 P.3d 1174 (Wa. 2007) 20

Statutes and Regulations **Page(s)**

Bipartisan Campaign Reform Act
§ 201 ..... 2, 3
§ 201(a) 3
§ 203 2

11 C.F.R. § 100.57 4

Statutes and Regulations (cont'd) **Page(s)**

11 C.F.R. § 100.57(a) 9

11 C.F.R. § 109.21 ..... 4, 8

11 C.F.R. § 109.21(a)-(c) 8

11 C.F.R. § 114.1(a)(1) 7, 9

11 C.F.R. § 114.2(b)(3) 7

11 C.F.R. § 114.15 ..... 8, 10

72 Fed. Reg. 72,899 ..... 8, 9

2 U.S.C. § 431(8)(A)(i)-(ii) 7, 9

2 U.S.C, § 431(9)(A)(i)-(ii) 7

2 U.S.C. § 434(f)(3)(A)(i) 7

2 U.S.C. § 437(d) 6

2 U.S.C. § 437g(a)(6) 10

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William S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (2008) 4

STATEMENT OF INTEREST

The Center for Political Accountability ("CPA") and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania ("The Zicklin Center") submit this brief as *amici curiae* in support of the Appellee.[1]

CPA is a non-profit, non-partisan organization dedicated to ensuring transparency and accountability of corporate political spending for the benefit of shareholders, the public, and the political process. CPA seeks to create a business environment that promotes ethical behavior. Critical to its success are laws and regulations that foster rather than impede ethical decision-making. Since CPA was founded in 2003, it has worked with shareholders and companies to enable companies to pursue their political interests openly and responsibly. Drawing from the published practices of leading companies, CPA developed a model code for corporate political activity. Major corporations, including Intel, Merck, and Dell, subsequently modeled their codes on CPA's.

CPA also promotes corporate disclosure and oversight of company political spending. As a result of its efforts, more than fifty leading public companies, including forty S&P 100 companies, have

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[1] CPA and The Zicklin Center submit this brief pursuant to the written consent of the parties. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than CPA and The Zicklin Center has made a financial contribution to its preparation or submission.

made political disclosure and oversight an essential element of their political programs.

The Zicklin Center, established in 1997, sponsors and disseminates leading research on business ethics and corporate social responsibility. It provides students, educators, business leaders, and policymakers with tools to meet the ethical challenges that arise in complex business transactions. The Zicklin Center supports research that examines organizational incentives and disincentives to ethical business practices.

CPA and The Zicklin Center strongly support the electioneering communication ("EC") disclosure requirements embodied in § 201 of the Bipartisan Campaign Reform Act ("BCRA"). These requirements promote corporate best practices with respect to funding political activity and enable voters and shareholders to make informed political and investment decisions.

SUMMARY OF ARGUMENT

This Court held in *Federal Election Commission v. Wisconsin Right To Life, Inc.* ("*WRTL*") that § 203 of BCRA unconstitutionally restricted a nonprofit corporation's right to broadcast issue-oriented ECs before federal elections. 127 S. Ct. 2652, 2673 (2007). Appellant Citizens United seizes upon *WRTL* in an attempt to dismantle various BCRA provisions, including its disclosure requirements. These requirements are necessary to enforce the substantive provisions of campaign finance law. By eliminating them, Citizens United would achieve indirectly what it cannot achieve directly: cutting all restraints on corporate influence of elections.

Nothing in *WRTL* suggests that this Court intended to undo more than a century of legislative efforts to check the danger of corruption from corporate campaign spending. *See Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 152-53 (2003) (discussing the 1907 Tillman Act and other campaign finance laws). Citizens United overreaches in its use of *WRTL* and this Court should uphold the challenged BCRA provisions.

CPA and The Zicklin Center agree with the Federal Election Commission ("FEC") that *Hillary: The Movie* is "the functional equivalent of express advocacy" and should not receive financial support from corporations. Appellee Br. at 10. Regardless of whether the movie is determined to be express or issue advocacy, the fact that it mentioned a clearly identified candidate for public office within the specified time periods renders it an EC under BCRA § 201(a). As such, corporate spending on broadcasts promoting the movie is still subject to the disclosure requirements. These requirements serve important governmental interests and are constitutional as applied to Citizens United.

BCRA § 201 is indispensable to corporate compliance with campaign finance law and sound corporate governance practices. The Federal Election Campaign Act ("FECA") generally prohibits corporate political contributions and expenditures, 2 U.S.C. § 441b(a), a fact unchanged by *WRTL*. Thus, a corporation can easily cross the line into prohibited election activity even by funding an ostensibly issue-driven EC. For example:

- a corporation or the recipient of corporate funding may coordinate its spending with a

candidate, making the EC illegal, *see Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976); 11 C.F.R. § 109.21;

- the solicitation of corporate funding may violate federal law, *see Federal Election Comm'n v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995); 11 C.F.R. § 100.57; and
- a corporation may finance an EC that the courts or the FEC later determine to expressly advocate the election or defeat of a candidate. *See, e.g., Federal Election Comm'n v. Citizens Club for Growth, Inc.*, No. CV 05-1851 (RMU) (D.D.C. filed Sept. 19, 2005); General Counsel's Report #2, FEC MUR # 5365 (Club for Growth, Inc.) (July 5, 2005).

Consequently, corporations must carefully adhere to the line separating protected speech from prohibited election activity. Many corporations have implemented internal compliance programs, but their success depends on support from a system of public disclosure and reporting. *See* William S. Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (2008). Compliance with federal law requires that a corporation's officers, directors, and shareholders be able to track the flow of company funds to ECs. To foster compliance, organizations that solicit or accept corporate support for ECs must be obligated to disclose their contributors, just as corporations must disclose their direct payments for ECs.

Equally important is the role of disclosure in educating the public and promoting good corporate governance. This Court has long recognized the importance of disclosure in deterring corruption, informing the public, and facilitating enforcement of campaign finance laws. Corporations also derive value from disclosure because it strengthens a corporation's ability to monitor the use of its funds and supervise employees and agents for compliance with its internal policies. This enables accountability to shareholders and directors for political spending that may diverge from a company's values, damage its reputation, or expose it to civil and criminal penalties. In short, disclosure brings transparency to corporate political activity that would otherwise remain shielded from view, to the detriment of the voting public, shareholders, and corporations themselves.

ARGUMENT

I. Public Disclosure is Essential to an Effective Corporate Compliance Program

Corporations confront an ever-changing landscape of campaign finance law that requires diligent, sustained compliance efforts.[2] For example, this Court recently clarified that corporations may fund issue advertisements within a certain time period before a federal election, where such

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[2] *See generally* Center for Political Accountability, *Open Windows: How Codes of Conduct Regulate Corporate Political Spending and a Model Code to Protect Company Interests and Shareholder Value*, 2007.

advertisements were previously thought to be strictly prohibited. *WRTL*, 127 S. Ct. at 2667.

Appellant paints a deceptively simple post-*WRTL* world in which a corporation's rights displace all of its prior obligations under the federal campaign finance laws. In Appellant's view, the fact that some corporate-funded issue advertisements cannot constitutionally be *proscribed* means they cannot be regulated at all. *See* Appellant Br. at 12.

In reality, corporations continue to encounter legal pitfalls in the form of complex, interrelated rules on contributions and expenditures, coordination and solicitation of funds, and the content of ECs. Violations result in economic and reputational harms that most companies can ill afford and may even trigger criminal prosecution of officers or directors. *See generally* 2 U.S.C. § 437(d). Disclosure requirements remind corporations of their legal obligations when they engage with the public on political issues, and enable them to develop and sustain the compliance programs necessary to safely navigate the terrain of campaign finance law.

A. Federal Law Prohibits Direct Corporate Spending in Connection with a Federal Election

Congress' ban on corporate treasury contributions to campaigns has been in place for over a century and, as this Court has long recognized, is justified by the public's interest in preventing corruption or the appearance of corruption. *See Beaumont*, 539 U.S. at 154; *accord McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203 (2003); *Buckley*, 424 U.S. at 66-68. To that end, FECA prohibits corporations from using

their general treasury funds to make "a contribution or expenditure in connection with any election to any political office, or in connection with any primary election . . . or any officer or any director of any corporation . . . to consent to any contribution or expenditure by the corporation . . . prohibited by this section." 2 U.S.C. § 441b(a).[3]

The concept of ECs was introduced to the campaign finance world with BCRA's enactment. In the context of a presidential election, BCRA defines an EC as a "broadcast, cable, or satellite communication" that refers to a clearly identified candidate and is made within sixty days before a general election or thirty days before a primary election or party nominating convention. 2 U.S.C. § 434(f)(3)(A)(i). BCRA prohibits corporations from using their treasuries to fund ECs. 2 U.S.C. § 441b(b)(2); 11 C.F.R. § 114.2(b)(3).

WRTL invalidated the corporate funding restriction as applied to certain issue ads and clarified that companies may fund ECs with general treasury funds unless the communication is the functional equivalent of express advocacy. 127 S. Ct. at 2667. Thus, an EC can be either a permissible issue-oriented ad or an impermissible campaign ad. After *WRTL*, an EC that "is susceptible of [any] reasonable interpretation other than as an appeal to vote for or against a specific candidate" is treated as issue advocacy. 127 S. Ct. at 2667.

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[3] A contribution or expenditure, broadly speaking, is "anything of value made by any person for the purpose of influencing any election for Federal office." *See* 2 U.S.C. §§ 431(8)(A)(i)-(ii) (defining "contribution"), 431(9)(A)(i)-(ii) (defining "expenditure"); 11 C.F.R. § 114.1(a)(1).

B. Distinguishing Prohibited Corporate Election Activity from Protected Speech Requires Care

Corporations walk a fine line between protected speech and prohibited political activity. To fully comply with federal law, corporations must insure that all of their officers, directors, and agents know the difference and conduct themselves accordingly.

This is no simple matter for a major corporation with tens of thousands of employees and a complex organizational structure including multiple subsidiaries, operating units, and affiliates. The safe harbor provisions of 11 C.F.R. § 114.15, which codified *WRTL*, do not otherwise alter the restrictions on corporate funding of ECs. *See generally*, *Electioneering Communications*, 72 Fed. Reg. 72,899 (Dec. 26, 2007). The company must still consider multiple variables, namely: whether it has coordinated its ECs, directly or indirectly, with a party or candidate; how the funds are solicited for ECs; and whether the content of its ECs amounts to express advocacy or its functional equivalent.

First, although corporations may fund issue-oriented ECs, in doing so they may not coordinate this activity with a candidate or a political party. *See* 11 C.F.R. § 109.21(a)-(c); *see also Buckley*, 424 U.S. at 42, 46-47 ("[C]ontrolled or coordinated expenditures are treated as contributions . . . under the Act."). Coordination terminates the EC's status as a permissible use of corporate funds and converts it to an illegal contribution. *See* 11 C.F.R. § 109.21.

> Thus, an EC that may be paid for with corporation or labor organization funds

> under the new exemption in section 114.15 may nevertheless be a prohibited corporate or labor organization in-kind contribution to a candidate or political party if that EC is coordinated with a candidate or party under the coordinated communications rules.

Electioneering Communications, 72 Fed. Reg. 72,899, at *72,901 (Dec. 26, 2007).

Second, if a person or entity gives funds in response to a solicitation that "indicates that *any portion* of the funds received will be used to support or oppose the election of a clearly identified Federal candidate," that person or entity has made a "contribution." 11 C.F.R. § 100.57(a) (emphasis added); *see also* 2 U.S.C. § 431(8)(A)(i)-(ii); *Survival Educ. Fund*, 65 F.3d at 295; 11 C.F.R. § 114.1(a)(1). For example, a 501(c)(6) trade association or a 501(c)(4) social welfare organization requests donations for an issue advertisement and explains that the ad's purpose is to generate opposition to a specific candidate. A corporation that funds an EC in response to such a solicitation violates FECA's prohibition against corporate contributions to influence elections. *See* 2 U.S.C. § 441b(b)(2). This is an independent restriction on corporate contributions that does not depend on the ultimate content of the EC in question. The violation occurs at the time of the contribution, even if the EC ultimately produced what might reasonably be interpreted as something other than a call to vote for

or against a particular candidate.[4] *See WRTL*, 127 S. Ct. at 2667.

Third, the content of an EC may trigger a violation. Corporations can no longer rely on *Buckley*'s "magic words"[5] to determine when a political message veers toward express advocacy. *See WRTL*, 127 S. Ct. at 2667; *McConnell*, 540 U.S. at 193; 11 C.F.R. § 114.15. The line separating permissible issue advocacy and impermissible express advocacy is thus imprecise, and a message skirting that line risks significant legal and economic repercussions for the funding corporation.[6]

In most cases, a corporation will not know the EC's ultimate content at the time of its contribution. The organization producing the EC may promise not to use the funds in a manner that violates the EC content rules, but this is precious little assurance given the potential costs of a violation.

A corporation exposes itself to each of these risks each time it authorizes spending for political activity. Minimizing that exposure requires that the corporation exercise control over the issuance of political funds and the ultimate use of those funds.

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[4] It should be noted that corporations are barred from contributing to partisan voter registration, absentee ballot, and get-out-the-vote campaigns even if there is no express advocacy in the speech that accompanies the campaign.

[5] *Buckley*, 424 U.S. at 44 n.52 (restricting definition of express advocacy to use of words such as "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

[6] *See* 2 U.S.C. § 437g(a)(6) & (d) (providing for civil and criminal penalties for violating federal campaign finance laws).

Absent disclosure requirements, however, a large corporation cannot establish the necessary control to carry out an effective compliance program.

C. To Assure Compliance, a Corporation Must be Aware of Electioneering Communications Paid in Whole or in Part with Corporate Funds

Large corporations often struggle to comply with campaign finance laws because of a basic problem: they do not know where their donations end up. A recent example well illustrates this point.

> In the money-laundering investigation of former House Majority Leader Tom DeLay, for instance, eight corporations were indicted for making donations to a Texas political group associated with Mr. DeLay. In Texas, donations by companies to political candidates are illegal; the firms say they weren't aware that their contributions might be directed to candidates.

Jeanne Cummings, *Investors Seek Clarity on Campaign Giving: Pressure Grows on Corporations to Improve How They Disclose and Track Political Donations*, WALL STREET JOURNAL, April 5, 2006, at A4.

Corporations regularly pass through funding to other entities – sometimes unwittingly, sometimes intentionally – that make the actual ECs for which the corporation is ultimately responsible. In some cases, corporations donate funds to trade associations or other organizations that spend on candidates or causes that directly conflict with

company policies. Cummings, *supra*. Absent disclosure, corporations have inadequate means to monitor how these funds are spent. Recently, Merck and other companies faced backlash for donating to a state judicial candidate who made racially charged remarks to an all-white audience, contradicting the ethos the company espouses in its employee diversity training. Bruce F. Freed & Karl J. Sandstrom, *Political Money: The Need for Director Oversight*, THE CONFERENCE BOARD, EXECUTIVE ACTION SERIES NO. 263, April 2008. Public disclosure reinforces compliance by alerting the company to the spending and forces the company to accept responsibility for how the money is used.

"Corporations have long been able to make their voices heard – and their identities concealed – on Capitol Hill by having their trade associations take the lead, and these groups often closely guard donor lists and finances." Cummings, *supra*. This Court addressed this issue in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), which upheld Michigan's restriction on corporations funding independent expenditures with general treasury funds. The Michigan Chamber of Commerce ("Michigan Chamber") argued that the prohibition should not apply because of its non-profit status, citing *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). *Austin*, 494 U.S. at 661. This Court rejected the Michigan Chamber's argument, holding that corporations otherwise prohibited from making direct general treasury contributions could contribute to campaigns indirectly through the Michigan Chamber. *Id.* at 664. Without the restriction, the Michigan Chamber could "serve as a

conduit for corporate political spending." *Id.* This Court concluded that restricting the Michigan Chamber itself from making contributions out of its general treasury funds served the compelling state interest of preventing corruption or the appearance of corruption, and did not offend the First Amendment. *Id.* at 658-59, 664-65.

Appellant argues that political spending by corporations is no different than such spending by individuals, commenting that, "[t]he for-profit corporations, at least, must respond to their shareholders through their boards of directors." Appellant Br. at 31. This is misleading on two accounts. First, for the reasons addressed above, there is greater risk of illegality with political spending by a corporation. Second, shareholders can exercise their important oversight function only if they are aware of the corporation's political activities. Eliminating disclosure requirements is tantamount to asking shareholders to conduct oversight while blindfolded.

Shareholders play a critical role in the success of compliance programs by providing an independent check on officers and directors. More than fifty leading public companies have voluntarily made political disclosure and oversight a key element of their political programs. *See* Center for Political Accountability, *Political Disclosure Tops 50 Companies*, May 28, 2008. Many of these corporations adopted these rules in response to shareholder resolutions. Aaron Bernstein, *When Political Giving Doesn't Pay: Investor Groups Want Greater Board Oversight & Disclosure of the Political Contribution Process*, DIRECTORSHIP, June 1, 2008.

Mandatory disclosure empowers corporate officers, directors and shareholders to make these programs viable and exerts market pressure for other corporations to follow suit.

II. In Addition to Compliance with Federal Law, Public Disclosure Serves Other Important Governmental Interests

Disclosure is not only the law, it is necessary for the law to be effective. More than three decades of this Court's jurisprudence firmly establish the importance of mandatory disclosure:

> [T]he important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full to BCRA. Accordingly, *Buckley* amply supports application of FECA § 304's disclosure requirements to the entire range of "electioneering communications."

McConnell, 540 U.S. at 196 (footnote omitted). In addition, this Court has recognized that disclosure helps secure the rights of shareholders and promote corporate governance standards that respect those rights. *See Beaumont*, 539 U.S. at 153; *Austin*, 494 U.S. at 673 (Brennan, J., concurring).

Appellant strains the meaning of *WRTL* in an attempt to erase what this Court has already said

about disclosure in *McConnell*. If *WRTL* narrowed the range of ECs subject to spending restrictions, the logic goes, so too must it have narrowed the range of ECs subject to disclosure requirements. In this revisionist view, disclosure requirements are *derivative of* the contribution restrictions and therefore do not apply to unrestricted spending. *See* Appellant Br. at 12, 42, 48-49. With this sleight of hand, Appellant attempts to make the government's interests in disclosure disappear. *See id.* at 42.[7]

Appellant cannot, however, erase the extensive body of law rejecting its view. In case after case, this Court has upheld disclosure requirements even while rejecting spending restrictions and even when candidate funding was not at issue. *See MCFL*, 479 U.S. at 262 (noting benefits of disclosure even when underlying expenditure restrictions were unconstitutional); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 298-99 (1981) (upholding

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[7] On this basis, Appellant implores this Court to apply strict scrutiny to all the regulations at issue. *See* Appellant Br. at 12, 42, 48. This Court and lower courts have repeatedly held that disclosure requirements are subject to "exacting," or intermediate, scrutiny. *See, e.g., McConnell*, 540 U.S. at 196; *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (noting that *Buckley v. Valeo* upheld FECA's recordkeeping, reporting and disclosure provisions as substantially related to important government interests); *Buckley*, 424 U.S. at 64, 66; *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427, 439 (4th Cir. 2008) (citing *Buckley v. Valeo* and *McConnell* in rejecting argument that strict scrutiny should apply to state election disclosure requirements); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 788 (9th Cir. 2006) (describing standard applied in *McConnell*). This issue was undisputed in *WRTL*.

requirement that contributors to ballot initiatives disclose their identities); *Buckley*, 424 U.S. at 44, 80 (striking expenditure limits but upholding disclosure).[8] Simply speaking, disclosure contributes to an informed debate on issues of public importance.

In addition, disclosure requirements facilitate enforcement of much more than contribution limits with respect to corporations. Gathering data on corporate political spending facilitates enforcement against all the categories of potential violations described above, including the restrictions on coordination, solicitation, and the content of ECs.

Thus, even assuming Appellant is correct that *Hillary: The Movie* is not the functional equivalent of express advocacy and not subject to BCRA's funding restrictions, the disclosure requirements remain constitutionally valid in this case because they support important governmental interests.

A. Disclosure Provides the Public with Valuable Information to Assess Corporate Political Involvement

Disclosure requirements inform members of the voting public about the economic interests behind certain political messages so that they can assess those messages in that light. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the

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[8] *See also R.I. Affiliate, Am. Civil Liberties Union, Inc. v. Begin*, 431 F. Supp. 2d 227, 236, 238 (D.R.I. 2006) (citing *MCFL* and *Berkeley* as holding funding restrictions unnecessary in light of disclosure requirements).

people will be able to evaluate the arguments to which they are being subjected."); *accord McConnell*, 540 U.S. at 231 (Rehnquist, C.J.) (holding that disclosure "bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing") (citation omitted); *id.* at 321 (Kennedy, J., concurring) (finding § 201's disclosure requirements substantially related to the public's informational interest).

Further, such exposure tends to discourage corporate misconduct with respect to political spending. "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election." *Buckley*, 424 U.S. at 67. The *Buckley* court said the disclosure mandates reflect the wisdom of Justice Louis Brandeis, who observed that, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Id.* (citation omitted).[9]

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[9] Disclosure requirements also facilitate enforcement of campaign finance restrictions after the fact. *See McConnell*, 540 U.S. at 195 (disclosure serves the government's interest in "gathering the data necessary to enforce more substantive electioneering restrictions"); *MCFL*, 479 U.S. at 262 (rejecting independent expenditure restrictions on certain non-profit organizations partly because "reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity"); *Buckley*, 424 U.S. at 67-68 ("Disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations.").

Citizens United and the United States Chamber of Commerce ("Chamber"), writing as *Amicus Curiae*, contend that disclosure rules are "content-based restrictions on political speech" (Appellant Br. at 43, 53) that "force" corporations "into silence" (Ch. of Comm. Br. at 6-8). The Chamber laments that it could have spent much more than the $15.7 million it spent on ECs in 2008 if its corporate members were able to spend anonymously, without exposing themselves to "risk." *Id.* at 6, 12.[10] The risk the Chamber fears is not the "threat of physical coercion, and other manifestations of public hostility," such as that faced by members of the NAACP in the 1950s American South. *See NAACP v. Alabama*, 357 U.S. 449, 451, 462-63 (1958). Nor is it the "reasonable probability" of "threats, harassment, or reprisals from either Government officials or private parties" faced by members of minor political parties. *See McConnell*, 540 U.S. at 197-99, 201 (except in rare cases, "[FECA's] disclosure requirements are constitutional because they 'd[o] not prevent anyone from speaking'") (quoting *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003)). The "risk," quite plainly, is that consumers and shareholders may hold corporations accountable for the political views they espouse. *See* Ch. of Comm. Br. at 13 n.8.

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[10] Biannual EC reports filed with the FEC show total corporate EC expenditures of $119.5 million in 2008. The Chamber was the largest spender with $24.3 million, including $8.6 million for a Chamber sub-entity called "Americans for Job Security." These figures were compiled by the FEC at the request of the CPA and The Zicklin Center.

That corporations have a First Amendment right to express those views does not diminish the public need for information about them. That an EC might reasonably be interpreted as something other than a call to vote for or against a particular candidate under *WRTL* does not mean the EC does not have the purpose or effect of influencing the electoral process. *See WRTL*, 127 S. Ct. at 2667. Coincidence cannot explain Citizens United's eagerness to run its ads promoting *Hillary: The Movie* just before the Democratic primary.[11] The Chamber pointedly notes its desire to spend more on corporate-supported ECs prior to elections because "both candidates and the American public are most receptive and attuned to such communications during pre-election periods." Ch. of Comm. Br. at 6. The public should not be denied the benefit of knowing who paid for an EC that is clearly intended to shape its opinion of a candidate immediately prior to an election.

This Court has repeatedly sustained disclosure requirements against First Amendment challenges in the context of issue speech, even when speech lacks any reference to a candidate. *See, e.g., Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202-03 (1999) (Colorado requirement that sponsors of ballot initiatives disclose their names and expenditures serves a substantial state interest in checking "domination of the initiative process by affluent special interest groups"); *Citizens Against*

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[11] Indeed, Citizens United believed running its ads before the primary election was so urgent that it sought, and was denied, preliminary injunctive relief. *See Citizens United v. Federal Election Comm'n*, 530 F. Supp. 2d 274 (D.D.C. 2008), *appeal dismissed for lack of jurisdiction*, 128 S. Ct. 1732 (2008).

Rent Control/Coalition for Fair Housing, 454 U.S. at 298-99 (requirement that contributors to ballot initiatives disclose their identities serves to inform voters "whose money supports or opposes a given ballot measure"). *WRTL* did not alter this Court's approval of disclosure requirements.[12]

Appellant asserts a First Amendment interest in airing its issue speech – regardless of the source of funding – but "ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *See McConnell*, 540 U.S. at 197 (quoting *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d at 237). The application of long-standing, constitutionally firm disclosure requirements here imposes no significant or unique burden on Appellant that outweighs the important interests in informing the public, facilitating enforcement, and preventing corruption.

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[12] This Court recently declined review of a case in which the Supreme Court of Washington rejected a First Amendment challenge to Washington's disclosure requirements for political committees. *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 166 P.3d 1174, 1186 (Wash. 2007), *cert. denied*, 128 S. Ct. 2898 (2008). In that case, a corporation paid for a television advertisement criticizing the state's former insurance commissioner, who was running for attorney general. *Id.* at 1177. Like *Hillary: The Movie*, the Voter Education Committee's advertisement focused on the candidate's record in her prior position without mentioning her candidacy for higher office. *Id.* at 1177-78. Nevertheless, the Washington court held that the advertisement was in "opposition to" the candidate because the ad sharply criticized her record as insurance commissioner while she was a candidate for another office. *Id.* at 1185-86.

B. Disclosure Discourages Use of Corporate Funds for Political Causes Not Approved by Shareholders

Mandatory disclosure enables shareholders to monitor the use of corporate funds for political activity and to exercise their right to object to uses of which they disapprove. The government has a significant interest in protecting shareholders' rights because it provides the legal framework that enables corporations to operate and to generate wealth. *See Austin*, 494 U.S. at 660 (upholding Michigan's restriction on corporations' independent expenditures from general treasury funds as justified by "state-conferred corporate structure that facilitates the amassing of large treasuries," which may be used to influence elections).

Justice Brennan's concurring opinion in *Austin* noted that Michigan's law protects dissenting shareholders – in that case, dues-paying members of the Michigan Chamber of Commerce – who object to the funneling of their money to political campaigns. *Id.* at 673 (Brennan, J., concurring).

> While the State may have no constitutional *duty* to protect the objecting Chamber member and corporate shareholder in the absence of state action, the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message. . . . We have long recognized the importance of state corporate law in

> "protect[ing] the shareholders" of corporations chartered within the State.

Id. at 675 (citations omitted); *cf. Beaumont*, 539 U.S. at 163. ("The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure.").

The federal government likewise has a substantial interest in protecting dissenting shareholders of companies engaged in interstate commerce. These corporations collect and use shareholders' funds under the auspices of federal law, and the government has an interest, if not an obligation, to hold them accountable to their shareholders under those same laws.

Disclosure provides shareholders with the information necessary to make informed decisions, without restricting the corporation from engaging in political activity. Shareholders can choose to use this information as they see fit – for example, they may divest, or they may seek change from within. *See Austin*, 494 U.S. at 710 (Kennedy, J., dissenting). Without disclosure requirements, however, shareholders lack the means to make that choice.

C. Disclosure Enables Shareholders and Directors to Oversee a Company's Political Involvement

Just as disclosure requirements provide the electorate with information to assess candidates and issues, so too do they provide information to

corporate shareholders and directors to assess a corporation's internal governance. The government lacks the capacity to monitor the vast majority of corporate political activity, and therefore has an abiding interest in supporting the strong corporate governance that characterizes healthy corporations.

Corporate donations do not always reach the purpose or destination intended by the corporation. "In recent years, some institutional investors have argued that political contributions could come back to haunt companies. . . . [T]hese investors have argued that corporate donations should be disclosed publicly so shareholders can assess any investment risks they may pose." Bernstein, *supra*. Political spending can be especially damaging if it ensnares the corporation in a political scandal. *See* Cummings, *supra* (discussing Tom DeLay).

Further, a large corporation has many employees and agents with different personal and political agendas. In a 2006 survey by Mason-Dixon Polling & Research, nearly three-quarters of shareholder respondents agreed that corporate giving advances the private interests of executives rather than the interests of the company and its shareholders. Cummings, *supra*. Studies show that corporate managers do engage in such "rent-seeking behavior," particularly by spending corporate funds to influence taxation changes that benefit them personally. *See* Sanjay Gupta and Charles W. Swenson, *Rent-Seeking by Agents of the Firm*, 46 JOURNAL OF LAW AND ECONOMICS 253 at 254-56, 266 (April 2001).

The growing concern among shareholders, institutional investors, and the general public over corporate political spending has alerted the attention

of such companies as Freddie Mac, Westar Energy, Sears Roebuck, and PepsiCo. Center for Political Accountability, *Open Windows: How Codes of Conduct Regulate Corporate Political Spending and a Model Code to Protect Company Interests and Shareholder Value*, at 1. "Companies not only have paid record fines, run up hefty legal bills and faced reputational knocks over the past few years because of political expenditures, but prosecutors are now taking a harder look at contributions as possible bribes." *Id.*

More corporations are adopting disclosure rules to address these risks, often in response to pressure from shareholders. Freed & Sandstrom, *supra.* Mandatory public disclosure by both corporations and those who receive corporate funds supports voluntary compliance and enables corporate directors and shareholders to detect potentially troublesome donations.[13] Without disclosure requirements, corporations lose one of the strongest tools for effective internal governance.

Appellant imagines a campaign finance landscape in which corporations, relieved of the suddenly heavy burdens of disclosure, are free to engage in "uninhibited, robust, and wide-open" speech. *See McConnell*, 540 U.S. at 196-97 (citation omitted). The plaintiffs in *McConnell* sought permission for organizations such as "Citizens for Better Medicare," funded by the pharmaceutical industry, to run advertisements without disclosing their funding

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[13] Compliance programs also invite leniency by enforcement agencies in the event that an officer or director is found to have committed a violation. *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2008).

sources. Much like those plaintiffs, Appellant "never satisfactorily answer[s] the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public." *See id.* at 197.

Corporations are coming to understand that members of the public demand greater transparency from companies that receive their investment and consumer dollars. Disclosure requirements cast light on the risks that secret political spending pose to our economy and our democracy, before they can become scandals that further erode the public trust.

CONCLUSION

This Court should affirm the judgment of the United States District Court for the District of Columbia.

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AMICUS CURIAE BRIEF

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No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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BOTH 4 EXCEPT

QUESTION PRESENTED[1]

Whether applying the reporting and disclosure requirements of § 201 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") to speech that was not functionally equivalent to express advocacy violated the First Amendment.

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[1] All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. APPLYING THE DISCLOSURE REQUIRE-MENTS OF BCRA § 201 TO EXEMPT SPEECH SERIOUSLY IMPAIRS CORE FIRST AMEND-MENT RIGHTS.	11
A. Forced Reporting and Disclosure Of Donors Seriously Burdens And Suppresses Corporate Speech.	11
B. Such Disclosure Requirements Also Threaten Complete Destruction Of The First Amendment Rights Of Willing Listeners.	15

Contents

Page

II. THE GOVERNMENT HAS FAILED TO JUSTIFY THESE SERIOUS INFRINGEMENTS OF CORE FIRST AMENDMENT RIGHTS. 19

A. The Applicable Standard Is Strict Scrutiny. 19

B. The Government Has Failed To Justify Application Of BCRA § 201 To Exempt Speech. 20

1. *McConnell*'s Record And Facial Holding Do Not Apply. 22

2. No Enforcement Or Anti-Circumvention Interest Exists. 22

3. No Anti-Corruption Justification Applies. 23

4. *Austin* Does Not Apply And, In Any Event, Should Be Overruled. 24

5. No Compelling Information Need Has Been Shown. 25

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

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494 U.S. 652 (1990) 9, 24, 25

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424 U.S. 1 (1976) ..... *passim*

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519 F.2d 821 (D.C. Cir. 1975),
aff'd in part, rev'd in part, 424 U.S. 1 (1976) .. 20-21

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v. Trucking Unlimited,
404 U.S. 508 (1972) 17

Chamber of Commerce of the United States
v. FEC, 69 F.3d 600 (D.C. Cir. 1995) 2

Chamber of Commerce of the United States
v. Moore, 288 F.3d 187 (5th Cir. 2002) 2

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128 S. Ct. 2759 (2008) 11, 19

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v. Noerr Motor Freight, Inc.,
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Central Committee, 489 U.S. 214 (1989) 18

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	Page
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FEC v. Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981)	15
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)	2, 12
FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007)	*passim*
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	15, 17, 18, 20
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Page

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514 U.S. 334 (1995) 18, 20, 26

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North Carolina Right to Life, Inc. v. Leake,
525 F.3d 274 (2008) 21

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 16

Republican Party v. White,
536 U.S. 765 (2002) 2

Roberts v. United States Jaycees,
468 U.S. 609 (1984) 15

Thomas v. Collins,
323 U.S. 516 (1945) 16, 17

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976) 16

Wisconsin Right to Life, Inc. v. FEC,
546 U.S. 410 (2006) 2

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Page

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Elections Board v. Wis. Manufacturers & Commerce, 597 N.W.2d 721 (Wis. 1999) ... 2

STATUTES AND REGULATIONS

2 U.S.C. § 437a 20

11 C.F.R. § 104.20 12

11 C.F.R. § 104.20(a) 3

Pub. L. No. 107-155, 116 Stat. 81 (2002) 3

72 Fed. Reg. 72899 (Dec. 26, 2007) 4

MISCELLANEOUS

24-Hour Notice of Disbursements/Obligations for Electioneering Communications, available at http://www.fec.gov/info/forms.shtml 3

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Page

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John Lott and Brad Smith, *Donor Disclosure Has Its Downsides*, Wall Street Journal, Dec. 26, 2008, *available at* http://online.wsj.com/article/SB123025779370234773.html 13

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Mark Pitsch, *EPIC Won't Deal with WMC Backers*, Wis. State Journal, June 27, 2008 ... 13-14

Random House, Roget's College Thesaurus (2000) 20

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BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation representing an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors—from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's

underlying membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being. The Chamber is incorporated. For purposes of federal campaign finance regulation, the Chamber and most of its members are classified as corporations.

The Chamber plays a key role in advocating for the interests of its members, including their First Amendment rights. In that role, the Chamber was a party to the *McConnell v. FEC*, 540 U.S. 93 (2003), litigation challenging the facial constitutionality of the electioneering communication ban on corporate political speech that is the subject of the instant as-applied challenge. The Chamber regularly files briefs *amicus curiae* where the business community's right to political speech is at stake. *See, e.g., Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002); *Elections Bd. v. Wis. Mfrs. & Commerce*, 597 N.W.2d 721 (Wis. 1999); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). And the Chamber also has litigated to preserve its own First Amendment rights of speech and association. *See, e.g., Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Chamber of Commerce of the United States v. FEC*, 69 F.3d 600 (D.C. Cir. 1995).

This appeal asks whether donor disclosure requirements may constitutionally be imposed on speech received by television or radio that refers to candidates during pre-election periods but does not advocate the election or defeat of any candidate. On behalf of America's business community, the Chamber actively

engages in such speech. During 2008, the Chamber filed reports with the Federal Election Commission ("FEC") disclosing more spending on such speech than any other entity.[2] The Chamber thus is intimately aware of the burdens such filings impose and is all too familiar with the suppressive effect they have on core First Amendment speech and expressive association.

STATEMENT OF THE CASE

The First Amendment forbids applying the "electioneering communications" provisions of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), to prohibit corporate speech that refers to candidates prior to elections but is not the functional equivalent of "express advocacy." *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"). Construing *WRTL II* very narrowly, the FEC applies BCRA § 201 to such "exempt speech," deeming it unlawful unless the speaker makes various public reports and disclosures.

Section 201 and the accompanying FEC regulations require persons who spend more than $10,000 in the aggregate on electioneering communications in a calendar year to file disclosure reports with the FEC. *See* 11 C.F.R. § 104.20(a). In particular, the reports must

[2] The disclosures are made using FEC Form 9, entitled *24-Hour Notice of Disbursements/Obligations for Electioneering Communications*, which is available on the FEC's website at *http://www.fec.gov/info/forms.shtml*. In addition to disclosing the largest amount of spending on electioneering communications in 2008, the Chamber also made more Form 9 filings than almost any other entity.

disclose each donor of $1,000 or more (aggregated yearly) that either gave in response to a solicitation for the specific purpose of engaging in electioneering communications or earmarked the donation for such a purpose, in whole or in part. *See Electioneering Communications*, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

Appellant Citizens United produced a documentary concerning U.S. Senator and presidential candidate Hillary Clinton. During the summer and fall of 2008, Citizens United sought to distribute its documentary and to broadcast ten and thirty second advertisements concerning the film. Br. of Appellant at 8. Whatever the status of the documentary itself – the parties are briefing that point – the ads clearly were "exempt speech" under *WRTL II*. Nevertheless, because Citizens United was not willing to disclose project donors, it did not broadcast those ads, *see id.* at 10, and persons interested in receiving them were entirely deprived of any opportunity to do so.

The FEC's application of BCRA § 201 to such exempt speech caused injury far beyond Citizens United, including to the Chamber. Business entities are profoundly affected by federal legislation, policy, and executive action on a wide range of issues, from tort reform to taxes, intellectual property to import controls, and employment standards to environmental protection. As a result, businesses are critically interested in the formulation and implementation of federal legislation and policy and in assuring that their knowledge and concerns are fully and effectively communicated to the public, federal legislators, and other government

officials. Because elected public officials are central to the formulation and implementation of public policy, that interest often requires incumbent officeholders and candidates to be identified and discussed in public communications.

These interests do not mysteriously evaporate during the lengthy periods during which BCRA restricts electioneering communications.[3] To the contrary, Members of this Court have recognized the importance of issue ads and similar speech during pre-election

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[3] The period in which BCRA forbids or restrains electioneering communications includes 30 days before each state's relevant presidential nominating primary, convention, or caucus, 30 days before the relevant national party convention, and 60 days before the relevant national presidential election. *See* BCRA § 201(a). The regulation applies to television and radio broadcasts (including cable and satellite transmissions) that can be received by at least 50,000 persons in a relevant jurisdiction. *Id.* Since broadcasts often reach multiple states that conduct nominating events on differing dates, the regulation effectively applies for much of the year prior to a presidential election. For example, many broadcasts in stations serving Boston, Massachusetts, also can be received in Rhode Island, Connecticut, Vermont, New Hampshire, and Maine. *See* Fed. Comm. Comm'n, Electioneering Communications Database (ECD), available at *http://gullfoss2.fcc.gov/ecd/* (results obtained using Boston-area stations WCBV, WHDH, and WBZ). During the 2008 election cycle, the combined presidential blackout period for those states – and hence for Boston broadcasts – encompassed six months. *See* FEC, *Electioneering Communications Periods* (2008), *available at http://www.fec.gov/info/charts_ec_dates_prez.shtml#Presidential.* As recent economic developments demonstrate, a great deal can happen during four to six months.

periods. *WRTL II*, 127 S. Ct. at 2667-68.[4] The Chamber likewise believes that both candidates and the American public are most receptive and attuned to such communications during pre-election periods. Thus, since December 26, 2007,[5] the Chamber spent and reported to the FEC, as required by BCRA § 201, over $15 million on its own exempt electioneering communications.

The Chamber's own general resources are quite limited. The Chamber wanted to seek and accept additional funds for the stated purpose of engaging in exempt speech on specific issues of direct concern to its members. However, many corporations, including many members of the Chamber, were not and are not willing to be publicly disclosed as supporting such speech. To avoid putting its member interests at risk, the Chamber decided as a matter of policy to limit itself to funds that were not solicited or designated for the specific purpose of financing electioneering communications. Thus, it was required to forego substantial exempt speech that could have been funded by specific solicitations that would have required disclosure. Moreover, the Chamber was forced to refrain from communicating with its members about specific plans for core speech since such speech might be deemed a solicitation that would trigger disclosures.

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[4] Unless otherwise noted, all citations herein are to the opinion of Chief Justice Roberts, which is controlling. *See Marks v. United States*, 430 U.S. 188, 192-93 (1977); *Horn v. Thoratec Corp.*, 376 F.3d 163, 175 (3d Cir. 2004).

[5] This is the date on which the FEC's regulations implementing this Court's decision in *WRTL II* went into effect.

Citizens United and the Chamber were not the only speakers whose speech was suppressed in this fashion. The Chamber has reviewed the FEC Form 9 reports of the 30 entities that spent the largest sums on exempt speech during 2008. Virtually no corporate donors were disclosed. Thus, BCRA § 201 suppressed nearly all corporate exempt speech except to the extent organizations like the Chamber could rely on funds raised without informing donors of their intended use.[6] Indeed, at least with respect to exempt speech funded by corporations, BCRA § 201 achieved almost no disclosure of donors, but instead functioned primarily to curtail corporate speech.

SUMMARY OF ARGUMENT

This Court long has recognized that compelled disclosures may substantially suppress speech. It also has made clear that the government bears the heavy burden of justifying each application of a statute that restricts First Amendment rights. Where, as here, a restriction impairs speech relating to core concerns of the First Amendment (i.e., how we are governed and who governs us), and particularly where it does so precisely because of the core content of the speech, this Court traditionally has required the government to meet the stringent demands of strict judicial scrutiny.

In several cases involving disclosure requirements, this Court has used the term "exacting" scrutiny. Particularly where disclosures have been a condition of

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[6] Of course, some reporting groups did not accept corporate contributions at all, although others did.

the right to engage freely in core speech, however, "exacting" scrutiny is indistinguishable from "strict" scrutiny. For example, the government still must prove narrow tailoring and demonstrate a compelling interest.

No matter whether the Court applies "strict scrutiny" or the "strict test" that is exacting scrutiny, *Buckley v. Valeo*, 424 U.S. 1, 64-66 (1976), the First Amendment injury inflicted by applying BCRA § 201 to exempt speech certainly requires extremely stringent review. Experience has shown that many corporations will refrain from core speech if it comes at the price of public disclosure. That has been the experience of the Chamber and other groups, whose core First Amendment speech has been and is substantially curtailed by BCRA's disclosure obligations. In short, BCRA's disclosure requirements suppress substantial exempt speech, just as occurred with respect to Citizens United. And those disclosure requirements threaten an even more Draconian impact on the First Amendment rights of willing listeners. Listeners have no ability to make disclosures such as those demanded of speakers by BCRA. If unacceptable disclosure demands force a speaker into silence, the right of willing listeners to hear is entirely destroyed. Thus, the government must satisfy stringent review in justifying the application of BCRA § 201's disclosure requirements to exempt speech. The government has not and cannot meet its stringent burden here.

- Because exempt speech is not the functional equivalent of express advocacy, *McConnell*'s record and facial ruling do not apply.

- Because exempt speech cannot be banned, there is no enforcement or "anti-circumvention" rationale for requiring disclosure of donors for such speech.

- Because exempt speech is independent of any candidate or campaign, there can be no actual or apparent *quid pro quo* corruption from funding such speech.

- Because exempt speech is not express advocacy or its functional equivalent, the aberrant theory of corporate wealth corruption in *Austin v. Michigan Chamber of Commerce*, 494 US. 652 (1990), does not apply, and *Austin* should be overruled rather than extended.

- Because voters can appropriately discount speech if those supporting it are not disclosed, there is no important need to compel such disclosures.

Indeed, the primary motivation for BCRA § 201's disclosure requirements seems to have been congressional hostility to independent speech, leading to a desire to burden and encumber whatever speech could not be banned outright. *See McConnell*, 540 U.S. at 245-50 (Scalia, J., concurring and dissenting in part). Such an anti-speech governmental purpose is not even constitutionally legitimate, much less a compelling reason to subordinate First Amendment guarantees. Therefore, § 201 violates the First Amendment as applied to exempt electioneering communications.

ARGUMENT

This brief focuses on the application of the disclosure requirements of BCRA § 201 to advertisements that refer to candidates but are not functionally equivalent to express advocacy. Appellant Citizens United specializes in making full length feature films and its brief understandably emphasizes its right to freely broadcast those films. But the issue in this case with the broadest significance is the constitutionality of applying BCRA § 201's disclosure requirements to advertisements that mention candidates. The Chamber and many similar groups rely on such ads, and they are central to efforts to communicate its policy speech to members of the public. At the same time, the constitutionality of demanding donor disclosure from sponsors of such ads is the vital question left open by *WRTL II*.

Citizens United suppressed several such ads. Even though *WRTL II* exempted those ads from the corporate ban, the FEC would have applied BCRA § 201's disclosure requirements, making the ads unlawful unless Citizens United disclosed its donors, which it would not do. In this amicus brief, the Chamber focuses on the status of such exempt ads, showing that application of BCRA § 201 to them violates the First Amendment rights of both speakers and listeners.

I. APPLYING THE DISCLOSURE REQUIREMENTS OF BCRA § 201 TO EXEMPT SPEECH SERIOUSLY IMPAIRS CORE FIRST AMENDMENT RIGHTS.

A. Forced Reporting and Disclosure Of Donors Seriously Burdens And Suppresses Corporate Speech.

This case confirms this Court's long-standing recognition that compelled disclosures may substantially suppress speech. *Buckley*, 424 U.S. at 64 (citing authority); *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008). Nor should that be surprising. At the time Congress adopted § 201's disclosure requirements, it also increased the penalties for failing to comply. *See* BCRA § 312 (increasing penalties for criminal violations). It also made filing false reports punishable as perjury. *See* BCRA § 201(a). Such severe penalties would not have been necessary if these disclosures were thought to be a minimal burden that Congress expected few speakers to resist. Moreover, it is common experience that, where the supporters of exempt speech are not disclosed, opponents can and do exploit the silence as a reason for discounting the speech. The fact that many speakers decline to identify their donors, even though doing so weakens the credibility of their speech, again confirms that required donor disclosure is burdensome and likely to suppress speech.

The Chamber's own experience has made it acutely aware of the reluctance of business corporations to be identified as supporters of issue speech near elections. During 2008, the Chamber was one of the most frequent

filers of FEC Form 9s, and it reported more spending on electioneering communications than any other group.[7] Yet the Chamber's reports did not disclose donors.

The reason no Chamber donors are disclosed is simple. Many of its members have made clear that they are not willing to be identified and will terminate or withhold support if disclosure becomes a risk. If the Chamber had solicited funds for the specific purpose of electioneering communications, or if donors had specified such a use, the FEC would have applied BCRA to require the Chamber to report the donation and the donor. *See* 11 C.F.R. § 104.20. Thus, the Chamber adopted a policy against soliciting or accepting donations for the specific purpose of exempt speech, and it repeatedly declined contributions offered to support specific speech.

The policy forced on the Chamber by BCRA § 201 carried a substantial First Amendment cost, for the American public as well as for the Chamber and its members. The Chamber's general resources are limited. If the Chamber had been able to solicit support for particular exempt speech and to accept donations earmarked for such speech, it could have done considerably more than it did to convey the views of the business community. This is understandable. After all, the

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[7] As Citizens United explains in its brief at 54, citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986), the administrative costs incurred when filing these reports is a burden of constitutional significance. The Chamber had to dedicate staff to draft the Form 9s, subject them to both internal and external legal review, and sign them under penalty of perjury, all within the required 24-hour reporting period. This was a major undertaking for engaging in otherwise exempt speech.

Chamber's members are businesses that are accustomed to knowing how their money is spent and ensuring that it is spent to further their respective enterprises.

The reluctance of corporations to be publicly identified with controversial speech or positions is not an idiosyncrasy of Chamber members. The Chamber examined Form 9 disclosures of the 30 groups reporting the highest levels of spending on electioneering communications during 2008. Those reports are available at *http://www.fec.gov/finance/disclosure/ec_table.shtml.* In some cases, individual donors were disclosed. But none of these reports disclosed any significant number of corporate contributors. In short, as applied to corporate exempt speech, the donor disclosure requirements of BCRA § 201 operate only to suppress the speech, not to obtain disclosures. And no one pretends that the disclosure of individual donors serves a vital role.[8]

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[8] The use of donor information for retaliation purposes is part of the daily news. For example, at http://www.eightmaps.com, the specific names and addresses of donors to the successful referendum to ban gay marriage in California are superimposed on local maps. A former member of the FEC, writing with a University of Maryland professor, discusses resulting retaliation in John Lott and Brad Smith *Donor Disclosure Has Its Downsides*, Wall Street Journal, Dec. 26, 2008, at A13, *available at* http://online.wsj.com/article/SB123025779370234773.html. Recent news reports confirm that business corporations identified as supporting a group taking controversial positions may be penalized. *See, e.g.*, Mark Pitsch, *EPIC Won't Deal with WMC*

(Cont'd)

The disclosure requirements also burdened and suppressed the Chamber's internal communications and interfered with the effective exercise of its right of expressive association. In practice, the Chamber would inform its members that it was raising money for public educational or grassroots lobbying programs, but when asked what those would be or how they would be carried out, the Chamber had to remain silent, at least as to any exempt speech. The Chamber's members were forced to guess and, based on that guess, decide whether to support the programs. Similarly, if a member interested in a campaigning incumbent officeholder's position on a particular policy issue wanted the Chamber to use the member's donation – combined with those of others – to run advertising about the issue, the member was precluded from communicating that to the Chamber. Ironically, even though the speech the Chamber ultimately funded with its members' donations was exempt from BCRA's prohibition pursuant to *WRTL II*, the Chamber and its members were prevented from

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(Cont'd)

Backers, Wis. State Journal, June 27, 2008; Jim Lobe, *ExxonMobil Takes Heat on Global Warming*, Inter Press Service News Agency, July 12, 2005, *available at* http://www.ipsnews.net/print.asp?idnews=29469 (last visited Jan. 15, 2009) (describing boycott of corporation's products for, among other things, "lobbying Congress to open the Artic National Wildlife Refuge (ANWR) to drilling"). Because a cautious corporate executive, of course, has no way of being sure in advance which contribution will produce negative consequences for his company, the safe course is to withhold financial support for expressive activities.

speaking about it to potential supporters. This directly impaired internal speech necessary to the effective exercise of the right to expressive association.[9]

In short, it is clear that the application of BCRA § 201 to require donor disclosure for exempt speech substantially suppresses such speech, causing direct First Amendment injury to would-be speakers and expressive associations.

B. Such Disclosure Requirements Also Threaten Complete Destruction Of The First Amendment Rights Of Willing Listeners.

The First Amendment's protections are not limited to speakers. Meaningful speech involves a process of communication, not just utterance. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978). Thus, the First Amendment "equally" protects the right of willing

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[9] *Buckley* held that compelled disclosure of associational acts was a sufficient burden to trigger exacting scrutiny. 424 U.S. at 64. *Roberts v. United States Jaycees* said that requiring "disclosure of the fact of membership in a group seeking anonymity" or "interfere[nce] with the internal organization or affairs" of an expressive association were examples of burdens that triggered strict scrutiny. 468 U.S. 609, 623 (1984) (collecting authority). Moreover, where litigation discovery is sought concerning such internal associational matters, courts regularly recognize a presumptive First Amendment shield that can be overcome only by a tailored showing of necessity. *See, e.g., FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389-90 (D.C. Cir. 1981); *FEC v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987).

listeners to hear what a speaker has to say. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976) (collecting authority); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (although limited frequency spectrum justifies regulation of broadcast speakers, the constitution requires protection of "the right of the public to receive" speech).

In many circumstances there is no need to analyze listener rights separately, but disclosure requirements affect listeners differently than speakers. A potential speaker can choose between making the required disclosure and standing silent. A listener, by contrast, has no such choice. If the speaker is unwilling to disclose, and so stands silent, the listener's right to hear is entirely defeated. Thus, the First Amendment burden on the listener's First Amendment rights is measured, not by the required disclosure, but by a complete loss of the desired speech. To justify inflicting such a substantial First Amendment injury, the government must prove that it has a sufficiently compelling need for speakers' disclosures to justify destroying listeners' rights to receive desired speech.

This Court long has recognized that disclosure requirements may be unconstitutional because of injury to listeners, even where the speaker's practical burden may be deemed minor. *Thomas v. Collins*, 323 U.S. 516 (1945), involved a Texas statute requiring labor organizers to identify themselves, their position, and their union to the Texas Secretary of State before soliciting workers to join a union. *Id.* at 524. Texas argued that the required disclosures were minimal and did not

significantly burden the speakers. However, the Court's opinion repeatedly mentioned the rights of listeners – e.g., "the rights of the workers to hear," *id.* at 534, and "the right of workmen," *id.* at 539 – in holding that the First Amendment had been violated even if Texas was correct that the speaker's burden was minor. *Id.* at 541-43. Focusing on the silence that would result if a speaker would not disclose, the Court said the "restraint is not small when it is considered what [is] restrained [i.e., speech and association]. . . . Seedlings planted in that soil [of "the most basic rights of all"] grow great and, growing, break down the foundations of liberty." *Id.* at 543. Thus, application of the disclosure requirement to the labor organizers violated the First Amendment. *Id.*

Bellotti confirmed that injury to the right to receive "political" speech violates the First Amendment. There, parties seeking to suppress corporate speech concerning a ballot issue argued that corporations had no protected First Amendment right to speak. 435 U.S. at 775-76. Of course they were mistaken.[10] But the Court ruled that it made no difference whether corporate

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[10] *See WRTL II*, 127 S. Ct. at 2677-78 (Justice Scalia's concurrence collecting authority that corporations have "full First Amendment protection"); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972) (the First Amendment "rights of association and of petition" allow "groups with common interests" – a group of trucking companies – "to advocate their causes and points of view respecting resolution of their business and economic interests"); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961) (construing antitrust laws narrowly to preserve the right of a group of railroads to petition the government).

speakers were protected, since the First Amendment centrally protected the "capacity for informing the public" of the speech. *Id.* at 777. *See also Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (protecting the ability of "voters seeking to inform themselves about the candidates and campaign issues"); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (a listener's right to receive speech does not depend on speaker's right to speak).[11]

Thus, the First Amendment injury inflicted by application of BCRA § 201 reaches far beyond the interests of Citizens United. The core First Amendment right of persons interested in receiving speech about a nationally-prominent Senator and candidate was entirely destroyed.[12]

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[11] These are not cases in which listeners were merely granted standing to assert the rights of speakers. In addition, *Bellotti* suggested in footnote dicta that a disclosure requirement might be more acceptable than the ban at issue there. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 n.32. That comment was dismissed as "dicta" in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 353-54 (1995). Moreover, that footnote dicta did not evaluate the effect on listener rights, where a disclosure requirement often operates as a ban.

[12] To be clear, the Chamber must not be understood to endorse the contents of the Citizens United materials. A listener may wish to receive speech with which the listener expects to disagree.

II. THE GOVERNMENT HAS FAILED TO JUSTIFY THESE SERIOUS INFRINGEMENTS OF CORE FIRST AMENDMENT RIGHTS.

A. The Applicable Standard Is Strict Scrutiny.

This Court long has recognized that compelled disclosures may substantially suppress speech. *Buckley*, 424 U.S. at 64 (collecting authority); *Davis*, 128 S. Ct. at 2774-75. It also has made clear that the government bears the heavy burden of justifying "each application" of a statute that restricts First Amendment rights. *WRTL II*, 127 S. Ct. at 2664. Where, as here, a restriction impairs speech relating to core concerns of the First Amendment (i.e., how we are governed and who governs us), and particularly where it does so precisely because of the core content of the speech, this Court traditionally has required the government to meet the stringent demands of strict judicial scrutiny. *See id.* (collecting authority).

In several cases involving disclosure requirements, this Court has used the words "exacting" scrutiny. *See Buckley*, 474 U.S. at 64; *Davis*, 128 S. Ct. at 2775. However, it has made clear that this is a "strict test." *Buckley*, 474 U.S. at 66; *see also Davis*, 128 S. Ct. at 2775 (noting that the Court has "*closely scrutinized* disclosure requirements") (emphasis added).

At least where disclosures have been a condition of the right to engage freely in core speech, "exacting" scrutiny is indistinguishable from "strict" scrutiny. This is not surprising since "exacting" and "strict" have very

similar meanings.[13] *Bellotti* held that, to satisfy exacting scrutiny, the government was required to prove a compelling interest. 435 U.S. at 795. And *McIntyre v. Ohio Elections Commission* held that, to satisfy exacting scrutiny, the government had to prove narrow tailoring. 514 U.S. 334, 347 (1995).

Thus, lower courts often have held that exacting and strict scrutiny mean the same thing. *McConnell v. FEC*, 251 F. Supp. 2d 176, 358 n.139 (D.D.C. 2003) (opinion of Henderson, J.) ("In no case of which I am aware does the [Supreme] Court hold that exacting scrutiny is any *less* rigorous than strict scrutiny"), *id.* n.140 (noting that courts "apply exacting (i.e., strict) scrutiny to disclosure and reporting requirements"); *Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 51 (D.D.C. 2008) (reviewing Supreme Court authority).

B. The Government Has Failed To Justify Application Of BCRA § 201 To Exempt Speech.

The 1974 version of the Federal Election Campaign Act ("FECA") included former 2 U.S.C. § 437a, a provision requiring disclosure of the donors to any group that spent funds to broadcast to the public any material referring to a candidate for the purpose of affecting an election. *Buckley v. Valeo*, 519 F.2d 821, 869-70 (D.C. Cir. 1975) (*en banc*), aff'd in part, rev'd in part,

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[13] "Exacting" means "unremittingly severe," while "strict" means "stringent in requirement" and "exact." Merriam-Webster's Collegiate Dictionary, 402, 1161 (10th ed. 2001). Moreover, *Random House Roget's College Thesaurus* lists "exacting" as a synonym for "strict." Thesaurus 24 (2000).

424 U.S. 1 (1976). Reading this provision to reach beyond speech directly tied to an election, the en banc court ruled the government had no sufficient justification to burden such vital speech and held it unconstitutional. *Id.* at 872, 878. The government did not even appeal that ruling.

Similarly here, the FEC has applied BCRA § 201 to demand donor disclosures during much of an election year for speech that is not express advocacy or its functional equivalent, so long as it mentions a candidate. It has not and cannot show an adequate justification for thus burdening this speech that, on the one hand, is central to the First Amendment and, on the other hand, has no immediate and unambiguous link to any election. *See North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281 (4th Cir. 2008) (the government's interest in regulating elections does not extend beyond speech unambiguously associated with an election).

Indeed, the exercise of looking for such a justification in this case is highly artificial. The fact is that Congress simply does not like independent speech near elections. Such speech raises issues incumbent candidates would prefer to ignore and can give a boost to challengers contrary to the interests of the incumbents who, of course, enact the laws. *See McConnell*, 540 U.S. at 248-50 (Scalia, J., concurring and dissenting in part). In BCRA, Congress set out to ban as much independent speech as it could, and to minimize the rest by making it as burdensome as possible. The burdens imposed have no other real

purpose – except perhaps satisfying curiosity and identifying political opponents for retaliation.[14]

1. *McConnell*'s Record And Facial Holding Do Not Apply.

The government cannot rely on *McConnell* to meet its burden. The record in *McConnell* was directed toward electioneering communications that were the functional equivalent of express advocacy. 540 U.S. at 206. *McConnell*'s facial holding was similarly limited. *Id.* at 206 n.88.

In upholding the § 201 disclosure requirements, *McConnell* did "not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. This challenge to the application of BCRA § 201 to speech exempt by *WRTL II* is precisely the type envisioned by *McConnell*. And *WRTL II* squarely holds that, if corporate electioneering communications are not functionally equivalent to express advocacy, they cannot be banned. 127 S. Ct. at 2652.

2. No Enforcement Or Anti-Circumvention Interest Exists.

The government cannot establish any anti-circumvention or enforcement justification here. This

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[14] As Justice Scalia noted, "[t]here is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation. . . . Those in power, even giving them the benefit of the greatest good will, are inclined to believe that what is good for them is good for the country." *McConnell v. FEC*, 540 U.S. 93 260 (2003) (Scalia, J., concurring and dissenting in part) (internal citations omitted).

case concerns public speech, so the exempt nature of the speech should be easy to confirm. Where, as here, the speech is not functionally equivalent to express advocacy, it cannot be banned. *Id.* Thus, funding of such speech cannot operate to evade either FECA's ban on corporate express advocacy or BCRA's ban on corporate electioneering communications that are functionally equivalent to express advocacy.

3. No Anti-Corruption Justification Applies.

Citizens United's speech was independent of any candidate or campaign. That is true of exempt speech generally. Coordinated speech is treated as a contribution to a candidate and, as such, is otherwise subject to reporting and limits, including a corporate ban. *See* BCRA § 202 (noting that coordinated communications are treated as candidate contributions).

Such independent speech is not a plausible vehicle for *quid pro quo* corruption. To the contrary, this Court has recognized that independent speech actually may work against candidate interests. *See Buckley*, 424 U.S. at 47 ("independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"). In fact, candidates for federal office have been denouncing and disavowing independent ads for at least the last two decades and continue to do so today for these reasons. *See, e.g.*, Stephen Engelberg, *Bush, His Disavowed Backers and a Very Potent Attack Ad*, N.Y. Times, Nov. 3, 1988; *Coleman Suspending Negative Ads*, Associated Press, October 10, 2008; Pat Minelli, *Negative Television Advertising: Polls Show It Can Have Reverse Effect*, Shakopee Valley News, Oct. 16, 2008.

Nor did Citizen United's speech give rise to a compelling appearance of corruption. Corporations of all kinds engage in public speech of all kinds all the time, and the basic premise of the First Amendment is that such speech is desirable.

4. *Austin* Does Not Apply And, In Any Event, Should Be Overruled.

In *Austin*, the Court adopted the strained position that corporate spending to expressly advocate the election or defeat of a candidate may be deemed inherently "corruptive" in the peculiar sense that some corporations have great resources.[15] One member of the *Austin* majority later changed his view. *See McConnell*, 540 U.S. 286, 323-29 (Kennedy, J., concurring and dissenting in part) (joined by Chief Justice Rehnquist). And *Austin* is in severe tension with other cases protecting corporate speech. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2678-79 (Scalia, J., concurring in part). That tension is particularly acute for corporations like the Chamber that exist for advocacy purposes. Thus,

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[15] Citizens United correctly argues that the aberrant ruling in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) — that independent corporate speech may be "corrupt" — should be overruled. In any event, *Austin* involved express advocacy. *Id.* at 654; *FEC v. Wisconsin Right to Life, Inc v. FEC.*, 127 S. Ct. 2652, 2673 (2007) ("the interest recognized in *Austin* as justifying regulation of corporate campaign speech and extended in *McConnell* to the functional equivalent of such speech *has no application to issue advocacy*") (emphasis added). As noted above, this case concerns speech that is not express advocacy or its functional equivalent.

Citizens United persuasively argues that *Austin* should be overruled.

In any event, *Austin* certainly should not be extended to reach beyond the express advocacy that was at issue there. As already discussed, exempt speech is neither express advocacy nor its functional equivalent. The First Amendment requires that such independent speech be deemed desirable and protected, rather than condemned as corruptive.

This is doubly so since the disclosure requirements of BCRA § 201 are not facially targeted to great wealth in any way. The reporting obligation extends to individual as well as corporate or labor union donors, regardless of their assets. And it simply is not plausible to maintain that the ability to make a $1,000 donation in connection with an exempt electioneering communication is a reliable measure of vast and corrupting wealth. Stringent scrutiny cannot be satisfied on the basis of a rationale that the statute does little to serve. *See FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984).

5. No Compelling Information Need Has Been Shown.

Finally, there is no showing that the public receives a compelling informational benefit from BCRA's disclosure requirements. Although BCRA theoretically could provide more information than otherwise would be available – assuming the public receives the disclosures – it also might provide less information, since would-be speakers who will not disclose stand silent. The

government has made no showing that the net effect of the BCRA disclosure requirements on public information is positive, much less that any net increase is so substantial and important as to justify defeating listeners' core First Amendment rights to receive speech that is suppressed or reduced by burdensome mandatory reporting. In this case, since Citizens United stood silent, the public suffered a loss of communication.

In this regard, it is offensively paternalistic for the government to simply assume that listeners are incapable of properly evaluating public speech in the absence of full disclosure of the speaker's funding sources. In their daily lives, Americans regularly discount speech to adjust for questions about its source. *See generally McIntyre*, 514 U.S. 334. That is doubly so in the area of political speech where speakers with opposing views are not shy in pointing out the absence of donor information.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed and the Court should hold that applying the disclosure requirements of BCRA § 201 to speech that is not functionally equivalent to express advocacy violates the First Amendment.

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AMICUS CURIAE BRIEF

Sup
JA
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No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED, *Appellant*
v.
FEDERAL ELECTION COMMISSION, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Brief of Amicus Curiae Committee for Truth in Politics, Inc. Supporting Appellant

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Table of Contents

Table of Authorities. ..... (ii)

Statement of Interest. 1

Summary of Argument. 2

Argument. 3

I. Campaign-Finance Laws May Only Regulate Unambiguously-Campaign-Related Activity. 3

II. *WRTL II*'s Appeal-to-Vote Test Requires a Clear Plea for Action Urging a Vote. 17

Conclusion. 25

Table of Authorities

Cases

American Civil Liberties Union of Nevada v. Heller, 378 F.3d 979 (9th Cir. 2004). 10

Anderson v. Spear, 356 F.3d 651 (6th Cir. 2004).... 10

Buckley v. Valeo, 424 U.S. 1 (1976). 2-8, 10-11, 13, 15-16, 18, 21

California Pro-Life Council v. Getman, 328 F.3d 1088 (9th Cir. 2003). 22

Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006)..... 10

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987). 20-22

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)..... 9, 18

FEC v. Wisconsin Right to Life, 127 S.Ct. 2652 (2007)..... *passim*

Koerber v. FEC, No. 08-39 (E.D. N.C. Oct. 29, 2008) 1

Marks v. United States, 430 U.S. 188 (1977) 1

McConnell v. FEC, 540 U.S. 93 (2003).... 9-11, 14-15, 20, 22

North Carolina Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008) 5, 13

Constitution, Statutes, Regulations & Rules

2 U.S.C. § 431(17) 9

2 U.S.C. § 434(f)(3) 15

Bipartisan Campaign Reform Act 1, 5

Federal Election Campaign Act 5

U.S. Const. amend. I 3

U.S. Const. art. I, § 4 4

Other Authorities

The American Heritage Dictionary of the English Language (4th ed. 2000) 18

James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353 (2007) 16

Statement of Interest[1]

The Committee for Truth in Politics, Inc. ("CTP") is a nonstock, nonprofit North Carolina corporation that advocates for limited government and honesty in government. Before the 2008 general election, it broadcast an electioneering communication about then-candidate Barack Obama's record on abortion. It was protected from the Prohibition[2] under *WRTL II*'s "appeal to vote" test, *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2667, 2670 (2007).[3] CTP complied with the Disclaimer Requirement but did not comply with the Reporting Requirement and challenged the Disclosure Requirements as applied to electioneering communications protected by *WRTL II*'s appeal-to-vote test. The district court denied a preliminary injunction. *See Koerber v. FEC*, No. 08-39 (E.D. N.C. Oct. 29, 2008), *appeal docketed*, No. 08-2257 (4th Cir. Nov. 13, 2008). CTP is at

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[1] No party counsel authored any of this brief (CTP counsel only represented Appellant until November 26, 2008), and no party, party counsel, or person other than CTP paid for brief preparation and submission. The parties consented to the filing of this brief.

[2] CTP follows the *Jurisdictional Statement* terminology, *id.* at 5, for Bipartisan Campaign Reform Act ("BCRA") **§ 201** ("Reporting Requirement"), **§ 311** ("Disclaimer Requirement") (these requirements together are the "Disclosure Requirements"), and **§ 203** ("Prohibition").

[3] This opinion ("*WRTL II*"), by Chief Justice Roberts joined by Justice Alito, states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (position in concurrences on narrowest grounds).

risk for an intrusive, burdensome, and unconstitutional investigation and enforcement proceeding.

CTP's counsel represented WRTL in *WRTL II*, and represented Citizens United in this case through November 26, 2008. Counsel respectfully refer the Court to their summary judgment briefing below (Docs. 52, 61), as well as the *Jurisdictional Statement* and *Brief Opposing Motion to Dismiss or Affirm* in this Court, for further arguments.

Summary of Argument

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court determined that campaign finance laws may only regulate communications "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80. Because *Buckley* applied this threshold requirement to disclosing expenditures for communications, *id.* at 80, it has direct application to the Disclosure Requirements, which are unconstitutional as applied to communications that are not unambiguously campaign related.

WRTL II's appeal-to-vote test, 127 S.Ct. at 2667, is the application of the unambiguously-campaign-related principle to electioneering communications. So whether an electioneering communication may be subjected to the Prohibition (at issue in *WRTL II*) or the Disclosure Requirements depends on whether an "ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.*

For an electioneering communication to be subject to interpretation "as an *appeal* to *vote*," it must contain a clear plea for action urging a vote. Since it must be assumed that the words of this test were chosen

carefully, it is decisive that the test is not whether an ad promotes, attacks, supports, or opposes a candidate —or whether it focuses on or criticizes a candidate— but whether it must be interpreted "as an *appeal* to *vote*." An ad cannot be interpreted as an *appeal* absent a clear plea for action, which requires some clear command or invitation to the hearer. And an ad cannot be interpreted as an appeal to *vote* unless the appeal somehow urges a vote.

Argument

I. Campaign-Finance Laws May Only Regulate Unambiguously-Campaign-Related Activity.[4]

Constitutional analysis should begin with the Constitution, which mandates that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This "'guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" *Buckley*, 424 U.S. at 15 (citation omitted). If "Congress shall make no law," how may government regulate election-related First

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[4] Part I addresses the second of the *Jurisdictional Statement*'s Questions Presented. Citizens United makes the unambiguously-campaign-related argument. *See, e.g., Brief for Appellant* at 46 (because ads "neither expressly nor impliedly advocate the election or defeat of that candidate," a disclaimer "would not provide viewers with relevant 'electora[l] . . . information'"), 48 n.3, 51 (interest in disclosure of donors for "campaign-related speech . . . . is inapplicable" to ads that neither "expressly nor impliedly advocate"). Because the unambiguously-campaign-related principle addresses a threshold requirement, *see infra*, the Court need go no further to decide this case.

Amendment activities? *Buckley* identified the answer as "[t]he constitutional power of Congress to *regulate federal elections*." *Id.* at 13 (footnote omitted) (emphasis added) (*citing* U.S. Const. art. I, § 4).

This authority is self-limiting. If government regulates speech and association not clearly related to elections, it exceeds its authority. Key to *Buckley*'s analysis in the expenditure-disclosure context is its question of whether "the *relation* of the information sought to the purpose of the Act [regulating elections] *may be too remote*," and, therefore, "*impermissibly broad*." *id.* at 80 (emphasis added). So this Court requires that government may only regulate First Amendment activity where the activity is "*unambiguously related* to the campaign of a particular federal candidate," *id.* at 80 (emphasis added), i.e., "unambiguously campaign related," *id.* at 81.[3] After this first-principle threshold is

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[3] The Fourth Circuit also identified this need to "cabin" campaign-finance regulations:

> *Buckley* . . . recognized that legislatures have . . . power to regulate elections . . . and . . . may establish standards that govern the financing of political campaigns. In particular, the Court identified "limit-[ing] the actuality and appearance of corruption" as an important governmental interest served by campaign finance regulation. . . . The Court simultaneously noted, however, that campaign finance restrictions "operate in an area of the most fundamental First Amendment activities," and thus threaten to limit ordinary "political expression." . . . *Buckley* . . . recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by

met, any regulation must still survive "exacting scrutiny." *See id.* at 44-48 (imposing express-advocacy construction to protect ordinary political speech, then applying exacting scrutiny), 64 (requiring "exacting scrutiny" and "*also* . . . 'substantial relation' between the governmental interest and the information required to be disclosed" (emphasis added) (citations omitted)), 80-81 (employing express-advocacy construction to satisfy unambiguously-campaign-related principle, then applying exacting scrutiny).

> demarcating a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley*, campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular . . . candidate." . . . This is because only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable.

North Carolina Right to Life v. Leake, 525 F.3d 274, 281 (4th Cir. 2008).

The need to cabin congressional and FEC authority to regulate ordinary political speech is especially evident in the present case, where the Federal *Election* Commission argued below that, under the Federal *Election Campaign* Act and the Bipartisan *Campaign* Reform Act, "the government's interest in providing information to the public extends *beyond speech about candidate election campaigns* to encompass activity that *attempts to sway public opinion or action on the specified issues*." *See* Doc. 61 (*quoting* Doc. 55) (emphasis added).

Buckley employed two tests to implement the unambiguously-campaign-related principle. First, to implement the requirement for PAC status, this Court created the major-purpose test for "political committees":

> To fulfill the purposes of the Act [i.e., regulating elections] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, *campaign related*.

Id. at 79 (emphasis added). Second, to implement the unambiguously-campaign-related requirement as to non-PAC expenditures, this Court imposed the express-advocacy test, i.e., whether a communication contains explicit words expressly advocating the election or defeat of a clearly identified candidate. *id.* at 44, 80. "This reading is directed precisely to that spending that is *unambiguously related to the campaign* of a particular federal candidate." *Id.* at 80 (emphasis added). "[A]s construed, [the disclosure requirement] bears a sufficient relationship to a substantial governmental interest. As narrowed, [it] does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result." *Id.* It "shed[s] the light of publicity on spending that is *unambiguously campaign related*." *Id.* at 81 (emphasis added).

Because *Buckley* expressly applied this first principle to *expenditure disclosure*, *id.* at 80, it has direct

application here. But *Buckley* applied the unambiguously-campaign-related principle in four contexts: (a) "expenditure" limitations, *id.* at 42-44; (b) "political committee" ("PAC") status and disclosure, *id.* at 79; (c) non-PAC *disclosure* of "contributions" and independent "expenditures," *id.* at 79-81; and (d) "contributions," *id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.").

Buckley also anchored the need for the unambiguously-campaign-related principle in another constitutional first principle, i.e., the fact that "[i]n a republic . . . the people are sovereign" and "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution," *id.* at 14. *Buckley* noted a dissolving-distinction problem that threatens to interfere with the People's debate in their sovereign, self-governing role, which problem requires a bright line—between (a) "discussion of issues and candidates" and (b) "advocacy of election or defeat of candidates"—to protect ordinary political speech:

> [T]he *distinction* between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often *dissolve* in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42 (emphasis added). The Court elaborated on the necessity of a bright line between (a) "discussion, laudation, [and] general advocacy" and (b) "solicitation":

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between *discussion, laudation, general advocacy*, and *solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (emphasis added).[6] *Buckley* cited this dissolving-distinction problem immediately before its first imposition of the express-advocacy construction, 424 U.S. at 42-44, so in its reference to the "vagueness" of the "expenditure" definition, *id.*, it also had in mind the overbreadth that results from violation of the unambiguously-campaign-related principle. *Buckley* expressly articulated the overbreadth concern when it

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[6] *WRTL II* reiterated the need for bright-line speech protection based on this dissolving-distinction problem. *See* 127 S.Ct. at 2659, 2669.

imposed the express-advocacy construction a second time "[t]o insure that the reach of [the expenditure disclosure provision] [wa]s not *impermissibly broad*." *Id.* at 80 (emphasis added).

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), this Court again recognized and applied the unambiguously-campaign-related principle. *MCFL* applied this first principle to the prohibition on corporate and union independent expenditures[7] at 2 U.S.C. § 441b. 479 U.S. at 249. The Court made clear that it was imposing the construction because of the dissolving-distinction overbreadth problem, *id.*, and the consequent need for a bright line "to distinguish *discussion of issues and candidates* from more pointed *exhortations to vote* for particular persons," *id.* (emphasis added). *MCFL* also reiterated the major-purpose test, which implements the unambiguously-campaign-related principle as to PAC status. *Id.* at 253, 262.

McConnell declared "the express advocacy restriction . . . an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell v. FEC*, 540 U.S. 93, 190 (2003). But the express-advocacy construction was created to implement the unambiguously-campaign-related principle, which *is* a first principle of constitutional law. *McConnell* recognized this by quoting *Buckley*'s explanation that the express-advocacy construction was done "'[t]o insure that the reach' of the disclosure requirement was 'not *impermissibly broad*.'" 540 U.S. at 191 (emphasis added) (*quoting*

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[7] An "independent expenditure" is now an express-advocacy communication not coordinated with a candidate. 2 U.S.C. § 431(17).

Buckley, 424 U.S. at 80). *McConnell* also recognized the unambiguously-campaign-related principle when it stated that "[i]n narrowly reading the FECA provisions in *Buckley* to avoid problems of vagueness and *overbreadth*, we nowhere suggested that a statute that was neither vague nor *overbroad* would be required to toe the same express advocacy line." *Id.* at 192 (emphasis added). So where a restriction on First Amendment liberties *is* vague or overbroad (e.g., for regulating activity not unambiguously campaign related), it must toe the express advocacy line,[8] or its functional equivalent in the electioneering communication context as established by *WRTL II*'s appeal-to-vote test. 127 S.Ct. at 2667. *McConnell*'s facial upholding of the

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[8] Since *McConnell*, several courts have embraced the express advocacy construction as an indispensable tool in dealing with vague or overbroad provisions. For example, the Ninth Circuit in *American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 985 (9th Cir. 2004), followed the Sixth Circuit in endorsing the express advocacy test as the appropriate tool where a provision is vague and overbroad:

> Nevertheless, as stated recently by the Sixth Circuit, *McConnell* "left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and over-breadth in statutes which regulate more speech than that for which the legislature has established a significant governmental interest." *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004).

See also Center for Individual Freedom v. Carmouche, 449 F.3d 655 (5th Cir. 2006).

electioneering communication Prohibition only "to the extent that [an ad is] the functional equivalent of express advocacy," 540 U.S. at 206, also reaffirms the unambiguously-campaign-related principle because it recognizes that only *true* equivalents to strictly-defined express advocacy may be regulated.[9] *McConnell* also expressly recognized the existence of "issue advocacy," which it described as "'discussion of political policy generally or advocacy of the passage or defeat of legislation,'" *id.* at 205 (*quoting Buckley*, 424 U.S. at 48), and of "genuine issue ads" that likely lay beyond Congress' ability to regulate. *Id.* at 206 n.88.

WRTL II applied the unambiguously-campaign-related principle to eliminate overbreadth in the regulation of electioneering communications when it stated its test for functional equivalence[10]: "[A]n ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific

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[9] *McConnell* unequivocally recognized that express advocacy itself requires "magic words." *See id.* at 217 (requiring political parties to choose between coordinated expenditures and express-advocacy independent expenditures "forced [them] to forgo only . . . magic words").

[10] The "functional equivalent of express advocacy" is not a *type* of express advocacy, so a functional-equivalence test may not be used to define express advocacy. Nor is there any free-floating functional-equivalence test in campaign-finance law because *McConnell* used the concept only in the electioneering-communication context. 540 U.S. at 206. Even in that context, it is replaced by *WRTL II*'s appeal-to-vote test, which now decides what is "the functional equivalent of express advocacy." 127 S.Ct. at 2667.

candidate." 127 S.Ct. at 2667. This appeal-to-vote test, is the application of the unambiguously-campaign-related principle to electioneering communications because the test mandates (a) no ambiguity (an ad must be "susceptible of no reasonable interpretation other than," *id.*, and "in a debatable case, the tie is resolved in favor of protecting speech," *id.* at 2669 n.7), and (b) a candidate-campaign-related message ("as an appeal to vote for or against a specific candidate," *id.* at 2667).[11, 12]

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[11] That the appeal-to-vote test is the implementation of the unambiguously-campaign-related principle is also clear from *WRTL II*'s reaffirmation that the dissolving-distinction problem, *see supra*, requires speech protection, not restriction, 127 S.Ct. at 2659, 2669. *WRTL II* similarly reaffirmed that "'[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" *Id.* at 2670 (citation omitted). Doing otherwise "'turns the First Amendment upside down.'" *Id.* (citation omitted).

[12] The Fourth Circuit has recognized that the unambiguously-campaign-related principle was applied in *WRTL II*, and that only two types of communications are recognized as meeting this first principle:

> Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that uses specific election-related words. Sec-

WRTL II used its appeal-to-vote test to determine which electioneering communications may be subjected to the Prohibition, but since the test determines which electioneering communications are unambiguously campaign related, it should also determine which electioneering communications may be subjected to the Disclosure Requirements. The unambiguously-campaign-related principle was articulated and applied in the expenditure-disclosure context in *Buckley*, 424 U.S. at 80.

Moreover, *WRTL II*'s analysis turned on the nature of the communication (which has broad ramifications), not the nature of WRTL (which would apply only in the Prohibition context). This Court could have ruled for WRTL based on (1) the nature of WRTL, (2) the nature of the funds used, or (3) the nature of the ads.[13] A

> ond, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This latter category . . . has the potential to trammel vital political speech, and . . . warrants careful judicial scrutiny.

Leake, 525 F.3d at 282-83. Only these carefully-defined categories "struck [the proper] balance" and "ensured that potential speakers would have clear notice as to what communications could be regulated, ensuring that political expression would not be chilled." *Id.* at 284.

[13] All three bases were argued. The nature of WRTL was argued in the *Brief of Family Research Council, Free Market Foundation, and Home School Legal Defense Association as Amici Curiae in Support of Appellee*, *WRTL II*, 127 S.Ct. 2652, prepared by the Stanford Constitutional Law Center,

decision based on the nature of WRTL or of its funds would necessarily have addressed the applicability of the corporate-form interest, i.e., whether there could be a *prohibition*.[11] *WRTL II*'s decision based on the nature of the ads addresses the proper *scope* of the electioneering communication, i.e., are these ads the functional equivalent of express advocacy, which is unambiguously campaign related? WRTL argued that its ads were not the functional equivalent of express advocacy. This Court agreed. Even when *WRTL II* addressed the corporate-form interest, it did so based on the nature of WRTL's ads, not the nature of WRTL: "We hold that the interest recognized in *Austin* [*v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990),] as justifying regulation of corporate campaign speech and ex-

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which argued that all nonprofits should be exempted from the electioneering communication prohibition because the government had no corporate-form interest as applied to nonprofits. The nature of the funds that WRTL proposed to use for its ads, if necessary to obtain judicial relief, was raised in Count II of WRTL's complaint, which offered to use funds from a separate bank account containing only funds raised for the purpose from individuals, which option would have eliminated the corporate-form interest.

WRTL II did not provide a narrow test limited to these options or the special context of grassroots lobbying, although that is what WRTL proposed. The Court should provide similarly comprehensive guidance in the present case in light of the core speech, association, and self-governance liberties and principles at issue.

[11] Only corporations (and unions for parity) are *prohibited* from making electioneering communications, based on the corporate-form interest. *See McConnell*, 540 U.S. at 205.

tended in *McConnell* to the functional equivalent of such speech *has no application to issue advocacy* of the sort engaged in by WRTL." *WRTL II*, 127 S.Ct. at 2673 (emphasis added). So although *WRTL II* never construed the electioneering-communication *definition* (2 U.S.C. § 434(f)(3)), its analysis went to the permissible *scope* of regulable electioneering communications, employing the unambiguously-campaign-related principle.[15] Since that first principle is not limited to the Prohibition context, and governs the expenditure-disclosure context, *Buckley*, 424 U.S. at 80, there is no justification for limiting *WRTL II*'s appeal-to-vote test for regulable electioneering communications to the Prohibition context. All electioneering-communication regulation must be limited to that permissible scope.

Finally, it must be noted that what *WRTL II* called constitutionally-protected "political speech" or "issue advocacy," *see, e.g.*, 127 S.Ct. at 2659, does not require focus on current legislative or administrative branch issues. The appeal-to-vote test contains no requirement that the communication focus on legislative issues in order to be protected, only that it "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," *id.* at 2670. *WRTL II* did observe, in *applying* its appeal-to-vote

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[15] *WRTL II* did not construe phrases of the "electioneering communication" definition because *McConnell* decided that the "'electioneering communication' [definition] raises none of the vagueness concerns that drove our analysis in Buckley," 540 U.S. at 194, and upheld the provisions facially, *id.* at 201-02, 207, and because there were no vague phrases such as *Buckley* construed to require express advocacy, as *McConnell* noted, *id.* at 191 (citations omitted).

test to grassroots lobbying, that WRTL's communications focused on legislative issues. *Id.* at 2667. But making that a requirement for the appeal-to-vote test or for qualifying as protected "political speech" confuses a *test* with the fact-bound *application* of the test.[16] To qualify as protected "political speech," a communication needs only to be "speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office," *id.* at 2659, or to "convey[] information and educate[]," *id.* at 2667, or to be a "discussion of issues and candidates" that falls short of express "advocacy of election or defeat of candidates." *id.* at 2669 (*quoting Buckley*, 424 U.S. at 42). Since *WRTL II* reaffirmed "'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his

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[16] Moreover, *WRTL II*'s discussion applying its test was responding to arguments made by the parties and amici, showing that even under various rejected tests WRTL's ads would be protected. In James Bopp, Jr. & Richard E. Coleson, *Distinguishing "Genuine" from "Sham" in Grassroots Lobbying: Protecting the Right to Petition During Elections*, 29 Camp. L. Rev. 353 (2007) (published contemporaneously with *WRTL II* briefing), present counsel argued, as they did in WRTL's briefing before this Court, for a test specific to *grassroots lobbying*. That test *did* require focus on a legislative or executive branch issue, excluded mention of an election, candidacy, a candidate's character, and so on. *See id.* at 385-89 ("PBA Ad Test"). *See also id.* at 406-12 (setting out other proposed tests). But *WRTL II* rejected all tests and criteria but one: whether an ad "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S.Ct. at 2667.

own message,'" *id.* at 2671 (citation omitted), no restriction may be imposed on what constitutes ordinary "political speech." The speaker is free to engage in speech without restriction *unless* there is a constitutionally-cognizable reason and means to restrict it, which there is not if the speech is not unambiguously campaign related under this Court's tests applying that requirement. In effect, then, ordinary "political speech" or "issue advocacy" is defined by the *absence* of either express advocacy or *WRTL II*'s "appeal to vote," not the *presence* of some topic.

In sum, all campaign-finance regulation is subject to the unambiguously-campaign-related principle and *WRTL II*'s appeal-to-vote test is the application of that principle in the electioneering communication context, so any electioneering communication protected by the appeal-to-vote test may neither be prohibited nor otherwise regulated. It is protected as ordinary "political speech" or "issue advocacy." Since Citizens United's ads are protected by the appeal-to-vote test, as the FEC concedes, they are not subject to the Disclosure Requirements. *Hillary: The Movie* is also protected from all regulation by the appeal-to-vote test because it contains no clear plea for action urging a vote.

II. *WRTL II*'s Appeal-to-Vote Test Requires a Clear Plea for Action Urging a Vote.[17]

WRTL II's appeal-to-vote test permits regulation of an electioneering-communication ad only if it "is susceptible of no reasonable interpretation other than *as*

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[17] Part II addresses the third of the *Jurisdictional Statement*'s Questions Presented. Citizens United also makes the present argument. *See Brief for Appellant* at 14, 36-37.

an appeal to vote for or against a specific candidate." 127 S.Ct. at 2667 (emphasis added). For an ad to be unmistakably subject to interpretation "as an appeal to vote," it must necessarily contain a clear plea for action urging a vote.

Since it must be assumed that the words of the appeal-to-vote test were chosen carefully, it is decisive that the test is not whether an ad promotes, attacks, supports, or opposes a candidate—or whether it focuses on or criticizes a candidate—but whether the ad must be interpreted "as an *appeal to vote*." An *appeal* is "[a]n earnest or urgent request, entreaty, or supplication." *The American Heritage Dictionary of the English Language* (4th ed. 2000). So to constitute an *appeal* to vote, an ad must clearly ask or command the hearer to do some action. And the ad cannot be interpreted as an appeal to *vote* unless the action solicited has to do with voting for or against a candidate.

This necessary focus on an *appeal* to *vote* is derived from the precedents. The dissolving-distinction problem that *Buckley* and *WRTL II* recognized as requiring a bright, speech-protective line, *see supra* at 7-8, 12 n.11, is about how to distinguish (a) "discussion of issues and candidates" from "*advocacy of election or defeat of candidates*," *Buckley*, 424 U.S. at 42 (emphasis added); (b) "discussion, laudation, [and] general advocacy" from "*solicitation*," *id.* at 43; and (c) "discussion of issues and candidates from more pointed *exhortations to vote* for particular persons," *MCFL*, 479 U.S. at 249. As the italicized terms indicate, what had to be isolated was express advocacy/solicitation/exhortation for a vote for or against a candidate. Candidates and issues could be freely discussed together, and candi-

dates could be focused on and lauded or criticized, so long as there was no appeal to vote. So when *WRTL II* required that an electioneering communication could only be regulated if it must be interpreted "as an appeal to vote," *WRTL II*, 127 S.Ct. at 2667, 2670, *WRTL II* was following precedent and recognizing that only an unmistakable appeal to vote would be unambiguously campaign related.

WRTL II expressly held that this dissolving-distinction problem may not be used to quash the very intermingled discussion of issues and candidates that is at issue in *Hillary*: "Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election." *Id.* at 2669. And it elaborated the point that the dissolving-distinction is a reason to protect, not restrict, free speech: "'The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" *Id.* at 2670 (citation omitted).

The fact that the appeal-to-vote test requires a clear plea for action urging a vote is also evident from the manner in which the test was to be applied. *WRTL II* required that the search for this unmistakable "appeal to vote" must focus on the *language of the communication* itself, i.e., the test "must be objective, focusing on the *substance of the communication* rather than amorphous considerations of intent and effect." *Id.* at 2666 (emphasis added). This focus on the actual words of the communication is also required by *WRTL II*'s rejection of reliance on "contextual factors," *id.* at 2669. This objective determination focused on the actual words

used is only possible where normal rules of grammar are applied to determine if there is in the words used a clear plea for action that urges a vote for or against a candidate.[18]

This understanding of the appeal-to-vote test does not make the test a "magic words" test. It is instructive to compare and contrast the appeal-to-vote test with the Ninth Circuit's attempt, in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), to frame an express-advocacy test that went beyond the magic words. Of course, *McConnell* made it clear that express advocacy requires "magic words," so no other express-advocacy test is permissible and *Furgatch* is a dead letter for that purpose.[19] But *Furgatch* represents an effort to permit government regulation beyond magic words. *WRTL II* does not go beyond *Furgatch* and differs at several points. *Furgatch* dealt with a newspaper ad that concluded with these words concerning President and candidate Jimmy Carter: "It is an attempt to hide his own record, or lack of it. If he succeeds the country will be burdened with four more years of incoherencies,

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[18] This analysis is supported by *WRTL II*'s repeated requirement that where there is *any doubt* as to whether the necessary unmistakable "appeal to vote" is present in the words of the communication then there is *not* an "appeal to vote" because all doubts and debatable words are to be resolved in favor of the speaker. *See id.* at 2667, 2669 & n.7, 2674. The elimination of borderline language requires that ads contain a clear plea for action that urges a vote for or against a candidate in order to be subject to regulation.

[19] *See infra* at n.9 (express advocacy requires "magic words").

ineptness and illusion, as he leaves a legacy of low-level campaigning. DON'T LET HIM DO IT." *Id.* at 858. The Ninth Circuit adopted the following express-advocacy test:

> We conclude that speech need not include any of the words listed in *Buckley* to be express advocacy . . . , but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but *as* an *exhortation to vote* for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and *unambiguous*, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a *clear plea for action*, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id. at 863-64 (emphasis added). The *Furgatch* test may fairly be called the exhortation-to-vote test because that is precisely what it requires—albeit without any particular magic words. And the test made clear that no communication could be considered "*as* an exhortation to vote" absent a clear plea for action that involved voting.

In its appeal-to-vote test, *WRTL II* rejected any reliance on "external events," requiring that the objective words of the communication itself must be the focus. 127 S.Ct. at 2666. Of course, an electioneering communication by definition is broadcast near an election, identifies a candidate, and targets the candidate's constituents, so there is a built-in relevant context. Like *WRTL II*, *Furgatch* mandated that the message must be "unambiguous" and that all doubts are resolved in favor of the speaker. And just as *WRTL II* requires an unmistakable "appeal to vote," *Furgatch* mandated "an exhortation to vote," which must be a "clear plea for action" that "encourages a vote."[20] *Furgatch* decided that "Don't let him do it!" was just such a clear plea for action that constituted an unambiguous exhortation to vote without saying "vote against." *WRTL II* was not endorsing a test going *beyond Furgatch*'s now-rejected express-advocacy test, so the "appeal to vote" requirement of *WRTL II*'s test must be taken at least as seriously as the Ninth Circuit took its "exhortation to vote" or "clear plea for action" requirement. Consequently, the *WRTL II* test requires some clear plea for action urging a vote for or against a candidate for an ad to be unmistakably interpreted *as* an appeal to vote.

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[20] Even before *McConnell* and *WRTL II* effectively overruled *Furgatch*'s express-advocacy test for "independent expenditures," the Ninth Circuit made clear that context was subordinate to the actual words and that some express words of advocacy were required under the *Furgatch* test: "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit *words* of advocacy." *See California Pro-Life Council v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003).

Hillary contained no clear plea for action urging a vote for or against then-candidate Clinton. In summary-judgment briefing the FEC made no attempt to identify any such plea for action. *See* Doc.56 at 44-46 (PDF pagination). Instead, the FEC argued a flawed version of *WRTL II*'s appeal-to-vote test. First, it argued that *Hillary* "mentions an election and candidacy." *Id.* at 44. Second, it argued that *Hillary* "takes a position on a candidate's character, qualifications, or fitness for office." *Id.* Third, the FEC argued that "the movie fails to qualify for an exemption under *WRTL* because it 'does not focus on legislative issues, or otherwise constitute issue advocacy.'" *Id.* at 45. From these criteria, the FEC concluded that "because *Hillary* . . . is nothing but an extensive critique of Senator Clinton's 'character, qualifications, and fitness for office,' and lacks indicia of genuine issue advocacy, the film is . . . susceptible of no reasonable interpretation other than as an appeal to vote against her." *Id.* at 46. So, the FEC concluded, "[i]t is . . . the functional equivalent of express advocacy . . . ." *Id.*

This argument is flawed. As to the first assertion, the appeal-to-vote test does not turn on mentioning an election or candidacy. The FEC attempts to substitute an *application* of the test—in which *WRTL II* addressed proposed (but rejected) tests that did turn on the presence or absence of such a criterion, *see infra* at 16 n.16—for the test itself. Such prestidigitation is impermissible. *See infra* at 15-17.

As to the second assertion, the argument that criticism constitutes the functional equivalent of express advocacy was argued and rejected in *WRTL*

II.[21] And the FEC has already settled two cases post-*WRTL II* about electioneering communications that set out candidates' positions on an issue and praised or criticized them for that position, which was a concession that non-criticism is not part of the appeal-to-vote test. *See* Doc. 52 at 16-17, 43-44. Moreover, the FEC has conceded that the ads at issue in this case meet the appeal-to-vote test, but the *Questions* Ad is clearly critical of Senator Clinton, *see Jurisdictional Statement* at 8 n.3, so the FEC's argument lacks credibility.

As to the third assertion, protected ordinary "political speech," or "issue advocacy," does not require focus on a particular issue. *See infra* at 15-17.

What the FEC was unable to do, and studiously evaded, was to point to any clear plea for action urging a vote for or against Senator Clinton. *Hillary* did not even contain something like "Don't let her do it!" So *Hillary* was protected from both the Prohibition and the Disclosure Requirements by the appeal-to-vote test because it was not unambiguously related to the *campaign* of Senator Clinton.

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[21] *See Brief for Appellee*, *WRTL II*, 127 S.Ct. 2652 (quoting and citing FEC and Intervenors' arguments that WRTL's ads were sham ads for criticizing candidate). In the present case, this issue was briefed and the *WRTL II* brief is quoted in Doc. 52 (summary judgment memo) at 44.

Conclusion

The judgment of the district court should be reversed.

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AMICUS CURIAE BRIEF

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No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Writ of Certiorari to the United States District Court for the District of Columbia

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BOTH 492 PPZ

TABLE OF CONTENTS

TABLE OF AUTHORITIES vi

INTEREST OF AMICI 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

IN ORDER TO ENSURE THAT THE BIPARTISAN CAMPAIGN REFORM ACT ("BCRA") IS LIMITED TO CONTENT THAT INCONTROVERTIBLY CONSTITUTES CAMPAIGN ADVERTISING, THE DISTRICT COURT'S DECISION MUST BE REVERSED. 2

I. THE "ELECTIONEERING COMMUNICATION" PROVISIONS OF BCRA THREATEN TO CHILL CORE POLITICAL SPEECH. 5

(A) THE STATUTORY DEFINITION OF "ELECTIONEERING COMMUNICATION" SWEEPS TOO BROADLY IN ITS REFUSAL TO CONSIDER ALL RELEVANT CONTENT, TAKING IN MESSAGES THAT ARE FAR FROM PURE ELECTIONEERING, INCLUDING PROTECTED POLITICAL SPEECH. 8

(B) THE STATUTE, AS INTERPRETED, COULD CONSTITUTE A PRIOR RESTRAINT OF SPEECH THAT CRITICIZES GOVERNMENT--AT A TIME WHEN SUCH SPEECH IS THE MOST

VALUABLE TO CITIZENS ON THEIR WAY TO THE POLLS. 10

II. THE MOVIE IS NOT AN "ELECTIONEERING COMMUNICATION" UNDER *WRTL II'S* APPEAL-TO-VOTE TEST. 12

(A) *WRTL II'S* APPEAL-TO-VOTE TEST REQUIRES A CLEAR PLEA FOR ACTION TO VOTE FOR OR AGAINST A CANDIDATE, IN ORDER TO CONSTITUTE AN "ELECTIONEERING COMMUNICATION." 14

(B) THE MOVIE DOES NOT HAVE A "CLEAR PLEA" FOR ACTION. IT CAN REASONABLY BE INTERPRETED AS AN INFORMATIONAL DOCUMENTARY--"SOMETHING OTHER THAN AN APPEAL TO VOTE FOR OR AGAINST A PARTICULAR CANDIDATE"--AND THEREFORE NOT REGULABLE AS AN "ELECTIONEERING COMMUNICATION." 15

(C) A BROADCAST FEATURE-LENGTH DOCUMENTARY MOVIE SOLD ON DVD, SHOWN IN THEATERS, AND ACCOMPANIED BY A BOOK IS NOT A "CAMPAIGN AD" SUBJECT TO REGULATION AS AN "ELECTIONEERING COMMUNICATION." 17

(i) THE MOVIE SHOULD ENJOY FREEDOM OF THE PRESS BECAUSE

IT EDUCATES AND INFORMS THE PUBLIC. 18

(ii) THE MOVIE IS "ISSUE ADVOCACY" BECAUSE IT EDUCATES VIEWERS ABOUT MANY PRESSING PUBLIC ISSUES. 20

(iii) THE MOVIE IS AN ARTISTIC ENDEAVOR ENTITLED TO FIRST AMENDMENT PROTECTION. 21

III. THE DISCLOSURE/DISCLAIMER REQUIREMENTS CANNOT BE CONSTITUTIONALLY APPLIED TO THE MOVIE. 22

(A) *McCONNELL* EXPRESSLY LEFT OPEN THE POSSIBILITY OF AS-APPLIED CHALLENGES TO THE DISCLOSURE REQUIREMENTS IMPOSED ON "ELECTIONEERING COMMUNICATIONS" WHEN IT UPHELD THE REQUIREMENTS AGAINST FACIAL CHALLENGE--"FOR THE ENTIRE RANGE OF ELECTIONEERING COMMUNICATIONS." 23

(B) THE DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL AS APPLIED TO ELECTIONEERING COMMUNICATIONS NOT PROHIBITED BY *WRTL II'S* APPEAL-TO-VOTE TEST. SUCH COMMUNICATIONS ARE PROTECTED "POLITICAL SPEECH"--NOT REGULABLE "CAMPAIGN SPEECH." 27

(i) THE MOVIE IS NOT "UNAMBIGUOUSLY RELATED TO THE CAMPAIGN OF A PARTICULAR FEDERAL CANDIDATE." *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976). 28

(ii) THE DISCLOSURE REQUIREMENTS FAIL STRICT SCRUTINY BECAUSE THEIR APPLICATION TO THE MOVIE IS NOT NARROWLY TAILORED TO SERVE ANY OF THE PURPORTED GOVERNMENT INTERESTS. 29

(a) THE ELECTORATE DOES NOT NEED TO BE INFORMED OF FUNDING SOURCES FOR A DOCUMENTARY MOVIE FOR WHICH THEY HAVE PAID AN ADMISSION PRICE. 30

(b) DISCLOSURE OF FUNDING SOURCES FOR THIS INDEPENDENTLY PRODUCED MOVIE WOULD NOT SERVE THE GOVERNMENTAL INTEREST IN PREVENTING CORRUPTION. . . . 32

(c) DISCLOSURE OF THE MOVIE'S FUNDING SOURCES DOES NOTHING TO DETER VIOLATIONS OF THE POLITICAL *CONTRIBUTION* LIMITS. 34

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

ACLU of Nev. v. Heller,
378 F.3d 979 (9th Cir. 2004) 22, 23, 31

Ashcroft v. Free Speech Coalition,
535 U.S. 234 (2002) 6

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 5, 18, 27, 33, 34

Bartnicki v. Vopper, 532 U.S. 514 (2001) 6

Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 21

Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87 (1982) 22, 23, 24

Buckley v. Valeo,
424 U.S. 1 (1976) ..... *passim*

Cal. Medical Ass'n v. FEC, 453 U.S. 182 (1981) . 35

Davis v. FEC, 128 S. Ct. 2759 (2008) 22, 27

FEC v. Beaumont, 539 U.S. 146 (2003) 35

FEC v. Furgatch,
807 F.2d 857 (9th Cir. 1987) 16, 17

FEC v. Mass. Citizens for Life,
479 U.S. 238 (1986) 3, 27, 33

FEC v. Wisconsin Right to Life,
127 S. Ct. 2652 (2007) ..... *passim*

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 2, 8, 18-20, 27

Jenkins v. Georgia, 418 U.S. 153 (1974) 21

Joseph Burstyn, Inc. v. Wilson,
343 U.S. 495 (1952) 21

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 6

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

McIntyre v. Ohio Elections Commission,
514 U.S. 334 (1995) 2, 22, 23, 28, 31

United States v. Paramount Pictures, Inc.,
334 U.S. 131 (1948) 21

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 6

Virginia v. Hicks, 539 U.S. 113 (2003) 7

Williams v. Rhodes, 393 U.S. 23 (1968) 3

Winters v. New York, 333 U.S. 507 (1948) 21

STATUTES

2 U.S.C. § 434(e) 8, 12

2 U.S.C. § 434(f)(2)(E) 11

2 U.S.C. § 434(f)(3)(A)(i)(I) 9

2 U.S.C. § 434(f)(4) 11

2 U.S.C. § 441b(b)(2) 5

26 U.S.C. § 501(c)(4) 33

FECA § 316(b)(2) 26

OTHER

www.citizensunited.org/about (last accessed on January 5, 2009) 3

https://secure.donationreport.com/donation.html ?key=ME6AVZNKIFP2 34

INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the D.C. Circuit Court of Appeals should be reversed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education and other means. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics*, and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on constitutional law.

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten (10) days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

IN ORDER TO ENSURE THAT THE BIPARTISAN CAMPAIGN REFORM ACT ("BCRA") IS LIMITED TO CONTENT THAT INCONTROVERTIBLY CONSTITUTES CAMPAIGN ADVERTISING, THE DISTRICT COURT'S DECISION MUST BE REVERSED.

The First Amendment was intended to protect the free discussion of public issues and governmental affairs, including the qualifications of candidates for public office. Such discussion is integral to the system of government established by the Constitution. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (hereafter "*Buckley*"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777 (1978) (hereafter "*Bellotti*"); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 346 (1995) (hereafter "*McIntyre*"). The freedom guaranteed "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Bellotti, supra*, 435 U.S. at 775. Government may not limit "the stock of information from which members of the public may draw." *Id.* at 783.

Carefully defined campaign finance laws exist to ensure the integrity of the electoral process by preventing corruption and assuring compliance with political contribution caps while simultaneously continuing to inform voters. But such laws must be strictly scrutinized to avoid chilling political speech and depriving the public of information that would

facilitate informed voting. Moreover, the right to make independent expenditures is at the very core of both the First Amendment and our electoral process. *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 351 (1986) (hereafter "*MCFL*"); *Buckley, supra*, 424 U.S. at 39; *Williams v. Rhodes*, 393 U.S. 23, 32 (1968). This Court has repeatedly struck down limits on expenditures--like the costs of producing "Hillary: The Movie"--that are wholly independent of any candidate or election campaign. *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (hereafter "*McConnell*"); *Buckley, supra*, 424 U.S. at 47.

Citizens United is a nonprofit organization:

> ...dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.
>
> www.citizensunited.org/about (last accessed on January 5, 2009)

"Hillary: The Movie" (the "Movie") is one of nine documentary DVD movies produced by the organization to educate and inform the public about current political concerns. The DVD's are sold through its website, and the Movie has been shown in selected theatres across the country. Unlike the multitude of

TV campaign ads that flood the screens near election time, the Movie is a well-researched, full-length film featuring numerous individual speakers on a variety of political issues that concern the American public.

People need this type of information--*particularly in the crucial days preceding a national election*--in order to make informed decisions at the polls. If campaign finance laws muzzle such speech, either the respective law is facially deficient and should be struck down, or its application must be carefully and narrowly circumscribed. This Court should first determine whether BRCA's definition of "electioneering communications"--even as defined by prior case law--sweeps too broadly or has the effect of an improper prior restraint on speech.

The appeal-to-vote test of *WRTL II* requires a clear plea for action to vote for or against a candidate in order to constitute an "electioneering communication." The Movie does not have a "clear plea" for action and therefore can reasonably be interpreted as an informational documentary--"something other than an appeal to vote for or against a particular candidate"--thus it is not regulable under BCRA as an "electioneering communication."

Even if a narrow, constitutionally workable definition can be utilized, the Court should carefully consider whether it can be properly applied to the Movie. Finally, this case challenges the application of BRCA's burdensome disclosure/disclaimer requirements to the Movie, because such application does not further any of the purported government interests.

If the District Court decision is affirmed, then it will be "...entirely obvious that the object of the law [the Court has] approved today is not to prevent wrongdoing but to prevent speech." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 694 (1990) (Scalia, J., dissenting) (hereafter "*Austin*").

I. THE "ELECTIONEERING COMMUNICATION" PROVISIONS OF BCRA THREATEN TO CHILL CORE POLITICAL SPEECH.

This case presents an opportunity for the Court to reconsider whether BRCA § 203 is facially constitutional, even after implementing the as-applied standard articulated in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2674, 2680 (2007) (Alito, J., concurring) (hereafter "*WRTL II*"). Lack of clarity, lack of effective alternatives to broadcasting, and unreasonable burdens on free speech are among the reasons this Court should reassess the law, particularly as applied to this independently produced Movie.

There is no clear test available which would permit BRCA's ban on "electioneering communications" to be upheld. *See* § 203 of the Bipartial Campaign Reform Act of 2002, 2 U.S.C. § 441b(b)(2). All of the various tests are impermissibly vague and chill free speech. *WRTL II, supra,* 127 S. Ct. at 2675, 2680 (Scalia, J., concurring). If there were a test short of reliance on "magic words," surely *Buckley* would have adopted it. *Id.* at 2681. This lack of clarity is no justification to risk banning protected political speech. On the contrary, this Court has rejected the principle that protected speech can be banned merely because it is

difficult to distinguish from unprotected speech. *Id.* at 2681. Even virtual images of child pornography have been granted First Amendment protection because they are not readily distinguished from real ones:

> "The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse."
>
> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)

Calling the *McConnell* decision a "sad day for free speech," Justice Scalia noted the Court's protection for not only virtual child porn images, but also tobacco advertising (*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001)), dissemination of illegally intercepted communications (*Bartnicki v. Vopper,* 532 U.S. 514, (2001)), and sexually explicit cable programming (*United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000)). Yet the law upheld by the *McConnell* majority "cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government." *McConnell, supra*, 540 U.S. 15 248 (Scalia, J., concurring); *see also id.* at 265 (Thomas, J., dissenting). Within the "right to criticize the government" is the right to fully examine the factual record of a government official.

Whatever test the Court adopts--if there is one--should provide a safe harbor for citizens desiring to exercise their First Amendment rights. This Court has declined to adopt a test that turns on intent or effect because that would chill political speech without a

safety net. *WRTL II, supra*, 127 S. Ct. at 2665; *Buckley, supra*, 424 U.S. at 43-44. But the far-reaching statutory language--taking in "*any* broadcast, cable, or satellite communication" within a certain time frame that identifies a candidate--must be circumscribed in order to pass constitutional muster.

Even though BCRA leaves room for some alternative means to finance protected expression, these are often unreasonably burdensome or inadequate means to communicate. For example, "PACs impose well-documented and onerous burdens, particularly on small nonprofits." *WRTL II, supra*, 127 S. Ct. at 2671. Websites and newspapers do not provide the impact and effectiveness of broadcast speech. *Id.* at 2671. But only broadcast speech is impacted by BCRA's definition of "electioneering communications."

Because of the onerous burdens imposed on broadcasting and the unavailability of effective alternative channels, many speakers will opt for silence. That silence is a loss to both the potential speaker and the voting public who might benefit from the information:

> "Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, [citation omitted]--harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas."

Virginia v. Hicks, 539 U.S. 113, 119 (2003)

Finally, the right to free speech necessarily includes auxiliary rights, such as associating with others and financing the communication. The law at issue restricts such rights, thereby burdening core political speech:

> The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.
>
> *McConnell, supra*, 540 U.S. at 252 (Scalia, J., dissenting)

Political association is a well-established component of the First Amendment, including use of the corporate form for expression. *Bellotti, supra*, 435 U.S. at 776-777. Even the Declaration of Independence includes the promise that "we mutually pledge to each other our Lives, *our Fortunes* and our sacred Honor." *McConnell, supra*, 540 U.S. at 252 (Scalia, J., dissenting; emphasis added).

(A) THE STATUTORY DEFINITION OF "ELECTIONEERING COMMUNICATION" SWEEPS TOO BROADLY IN ITS REFUSAL TO CONSIDER ALL RELEVANT CONTENT, TAKING IN MESSAGES THAT ARE FAR FROM PURE ELECTIONEERING, INCLUDING PROTECTED POLITICAL SPEECH.

Buckley construed the term "expenditure" in 2 U.S.C. § 434(e) in terms of express advocacy because the statutory phrase "relative to" a candidate was

vague and impermissibly broad. The reporting requirements applied only to "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley, supra*, 424 U.S. at 80. The Court thus narrowed the reach of the statute to ensure it would not be overbroad, i.e., *unconstitutional*. *McConnell, supra*, 540 U.S. at 280 (Thomas, J., dissenting).

It is by no means clear that the replacement statute solved the problem of overbreadth. *McConnell* admitted that the newly coined "electioneering communication" definition stretches beyond *Buckley's* "express advocacy." *McConnell, supra*, 540 U.S. at 189, 204. An "electioneering communication" is one that **"refers to** a clearly identified candidate for Federal office" (emphasis added). 2 U.S.C. § 434(f)(3)(A)(i)(I). *McConnell* held this language did not raise the vagueness concerns present in *Buckley*. *Id.* at 194.

Perhaps the definition is not vague, but it is surely broad. The mere mention of a candidate's name through broadcast media, within the forbidden time frame, captures the communication. If a prime time TV show--e.g., *Boston Legal* or *Law and Order*--mentioned a candidate's name in passing during an episode aired near election time--the statute would technically be triggered. The context and surrounding content are apparently irrelevant. This is no more constitutionally proper than the hypothetical proposed in *Buckley*, wherein it would be a "federal criminal offense for a person or association to place a single one-quarter page advertisement 'relative to a clearly identified candidate' in a major metropolitan newspaper." *Buckley, supra*, 424 U.S. at 40. It seems

that one "magic word"--the whisper of a candidate's *name*--subjects the speaker to legal penalties.

Former Chief Justice Rehnquist criticized *McConnell* because "...the Court gloss[ed] over the breadth of the restrictions...regulating a good deal of speech that does *not* have the potential to corrupt federal candidates and officeholders...." *McConnell, supra*, 540 U.S. at 351 (Rehnquist, J., dissenting). This Court later acknowledged that "BCRA's definition of 'electioneering communication' is clear and **expansive**" (emphasis added). *WRTL II, supra*, 127 S. Ct. at 2660. Indeed it is. The statute embraces *any* broadcast, cable, or satellite communication, and alternate modes of communication, such as newspapers and websites, are far less effective in reaching the public with the information they need to make informed voting decisions. *Id.* at 2671.

(B) THE STATUTE, AS INTERPRETED, COULD CONSTITUTE A PRIOR RESTRAINT OF SPEECH THAT CRITICIZES GOVERNMENT--AT A TIME WHEN SUCH SPEECH IS THE MOST VALUABLE TO CITIZENS ON THEIR WAY TO THE POLLS.

The Movie contains far more content than a 30-second or 60-second *advertisement* that endorses or opposes a candidate. It has detailed information and commentary about critical issues like health care, the war in Iraq, the economy, terrorism, corruption during Bill Clinton's administration, and Hillary Clinton's

alleged campaign finance violations.[2] Information that criticizes government must not be suppressed at the time when the people need it most in order to make informed decisions at the polls. If the District Court decision is allowed to stand, other politically motivated films could suffer a similar fate. Such productions are not limited to one political perspective, but would include movies critical of the Bush administration if a candidate's name is mentioned and they are aired in the critical pre-election period: *W.*, *Rendition*, or *Lions for Lambs*.

Even if the Movie is not banned altogether, disclosure requirements might constitute a prior restraint. The statutory scheme defines the term "Disclosure Date" for required reporting. 2 USC § 434(f)(4). Required disclosures include the names and addresses of donors who contribute $1,000 or more to a segregated fund that disburses over $10,000 for direct costs to produce or air an electioneering communication. Disclosure requirements are triggered whenever the $10,000 mark is reached. 2 USC § 434(f)(2)(E). The cost to produce a full-length documentary film like the Movie would no doubt reach the $10,000 threshold *before* the speech is aired to the public.

McConnell concluded that the restriction on political spending from corporate general treasuries is "firmly embedded in our law" and the ability to segregate funds is "a constitutionally sufficient

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[2] It would be ironic indeed if the campaign finance laws were used to suppress speech exposing a candidate's alleged violation of those very laws.

opportunity to engage in express advocacy." *McConnell, supra*, 540 U.S. at 203. The majority argued that "it is 'simply wrong' to view the provision as a 'complete ban' on expression rather than a regulation" even though the restrictions extend to all electioneering communications and not merely "express advocacy." *Id.* at 204. But because segregated funds require advance planning, *spontaneous* corporate speech naming a candidate is prohibited unless a PAC is already established. *Id.* at 332 (Thomas, J., dissenting). Time constraints may foreclose speech where a new issue arises so close to an election that a PAC cannot be set up in time. *Id.* at 334 (Thomas, J., dissenting). These situations illustrate the potential for prior restraint. Although *Buckley* found no prior restraint problem with 2 USC § 434(e), the Court was careful to explain that the statute had been narrowed to reach only express advocacy and was a minimally restrictive means to further First Amendment values by opening the federal election system to public view. *Buckley, supra*, 424 U.S. at 82. "Electioneering communications" reach a far broader spectrum of speech and--under the circumstances surrounding production of the Movie--do not further any government interests sufficient to justify the intrusion.

II. THE MOVIE IS NOT AN "ELECTIONEERING COMMUNICATION" UNDER *WRTL II'S* APPEAL-TO-VOTE TEST.

In *McConnell*, the plaintiffs argued that justifications for the regulation of express advocacy were not applicable to a significant quantity of speech covered by the statutory definition of "electioneering communications." *McConnell, supra*, 540 U.S. at 205-

206. The Court rejected that argument for issue ads--broadcast during the relevant time frame--that are "the functional equivalent of express advocacy," reasoning that:

> The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect.
>
> *Id.* at 206.

Several years later, this Court rejected the use of an intent-and-effect test, concluding instead that:

> [A] court should find that an ad is the functional equivalent of express advocacy only if the ad is **susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.**
>
> *WRTL II, supra*, 127 S. Ct. at 2667 (emphasis added)

The Court explained that WRTL's ads focused on a legislative issue (filibusters that delay confirmation of judicial nominees), took a position on that issue, and urged people to contact public officials. Moreover, the ads did not mention an election, candidate, or political party, and did not "take a position on a candidate's character, qualifications, or fitness for office." *Id.* at 2667. The ads were deemed "issue advocacy" in contrast to "express advocacy":

> Issue advocacy **conveys information and educates**. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose--uninvited by the ad--to factor it into their voting decisions.
>
> *Id.* at 2667 (emphasis added)

(A) *WRTL II'S* APPEAL-TO-VOTE TEST REQUIRES A CLEAR PLEA FOR ACTION TO VOTE FOR OR AGAINST A CANDIDATE, IN ORDER TO CONSTITUTE AN "ELECTIONEERING COMMUNICATION."

Buckley's examples of express advocacy language led to a "magic words" requirement--"vote for," "elect," "support," "defeat," "reject." *Buckley, supra*, 424 U.S. at 44, n. 52; *McConnell, supra*, 540 U.S. at 190. *McConnell* calls the "magic words" requirement a "functionally meaningless" test that is easily evaded. *Id.* at 193. The *McConnell* opinion reproduced a "Bill Yellowtail" ad that describes a candidate's abuse of his own family, then urges readers to "call Bill Yellowtail...tell him to support family values." This Court rejected the conclusion that this ad was about the issue of "family values" rather than Yellowtail's campaign. *Id.* at 194.

But the "Yellowtail" ad was a clear plea for action: "call Bill Yellowtail...." The Movie educates and informs, but never urges viewers to take any particular action. Content that educates and informs, without a plea to the audience to act, poses no risk of the campaign corruption the statute seeks to prevent.

In *WRTL II*, this Court acknowledged that "the First Amendment requires us to err on side of protecting political speech rather than suppressing it." *WRTL II, supra,* 127 S. Ct. at 2659. Such caution mandates an approach that steers clear of chilling protected speech and offers a safe harbor for speakers. The *WRTL II* Court substantially narrowed the reach of the statute to allow breathing room for core political expression--like the full-length feature film at issue in this case--that does not unequivocably constitute campaign advertising. A "clear plea for action to vote for or against a candidate" is an interpretation of *WRTL II* consistent with its recognition that the Court must err on the side of protecting political speech.

(B) THE MOVIE DOES NOT HAVE A "CLEAR PLEA" FOR ACTION. IT CAN REASONABLY BE INTERPRETED AS AN INFORMATIONAL DOCUMENTARY--"SOMETHING OTHER THAN AN APPEAL TO VOTE FOR OR AGAINST A PARTICULAR CANDIDATE"--AND THEREFORE NOT REGULABLE AS AN "ELECTIONEERING COMMUNICATION."

A public communication does not fit *WRTL II's* appeal-to-vote test if it may be "reasonably interpreted as something other than as an appeal to vote for or against a specific candidate." *WRTL II, supra*, 127 S. Ct. at 2670. This Court recognized that the distinction between campaign and issue advocacy "may often dissolve in practical application." *Id.* at 2659. In the event of a close call, the "...tie is resolved in favor of protecting speech." *Id.* at 2669, n. 7.

Prior to *WRTL II*--but after *McConnell*--the Ninth Circuit considered an advertisement about Jimmy Carter to be a "close call" even though it contained an "unequivocal message that Carter must not 'succeed' in burden[ing] the country with 'four more years' of his allegedly harmful leadership." *FEC v. Furgatch*, 807 F.2d 857, 860-861 (9th Cir. 1987). The Carter ad is similar to the Movie in that both criticize the public record of a federal candidate, and listeners might decide to vote against that person. But the Movie is substantially different, not only in length but in content. The Movie "conveys information and educates." *WRTL II, supra*, 127 S. Ct. at 2667 (defining "issue advocacy"). There are many speakers on the screen--news commentators, public figures, and private figures--plus extensive documentation of facts concerning Hillary Clinton's public record over a period of years. A variety of crucial public issues are discussed, including government corruption, health care, the economy, the war in Iraq, terrorism, and Freedom of Information Act requests.

Even if the intent of producing the Movie was to discourage voters from supporting Hillary Clinton, and even if had such an effect, this Court's rejection of intent-and-effect tests cautions against reliance on these factors. This type of test chills free speech because it "blankets with uncertainty whatever may be said" and "offers no security for free discussion." *WRTL II, supra*, 127 S. Ct. at 2666; quoting *Buckley, supra*, 424 U.S. at 43.

The Ninth Circuit foreshadowed *WRTL's* "susceptible of no other reasonable interpretion" language and suggested three components for the analysis. First, the message must be "unmistakable

and unambiguous, suggestive of only one plausible meaning." Second, there must be a "clear plea for action" rather than a presentation that is "merely informative." Finally, "it must be clear what action is advocated." *FEC v. Furgatch, supra*, 807 F.2d at 864. The Movie does not urge listeners to take action, but informs and educates the public about pressing current issues and Hillary Clinton's years as First Lady and New York Senator.

(C) A BROADCAST FEATURE-LENGTH DOCUMENTARY MOVIE SOLD ON DVD, SHOWN IN THEATERS, AND ACCOMPANIED BY A BOOK IS NOT A "CAMPAIGN AD" SUBJECT TO REGULATION AS AN "ELECTIONEERING COMMUNICATION."

When Congress enacted legislation regulating "electioneering communications," its concern focused on the use of corporate funds "to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections." *McConnell, supra*, 540 U.S. at 207, citing 3 1998 Senate Report 4465, 4474-4481. But the Movie, in contrast to these fleeting 30-second to 60-second ads that flood the television screen, provides 90 minutes of detailed documentation that educates and informs voters. *McConnell* rejected the argument that the law was underinclusive because it does not encompass print media or the internet. *McConnell, supra*, 540 U.S. at 208. But by indiscriminately taking in *all* broadcast media without consideration of content, the law is vastly overinclusive and unlawfully regulates protected political speech.

The Movie differs from TV campaign ads in several significant ways. It was produced by a nonprofit group that can be deemed a "media corporation" with requisite rights to freedom of the press. The film reasonably constitutes "issue advocacy" because of its in-depth coverage of major public issues. The Movie also falls within the First Amendment protection granted to artistic and entertainment speech. It is not merely an extremely long campaign *advertisement*, but rather a feature film documentary--a category the Academy of Motion Picture Arts and Sciences deems worthy of nominations and awards.

(i) THE MOVIE SHOULD ENJOY FREEDOM OF THE PRESS BECAUSE IT EDUCATES AND INFORMS THE PUBLIC.

This Court has observed that the press has a "recognized role...in informing and educating the public, offering criticism, and providing a forum for discussion and debate" but "does not have a monopoly on the First Amendment or the ability to enlighten." *Bellotti, supra*, 435 U.S. at 781, 782. Past decisions have acknowledged the role of "corporations in the business of communication or entertainment...in affording the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783. Even *Austin*, upholding a Michigan law that restricted corporate funding of express advocacy, recognized that "media corporations" differ from their corporate counterparts because "their resources are devoted to the collection of information and its dissemination to the public." *Austin, supra*, 494 U.S. at 667. *McConnell* rejected the argument that the law discriminated in favor of media companies, again

affirming the distinction for corporations regularly engaged in the business of imparting news to the public. *McConnell, supra*, 540 U.S. at 208.

Citizens United exhibits the core characteristics of a "media corporation." It is primarily and regularly engaged in "the collection of information and its dissemination to the public." The Movie is one of nine informative feature length films offered to the public on DVD and in theatres.

The Press Clause complements the Free Speech Clause but "focuses specifically on the liberty to disseminate expression broadly." *Bellotti, supra*, 435 U.S. at 800. It has historical roots in the early British efforts to restrain the press, soon after the invention of the printing press:

> Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication.
>
> *Bellotti, supra*, 435 U.S. at 800

In *McConnell* both the majority and dissent agreed that Congress could not regulate contributions to political talk show hosts or newspaper editors. *McConnell, supra*, 540 U.S. at 156, n. 51. But legislation that targets broadcasting--the twentieth century equivalent of the printing press when it was first invented--is just as objectionable as those early attempts to inhibit the print media when it was a new "means of mass communication."

Moreover, this Court has noted the difficulty in distinguishing media corporations from other companies. *Bellotti*, 435 U.S. at 796 (Burger, J., concurring). As Justice Thomas observed in *McConnell*: "The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press." *McConnell, supra*, 540 U.S. at 283 (Thomas, J., dissenting). Similarly, regarding the Movie as an "electioneering communication" is an onimous step in the direction toward outright regulation of the press.

(ii) THE MOVIE IS "ISSUE ADVOCACY" BECAUSE IT EDUCATES VIEWERS ABOUT MANY PRESSING PUBLIC ISSUES.

The Movie can also reasonably be viewed as issue advocacy because it "conveys information and educates." *WRTL II, supra*, 127 S. Ct. at 2667.

The line between issue advocacy and express advocacy is admittedly a thin one. *WRTL II, supra*, 127 S. Ct. at 2669; *Buckley, supra*, 424 U.S. at 42. *McConnell* rejected any constitutionally mandated line between the two, observing that the new definition of "electioneering communication" covers both. *McConnell, supra*, 540 U.S. at 189, 190. The *McConnell* majority went so far as to conclude that there is no constitutional right to issue advocacy as compared to express advocacy (*id.* at 192-193), but at the same time, the Court acknowledged that the First Amendment protects both campaign and issue speech (*id.* at 205).

WRTL II reigned in the far-reaching implications of *McConnell*. The earlier decision concluded that corporations could simply avoid any specific reference to a candidate (perhaps a "magic omission" comparable to *Buckley's* "magic words"), or use a PAC in doubtful cases. *McConnell, supra*, 540 U.S. at 206. *WRTL II* carved out breathing room for speech that names a candidate but is not truly a "campaign ad" because there is no clear plea to vote for or against a candidate. The Movie names a candidate--Hillary Clinton--but leaves all decisions with the voters, depending on their individual responses to the documentary information and speakers presented on the screen.

(iii) THE MOVIE IS AN ARTISTIC ENDEAVOR ENTITLED TO FIRST AMENDMENT PROTECTION.

The Movie also shares characteristics with speech in the realm of art and entertainment. First Amendment protection extends to artistic and entertaining speech. *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious" motion picture); *Jenkins v. Georgia*, 418 U.S. 153 (1974) (borderline obscene film in movie theatre); *Winters v. New York*, 333 U.S. 507 (1948) (magazines); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (school library books). Motion pictures, like radio and television, are entitled to freedom of the press. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948). "Hillary: The Movie" and other politically motivated films (*W., Rendition, Lions for Lambs*) should enjoy similar First Amendment protection.

III. THE DISCLOSURE/DISCLAIMER REQUIREMENTS CANNOT BE CONSTITUTIONALLY APPLIED TO THE MOVIE.

McConnell found that "amended FECA § 304's disclosure requirements are constitutional because they do not prevent anyone from speaking." *McConnell, supra*, 540 U.S. at 201. But this Court has long recognized that compelled disclosure of political associations and beliefs "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley, supra*, 424 U.S. at 64; *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982); *Davis v. FEC*, 128 S. Ct. 2759, 2774-2775 (2008).

The required disclaimers are constitutionally suspect because they directly regulate the content of speech. *McIntyre, supra*, 514 U.S. at 345-346 (speaker identification on documents designed to influence voters). *McIntyre* and a more recent Ninth Circuit case both involved "campaign statutes that go beyond requiring the reporting of funds used to finance speech to affect the content of the communication itself." *ACLU of Nev. v. Heller*, 378 F.3d 979, 987 (9th Cir. 2004). Disclaimers would use a substantial portion of Citizens United's proposed ads for the Movie and would burden the organization with the cost of additional air time in order to run the ads in their entirety.

This Court has recognized as-applied challenges to disclosure laws where there are threats of harm or retaliation, even if the risk does not extend to all those exposed to public scrutiny. *Brown v. Socialist Workers*

'74 Campaign Comm. (Ohio), supra, 459 U.S. at 97, n. 14. This is a common situation where the application of disclosure laws violates the First Amendment. But it is not necessarily the only one. For example, coerced disclosure can distort the listener's receptiveness to a message because of preconceived prejudices about the speaker. Anonymity would facilitate transmission of the speech and protect the speaker's right to disseminate his message without that distortion. *ACLU of Nev. v. Heller*, *supra*, 378 F.3d at 990.

The Court is urged to consider the facts of *this* case. The Movie has a wide spectrum of speakers appearing on the screen and is anything but anonymous--even though anonymous speech is protected under *McIntyre*. Viewers can check out the facts presented in the documentary without knowing the identity of those who contributed to get the Movie produced. Moreover, unlike the typical *advertisement*, it costs money to purchase the DVD, to see the Movie at a theatre, or to subscribe to cable TV. The Movie is not a campaign ad where disclosure of funding sources would enlighten viewers or serve any other important governmental interests.

(A) *McCONNELL* EXPRESSLY LEFT OPEN THE POSSIBILITY OF AS-APPLIED CHALLENGES TO THE DISCLOSURE REQUIREMENTS IMPOSED ON "ELECTIONEERING COMMUNICATIONS" WHEN IT UPHELD THE REQUIREMENTS AGAINST FACIAL CHALLENGE--"FOR THE ENTIRE RANGE OF ELECTIONEERING COMMUNICATIONS."

This Court has affirmed the general principle that facial validity does not foreclose a later as-applied challenge:

> Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack, so *McConnell* could not have settled the issue we address today. See *Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 803, n. 22, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)* ("The fact that [a law] is capable of valid applications does not necessarily mean that it is valid as applied to these litigants"). Indeed, *WRTL I* confirmed as much. *Wisconsin Right to Life v. FEC*, 546 U.S. 410, 411-412 (2006).

WRTL II, supra, 127 S. Ct. at 2670

The *McConnell* court acknowledged that evidence of a "reasonable probability" of "threats, harassment, and reprisals" could successfully establish an as-applied challenge to the campaign finance law disclosure requirements. *McConnell, supra*, 540 U.S. at 198-199; *see Brown v. Socialist Workers '74 Campaign Comm. (Ohio),* 459 U.S. 87 (1982). But the Court did not stop there. Instead, the language appears to expressly leave open the potential for later as-applied challenges, in spite of upholding the disclosure requirements against facial challenge for "the entire range of electioneering communications":

> In this litigation the District Court applied *Buckley*'s evidentiary standard and found--consistent with our conclusion in *Buckley*, and in contrast to that in *Brown*--that the evidence

> did not establish the requisite "reasonable probability" of harm to any plaintiff group or its members. The District Court noted that some parties had expressed such concerns, but it found a "lack of specific evidence about the basis for these concerns." *251 F. Supp. 2d, at 247 (per curiam).* We agree, but we note that, like our refusal to recognize a blanket exception for minor parties in *Buckley,* **our rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement.**
>
> *McConnell, supra*, 540 U.S. at 199 (emphasis added)

While the particular challenge before the *McConnell* Court related to threats of harm, this language does not foreclose the possibility of a different as-applied challenge based on other circumstances.

Additional observations from *McConnell* support this conclusion. The Court observed that *Buckley* upheld the contribution and expenditure disclosure requirements against facial attack, but "recognized that compelled disclosures may impose an unconstitutional burden on the freedom to associate in support of a particular cause." *McConnell, supra*, 540 U.S. at 197-198. Facial validity indicates that there are constitutional applications of the law, but such a ruling does not foreclose the possibility that the same law might be unconstitutional as applied to other circumstances not before the court.

In rejecting claims that FECA § 316(b)(2)'s segregated-fund requirement for electioneering communications is overbroad, *McConnell* admits that the law may inhibit some constitutionally protected corporate and union speech. *McConnell, supra*, 540 U.S. at 207. Although that conclusion would not justify the prohibition of all enforcement of the law, it does appear to leave the door open for as-applied challenges. If the disclosure requirements inhibit protected speech under particular circumstances, an as-applied challenge should be viable.

Finally, *McConnell* admits that the line between express advocacy and other expression influencing elections is a fuzzy, "functionally meaningless" line. Consequently, restrictions on independent express advocacy do not serve a strong government interest. *McConnell, supra*, 540 U.S. at 217. This observation is made in the context of a discussion about the use of a nonprofit corporation's general funds for advocacy--not disclosure requirements. Nevertheless, the blurry line separating regulable campaign speech from other political expression should signal the very real possibility that a valid as-applied challenge may come before the Court under circumstances not considered in any of its prior decisions. In this case, Citizens United has independently produced a full-length documentary film without the assistance, authorization, or endorsement of any political party, candidate, or campaign. Viewers pay to see it, either through the purchase of a DVD, theatre ticket, or cable TV subscription. Such independent activity is protected expression that is fundamentally different from the barrage of TV ads that Congress sought to address when it enacted BCRA.

(B) THE DISCLOSURE REQUIREMENTS ARE UNCONSTITUTIONAL AS APPLIED TO ELECTIONEERING COMMUNICATIONS NOT PROHIBITED BY *WRTL II'S* APPEAL-TO-VOTE TEST. SUCH COMMUNICATIONS ARE PROTECTED "POLITICAL SPEECH"--NOT REGULABLE "CAMPAIGN SPEECH."

In considering this as-applied challenge, the Court should apply a high standard of review consistent with its past decisions about political expression. Compelled disclosure can seriously infringe protected rights to both political association and speech. *Buckley, supra*, 424 U.S. at 64; *Davis, supra*, 128 S. Ct. at 2775. It is not enough to merely assert a legitimate governmental interest. The statute must survive exacting scrutiny, even if rights are burdened "indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley, supra*, 424 U.S. at 65. Similarly, this Court applied "exacting scrutiny" in its review of a law that prohibited corporate speech "intimately related to the process of governing." *Bellotti, supra*, 435 U.S. at 786. That exacting scrutiny required the government to show a compelling interest and means closely drawn to achieve it. *Id.* at 786. A few years later, this Court required a compelling state interest to justify restrictions on independent expenditures, noting that restrictions on expenditures demanded a more compelling justification than restrictions on contributions. *MCFL, supra*, 479 U.S. at 251, 259-260. Again in *Austin*, a compelling governmental interest and narrow tailoring were needed to infringe the right to engage in political expression. *Austin, supra*, 494

U.S. at 666. *McIntyre* applied exacting scrutiny to assess restrictions on anonymous speech. *McIntyre, supra*, 514 U.S. at 347. Even *McConnell* acknowledged the need for a compelling interest to curtail political expression. *McConnell, supra*, 540 U.S. at 205. More recently, this Court applied strict scrutiny to evaluate the application of BCRA § 203 to WRTL's ads. *WRTL II, supra*, 127 S. Ct. at 2664.

Even if this Court were to deem the Movie to be an "electioneering communication," the lack of a clear plea for action--specifically, an unequivocable appeal to vote against Hillary Clinton--renders it protected political speech rather than campaign speech that can be lawfully restricted. It not only fails to qualify under either *WRTL II's* appeal-to-vote test or *Buckley's* unambiguously-related test, but it also fails the applicable strict scrutiny test. Moreover, application of the "campaign ad" disclosure requirements to the Movie would not serve any of the compelling government interests that ordinarily justify this type of campaign finance regulation, such as anti-corruption, informing voters, and preventing circumvention of the campaign contribution caps.

(i) THE MOVIE IS NOT "UNAMBIGUOUSLY RELATED TO THE CAMPAIGN OF A PARTICULAR FEDERAL CANDIDATE." *See Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

Buckley adopted this language to ensure that the statutory disclosure requirements were not impermissibly broad. The Court easily validated the requirements as applied to candidates and political committees, because these are "by definition, campaign

related." *Buckley, supra*, 424 U.S. at 79. The Court continued its analysis with great caution:

> But when the maker of the expenditure is not within these categories -- when it is an individual other than a candidate or a group other than a "political committee" -- the relation of the information sought to the purposes of the Act may be too remote.
>
> *Id.* at 79-80.

Buckley went on to conclude that independent expenditures came within the reach of the statute only when funds were used for "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80. The Movie differs substantially from the typical campaign ad in its thorough, extensively documented presentation of issues with no clear "appeal-to-vote" for or against a candidate. Application of the disclosure requirements under these circumstances bears only the most tenuous relationship to the governmental interests asserted.

(ii) THE DISCLOSURE REQUIREMENTS FAIL STRICT SCRUTINY BECAUSE THEIR APPLICATION TO THE MOVIE IS NOT NARROWLY TAILORED TO SERVE ANY OF THE PURPORTED GOVERNMENT INTERESTS.

McConnell expressed concern about corporations funding broadcasting advertisements while concealing their identities. *McConnell, supra*, 540 U.S. at 196.

The Court provided several illustrations of misleading names that masked the real powers behind them: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), and "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). *Id.* at 197. The Court identified three main governmental interests to sustain the "entire range" of electioneering communications--informing the electorate about the source of speech, preventing corruption (particularly "quid pro quo"), and precluding circumvention of the political contribution caps.

The strict standard of review requires that the law be narrowly tailored to further these interests. Narrow tailoring is particularly crucial here because the disclosure laws burden *two* First Amendment rights--core political speech *and* the freedom to associate with others. It is questionable whether the disclosure requirements--as applied to the Movie--are sufficiently linked to any of the three stated governmental interests, let alone narrowly tailored.

(a) THE ELECTORATE DOES NOT NEED TO BE INFORMED OF FUNDING SOURCES FOR A DOCUMENTARY MOVIE FOR WHICH THEY HAVE PAID AN ADMISSION PRICE.

One of the government interests asserted is providing voters with additional relevant information to facilitate their evaluation of speech. However, that interest alone is insufficient to justify requiring a

speaker to make statements or disclosures that would otherwise be omitted. *McIntyre, supra*, 514 U.S. at 348. As this Court stated, listeners are able to consider anonymity along with content:

> "Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible,' what is valuable, and what is truth." *New York v. Duryea*, 351 N.Y.S.2d 978, 996 (1974).

Id. at 348, n. 11

Coercive disclosure requirements may actually inhibit speech and accomplish the very opposite of the intended effect. "[I]f anonymous speech is banned, some useful speech will go unsaid." *ACLU of Nev. v. Heller, supra*, 378 F.3d at 993.

Disclaimer requirements can cut into the limited (and costly) time and space available for other speech, decreasing the overall content. *McConnell* held that the Sect. 318 disclaimer provisions bear "a sufficient relationship to the important governmental interest of shed[ding] the light of publicity" on campaign financing. *McConnell, supra*, 540 U.S. at 231. Even if that were true as applied to the Movie, a short on-screen statement would be more narrowly tailored to that interest than the burdensome requirements that eat up a substantial portion of the allotted ad time.

The Movie includes a variety of speakers identified by name and interviewed on the screen. This serves the voters' interest in having information about who is speaking and undermines any argument that the statutory disclosure requirements are narrowly tailored to serve that interest.

(b) DISCLOSURE OF FUNDING SOURCES FOR THIS INDEPENDENTLY PRODUCED MOVIE WOULD NOT SERVE THE GOVERNMENTAL INTEREST IN PREVENTING CORRUPTION.

The government has a legitimate interest in preventing corruption--or even the appearance of it--in federal elections. Large political contributions have the potential to "buy" favors from a candidate who is elected to office. Public communications that promote or attack a candidate also have an impact on elections and directly benefit candidates. Contribution caps are closely tied to preventing corruption. *McConnell, supra*, 540 U.S. at 169. However, campaign finance restrictions must be narrowly tailored to combat corruption without chilling protected speech. *Buckley* struck down limitations on independent expenditures, finding the governmental anti-corruption interest sufficient to justify the $1,000 contribution cap but inadequate to uphold limits on independent expenditures. *Buckley, supra*, 424 U.S. at 26, 47-48.

This case is not about contributions caps. It is about independent expenditures that are far removed from any candidate, campaign, or political party. No candidate or political entity has authorized, endorsed, or in any way financed the production of the Movie.

The potential for corruption is too remote to justify either banning it at election time or imposing intrusive disclosure requirements.

There is also little risk that Citizens United can accumulate sufficient wealth to endanger the integrity of the electoral process. *McConnell* expressed concern about the "corrosive and distorting effects of immenses aggregations of wealth." *McConnell, supra*, 540 U.S. at 205; citing *Austin, supra*, 494 U.S. at 660. However real this concern may be in some circumstances, its heaviest impact is likely to fall on "budget-strapped nonprofit entities." *McConnell, supra*, 540 U.S. at 340 (Thomas, J., dissenting). Citizens United is such an entity, financially dependent on many small membership fees, non-deductible contributions, and sales of products.

Citizens United is similar to the group involved in *MCFL, supra,* 479 U.S. 238. Such groups pose no danger of corruption through mass accumulation of funds that can be used to gain improper political advantage. *Id.* at 259. Contributors are aware of and support the group's political purposes. *Id.* at 260-261. *MCFL* considered three factors the key to its decision. *Id.* at 264. First, MCFL was expressly formed to promote political ideas. Second, MCFL had no shareholders or other persons with a claim on corporate income or assets. Finally, MCFL was not formed as a business corporation or labor union and did not accept contributions from such entities.

Citizens United is a nonprofit organization tax-exempt under Sect. 501(c)(4) of the Internal Revenue Code. 26 U.S.C. § 501(c)(4). Its mission statement, reproduced above (Introduction) and displayed on its

website, shows that it was formed to promote political ideas such as limited government, free enterprise, strong families, national sovereignty and security. As a non-business nonprofit corporation, it has no shareholders or others with a vested financial interest in its income or assets. The website offers memberships for a contribution of $15.00 or more, and the website format is designed solely for individual donors. See https://secure.donationreport.com/donation.html?key=ME6AVZNKIFP2.

MCFL challenged the pre-election ban of its ads rather than disclosure requirements. The corporation had to make various disclosures. However, MCFL's distinguishing characteristics--formation for political purposes, lack of shareholders, and non-business status--are also relevant to finding that there is only a tenuous link between the disclosure requirements and the government's interest in preventing corruption. Citizens United brings private citizens together, not to curry political favor but to engage in protected political speech that is independently funded and disseminated.

(c) DISCLOSURE OF THE MOVIE'S FUNDING SOURCES DOES NOTHING TO DETER VIOLATIONS OF THE POLITICAL *CONTRIBUTION* LIMITS.

This Court has upheld legislation designed to curb "the corrosive and distorting effects of immense aggregations of wealth" accumulated by corporations but having little correlation to public support for the political views funded with that wealth. *McConnell, supra*, 540 U.S. at 205; *Austin, supra*, 494 U.S. at 660.

Even nonprofit advocacy groups can be subjected to limitations on direct contributions, which involve speech by someone other than the donor and thus are "closer to the edges" of the First Amendment. *FEC v. Beaumont*, 539 U.S. 146, 161 (2003).

But this Court has repeatedly have struck down limitations on expenditures "made totally independently of the candidate and his campaign." These provide little (if any) assistance to candidates and may even be counterproductive. *McConnell, supra*, 540 U.S. at 221; *Buckley, supra*, 424 U.S. at 47. Limits on independent expenditures "impose far greater restraints on the freedom of speech and association than do limits on contributions and coordinated expenditures" without serving the governmental interest in stemming corruption. *McConnell, supra*, 540 U.S. at 221; *Buckley, supra*, 424 U.S. at 44, 47-48. Justice Blackmun's concurring opinion in *Cal. Medical Ass'n v. FEC*, 453 U.S. 182, 203 (1981) stressed that "contributions to a committee that makes only independent expenditures...pose no threat" of corruption or the appearance thereof.

Disclosure requirements allegedly serve the government's interest in curbing violations of political contribution caps. But contributions to Citizens United are not the direct political contributions targeted by those caps. The disclosures impose a substantial burden on the First Amendment rights of the people who have associated with Citizens United in order to engage in protected speech. Moreover, the cost of producing the Movie is partially offset by revenue from DVD and theatre ticket sales.

Finally, as the late Chief Justice Rehnquist cautioned, the alleged "circumvention" interest eviscerates the narrow tailoring requirement:

> In allowing Congress to rely on general principles such as affecting a federal election or prohibiting the circumvention of existing law, the Court all but eliminates the "closely drawn" tailoring requirement and meaningful judicial review.
>
> *McConnell, supra*, 540 U.S. at 357 (Rehnquist, C.J., dissenting)

This comment was not made in the context of examining disclosure requirements. However, requiring disclosure about the independent expenditures of a nonprofit advocacy group is far removed from the direct political contributions that Congress may lawfully regulate. It is unclear how disclosing information about Citizens United's donors and expenditures does anything to facilitate compliance with laws that limit such contributions.

CONCLUSION

Regulation of this type of movie as an "electioneering communication," subject to pre-election ban and burdensome disclosures, could ultimately inhibit a broad array of protected political speech at the time when citizens need it most. The mere mention of a candidate's name during the crucial days before an election triggers a host of onerous regulations that chill core political speech. Although current law extends only to broadcast media, if it is applied to an informational documentary so dissimilar

to the "virtual torrent" of TV ads that concerned Congress, the potential exists to enact laws that regulate television shows, books, magazines, and newspaper editorials--in short, the entire press. This Court, in accord with *WRTL II's* narrowing language, should construe the Bipartisan Campaign Reform Act so that it only reaches that small slice of speech that unambiguously constitutes regulable campaign advertising.

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124

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In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From
The United States District Court
For The District Of Columbia

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF APPELLANT, CITIZENS UNITED

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. DISCLOSURE REGULATIONS CHILL SPEECH BY BURDENING CITIZENS' RIGHT TO ENGAGE IN ANONYMOUS SPEECH AND BY ENABLING PERSONAL AND ECONOMIC REPRISALS 6

A. Disclosure Creates A Disincentive To Engage in Political Activity 8

B. Fear Of Political Reprisal Is Both Real and Reasonable 13

C. The FEC's Regulations Violate the First Amendment 16

II. BURDENSOME REPORTING REQUIREMENTS CHILL SPEECH 18

III. THE GOVERNMENT SHOULD CARRY THE BURDEN TO DEMONSTRATE THE NEED FOR DISCLOSURE INSTEAD OF SPEAKERS BEARING THE BURDEN TO PROVE THE NEED TO REMAIN ANONYMOUS 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Battaglieri v. Mackinac Ctr. for Pub. Policy, 680 N.W.2d 915 (Mich. Ct. App. 2004) 2

Broward Coal. of Condo. v. Browning, ___ F. Supp. 2d ___, 21 Fla. L. Weekly 420 (N.D. Fla. 2008).....1

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Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999).....4

Buckley v. Valeo, 424 U.S. 1 (1976) 4, 26, 27

Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088 (9th Cir. 2003) 4

Davenport v. Wash. Educ. Ass'n, ___ U.S. ___, 127 S.Ct. 2372 (2007).....1

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TABLE OF AUTHORITIES – Continued

Page

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STATUTES

2 U.S.C. § 434(f) 6, 7

2 U.S.C. § 434(i) 8

11 C.F.R. § 104.20 ..... 6, 7

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Supreme Court Rule 37.3 1

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Page

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Page

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Kimberley A Strassel, *Challenging Spitzerism at the Polls*, Wall St. J., August 1, 2008 ..... 14, 15

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Steve Lopez, *A Life Thrown in Turmoil by $100 Donation for Prop. 8*, Los Angeles Times, December 14, 2008 13

INTEREST OF THE AMICUS

Pursuant to Rule 37.3 of this Court, the Institute for Justice (the "Institute") respectfully submits this amicus curiae brief in support of Appellant Citizens United.[1]

The Institute is a nonprofit public interest legal center dedicated to defending the essential foundations of a free society: private property rights, economic and educational liberty, and the free exchange of ideas. The Institute litigates First Amendment cases throughout the country and files amicus curiae briefs in important cases nationwide, including this Court's decisions in *Davenport v. Washington Education Association*, ___ U.S. ___, 127 S.Ct. 2372 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); and *McConnell v. FEC*, 540 U.S. 93 (2003). The Institute regularly brings cases on behalf of individuals whose right to speak and associate has been infringed by the actions of the government. In particular, the Institute has represented parties in a number of actions challenging campaign finance regulations. *See Independence Inst. v. Coffman*, ___ P.3d ___, 2008 WL 5006531 (Colo. App. 2008); *Broward Coal. of Condo. v.*

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[1] The Institute has received consent from counsel of record pursuant to Sup. Ct. R. 37.3, as submitted with this brief. The Institute affirms, pursuant to Sup. Ct. R. 37.6, that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Browning, __ F. Supp. 2d ___, 21 Fla. L. Weekly 420 (N.D. Fla. 2008); *Sampson v. Coffman*, ___ F. Supp. 2d ___, 2008 WL 4305921 (D. Colo. Sept. 18, 2008); *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008); *McComish v. Brewer*, No. cv-08-1550-PHX-ROS (D. Ariz. Oct. 17, 2008); *San Juan County v. NoNewGasTax.com*, 157 P.3d 831 (Wash. 2007); and *Battaglieri v. Mackinac Ctr. for Pub. Policy*, 680 N.W.2d 915 (Mich. Ct. App. 2004). Further, the Institute has published two recent empirical research studies identifying the burdens and costs of campaign finance disclosure requirements.

The Institute believes that its legal perspective, experience, and empirical research will provide this Court with valuable insights regarding the impact of mandatory disclosure on political activity.

SUMMARY OF ARGUMENT

Mandatory reporting and disclosure requirements are common features of campaign finance regulations, largely because they are generally accepted as a relatively cost-free means of regulation. Until the Institute researched the issue, however, no one previously attempted to systematically measure the extent to which mandatory disclosure of information about a citizen's political activities (including the widespread dissemination of such information) creates disincentives for the rigorous exercise of First

Amendment rights. The Institute's empirical research demonstrates that mandatory disclosure of the kind sought by the Appellees in this case chill the exercise of First Amendment free speech and association rights because of (i) a reasonable fear of reprisals, and (ii) the burdens of compliance wedded to severe penalties for failing to accurately comply with disclosure rules.

Under strict scrutiny, it is the government's burden to demonstrate – through facts and not mere conjecture – that any harms that disclosure aims to prevent are real and that mandating disclosure actually alleviates those harms. The Institute's empirical evidence shows that the government cannot meet this burden in this case. For this reason, this Court should reject the arguments of the Appellee regarding the constitutional legitimacy of mandatory disclosure of political activity. At the very least, this Court should hold that the government must demonstrate that mandatory disclosure of political activity will *not* result in threats, harassment, or reprisals from either the government or private parties, instead of placing the burden on the speaker to demonstrate such consequences if anonymity is lifted.

ARGUMENT

This Court has previously upheld various mandatory disclosure requirements in the campaign finance context. *See, e.g., McConnell v. FEC*, 540 U.S.

93, 196-99, 231, 321 (2003); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999); and *Buckley v. Valeo*, 424 U.S. 1, 81 (1976). This line of reasoning has prevailed in the lower courts as well. *See, e.g., Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003). Significantly, however, none of these cases actually engaged in an analysis of the factual evidence regarding the effects and impacts of disclosure requirements on the exercise of First Amendment rights. Instead, the cases assume that disclosure had some negative impact on the vigorous expression of First Amendment rights, but that this burden was not significant enough to overcome the government's interest in combating corruption or the appearance of corruption. *See Buckley*, 424 U.S. at 81 (1976) (assumes that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption Congress found to exist").[2] In that regard, neither this Court,

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[2] Many courts find support for mandatory disclosure in *United States v. Harriss*, 347 U.S. 612 (1954). *See, e.g., Buckley*, 424 U.S. at 67 n. 79; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n. 32 (1978); *Getman*, 328 F.3d at 1106. The application of this case beyond its facts is questionable, however. First, *Harriss* concerned a statute narrowly targeting professionals who lobbied members of Congress, in contrast to Citizens United's role in speaking to the public at large. *See Harriss*, 347 U.S. at 620-21 n. 10. Moreover, *Harriss* was issued years before the Internet made campaign-finance data easily available to anyone with access to a computer. In 1954, the cost of accessing information on political activity was relatively high. Now, as discussed below, the Internet has allowed states to create

(Continued on following page)

nor any other court, has analyzed whether mandatory disclosures are, as widely assumed, in reality "the least restrictive means" in comparison to the purported benefits of such regulation.

For the Federal Election Commission ("FEC") to impose the mandatory disclosure regulations at issue before this Court in a manner consistent with the dictates of the First Amendment, it must demonstrate a compelling state interest which the reporting requirements are narrowly tailored to meet. *FEC v. Wisc. Right to Life*, ___ U.S. ___, 127 S.Ct. 2652, 2664, 168 L. Ed. 2d 329 (2007) ("*WRTL*"). To demonstrate such an interest, the FEC must offer actual evidence of a real problem that the law is designed to remedy. *See Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). This Court has further noted, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986) ("*MCFL*").

This case presents the Court with the opportunity to consider, for the first time, the tangible burdens and costs of disclosure requirements using

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government-run databases of political activity that can be accessed with just a few keystrokes. Twenty-first century technology has simply made *Harriss* a vestigial organ of a time when accessing information was difficult and expensive.

empirical information, not mere assumptions or conjecture. While evidence as to the burdens and benefits of mandatory disclosure laws was not previously available, it now exists. Rather than justifying mandatory disclosure laws, this evidence undermines their constitutionality. The FEC may not merely rest on conjecture, it must demonstrate, using actual evidence, that mandatory disclosure of Appellants' donors is narrowly tailored to deter corruption or the appearance of corruption. Now that empirical evidence exists regarding the benefits and burdens of disclosure and reporting requirements, however, the FEC simply cannot meet its burden to justify the reporting requirements at issue. *See* 2 U.S.C. § 434(f)(2); 11 C.F.R. § 104.20.[3]

I. DISCLOSURE REGULATIONS CHILL SPEECH BY BURDENING CITIZENS' RIGHT TO ENGAGE IN ANONYMOUS SPEECH AND BY ENABLING PERSONAL AND ECONOMIC REPRISALS

Despite the widespread use of mandatory disclosure laws by governments regulating political activity, before the Institute's recent studies, "no one [had] analyzed systemically the effects of campaign-finance

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[3] The Institute agrees with Citizens United's arguments regarding the constitutionality of all aspects of the FEC's regulations at issue and in particular with its argument at pages 53-57 of the Appellant's Opening Brief, addressing the disclosure requirements in the FEC's regulations.

regulations on freedom of speech or association." Jeffrey Milyo, Ph.D., *The Political Economics of Campaign Finance*, The Independent Review, Vol. 3, Issue 4, 537 (Spring 1999) *available at* http://web.missouri.edu/~milyoj/files/polecon%20article.pdf. Given the push in recent years for increased campaign finance regulations, this lack of analysis is significant because "[i]t is difficult to evaluate the desirability of either current laws or proposed reforms when the potential costs of various policies have been completely ignored by scholars and policy makers alike." *Id.* We now have empirical research into the costs of mandatory reporting and disclosure laws demonstrating the full extent of their chilling effect on First Amendment freedoms.[4]

Under the FEC's rules, Appellant Citizens United, if subject to the reporting requirements at issue in this case, would have to disclose the name and address of each person who contributed $1,000 or more since the beginning of the prior calendar year for the purpose of funding "electioneering communications." 2 U.S.C. § 434(f); 11 C.F.R. § 104.20. Crucially, this data is then made publicly and broadly available by the FEC on public internet websites and

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[4] While the particular research studies discussed below were conducted within the context of ballot issue elections, the primary empirical findings are applicable to candidate elections as well and are therefore relevant to this Court's analysis of claims arising in the context of a candidate election.

is easily accessible and searchable. 2 U.S.C. § 434(i)(4). This kind of reporting or disclosure requirement is not unusual in campaign finance regulatory schemes.

A. Disclosure Creates A Disincentive To Engage in Political Activity

In 2007, Dr. Dick Carpenter conducted research to determine whether mandatory disclosure requirements impose burdens that chill political participation. *See* Dick Carpenter, Ph.D., *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* at 5-6, Institute for Justice, March 2007, http://www.ij.org/publications/other/disclosurecosts.html (last visited January 12, 2009). Dr. Carpenter is an Associate Professor at the University of Colorado, Colorado Springs, where he teaches graduate courses in research methods and statistics, and he is the Director of Strategic Research at the Institute for Justice. *Id.* at 22.

Dr. Carpenter's research is the first of its kind to address substantively issues that have long been raised by scholars:

> [M]ore than 30 years ago political scientist Herbert Alexander warned against a "chilling effect" of [campaign finance] laws on free speech and citizen participation. Alexander described a situation in which citizens might be reluctant to participate or speak for fear

> of unintentionally violating laws they knew little about or did not understand.
>
> Brad Smith, former chair of the Federal Election Commission and current chair of the Center for Competitive Politics, also points to the not unheard of possibility of retaliation against citizens whose political activities are disclosed to the public by the state. Smith asks, "What is forced disclosure but a state-maintained database on citizen political activity?"

Id. at 5.

Specifically, Dr. Carpenter's study examined respondents' general opinions about mandatory disclosure requirements in the abstract, as well as when the respondents themselves might be affected personally. Dr. Carpenter found that people generally favor mandatory disclosure – or, at least they favor it until they may be personally affected by these requirements:

> More than 82 percent of respondents agreed or strongly agreed with the idea [of mandatory contribution disclosure requirements]. . . . Yet, support for disclosure wanes considerably when the issue is personalized. . . . [M]ore than 56 percent disagreed or strongly disagreed that their identity should be disclosed, and the number grew to more than 71 percent when disclosure of their personal information included their employer's name.
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> * * *

> Indeed, when we compared respondents' support for disclosure generally to their support for disclosing their own personal information, we found a very weak statistical relationship, especially if disclosure of one's employer is required. In other words, enthusiastic support for disclosure laws does not translate into a belief that one's own personal information should be released publicly.

Id. at 8 (internal citations omitted). The bottom line? "[E]ven those who strongly support forced disclosure laws will be less likely to contribute to an issue campaign if their contribution and personal information will be made public." *Id.*

In that regard, the desire to engage in anonymous political speech and association was the main factor underlying respondents' concerns with disclosure of personal information:

> When asked, through open-ended probes, why they would think twice if their personal information was disclosed, the reason most often given (54 percent) was a desire to keep their contribution anonymous. Responses such as, "Because I do not think it is anybody's business what I donate and who I give it to," and "I would not want my name associated with any effort. I would like to remain anonymous," typified this group of responses.
>
> * * *

> Respondents also most often cited the issue of anonymity (32 percent) when asked why they would think twice before donating if their *employer's* name were disclosed. In this case, the concern was over revealing where they work. For example, "It's not anybody's business who my employer is and it has nothing to do with my vote," or "My employer's name is nobody's business," most often represented this concern.

Id. at 8-9 (emphasis in original). Beyond the desire for anonymous political participation, respondents also had concerns over a variety of potential repercussions, including fears of identity theft, invasion of privacy, and loss of employment:

> Respondents also frequently mentioned a concern for their personal safety or the potential for identity theft. Comments included, "Because I am a female and [it's] risky having that info out there"; "With identity theft I don't want my name out there"; and "I wouldn't donate money because with all the crazy people out there, I would be frightened if my name and address were put out there to the public."
>
> Other participants saw a relationship between disclosure and a violation of their private vote with responses like, "I don't want other people to know how I'm voting," or, "Because that removes privacy from voting. We are insured privacy and the freedom to vote." Still others noted the opportunity for repercussions. "I think it's an opening for

> harassment"; "I don't think my information should be out there for fear of retaliations"; or "My privacy would be invaded by the opposition," illustrate such concerns.
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> * * *
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> Respondents also often cited concern for the longevity of their job should their employer, through mandatory disclosure, learn of the employee's beliefs expressed through a contribution. Some simply stated, "I would never want my employer to know who I give money to," or, "I wouldn't want my employer to be informed on what I do." But others explicitly stated their fear: "Because that could jeopardize my job"; "I might get fired for that kind of stuff"; and, "If you were a union member and you vote on another side it would come back at you and hit you in the face."
>
> Still others feared for the negative effect on their own business: "I am self-employed, and I wouldn't want that to be released to the public," or, "Because I own a business and who I support is part of my own internal business practices and should not be public."

Id. at 8-9. As discussed below, however, concerns about economic or personal repercussions are certainly not hypothetical in an age where campaign finance reports are available on the Internet, easily accessible, and are used more frequently to retaliate against political opponents.

B. Fear Of Political Reprisal Is Both Real and Reasonable

In the most recent election cycle, supporters of California's Proposition 8, relating to same-sex marriage, found themselves subject to reprisals in a variety of forms following the proposition's success. *See* Steve Lopez, *A Life Thrown in Turmoil by $100 Donation for Prop. 8*, Los Angeles Times, December 14, 2008 (describing the experience of a restaurant manager who made a personal donation in support of Proposition 8, ultimately resulting in the boycott of her restaurant); John R. Lott, Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides: Supporters of California's Prop. 8 Have Faced a Backlash*, Wall St. J., Dec. 26, 2008 (summarizing examples of individuals who faced economic retaliation for donations in support of Proposition 8); Amy Bounds, *Gay rights advocates picket Boulder Cineplex*, Rocky Mountain News, November 30, 2008 (business picketed and boycotted based on CEO's personal donation). In fact, a website recently appeared providing an interactive map with pinpoint locations, names, addresses, and donation amounts for individuals and entities that supported Proposition 8 – in this circumstance, access to this personal information regarding political activities is even easier. *See* www.eightmaps.com (last visited January 12, 2009).

The experience of Proposition 8 supporters in 2008 is by no means unique. Exacting political retribution for individuals' support or opposition of particular candidates or causes specifically based on data

gleaned from campaign finance reports is becoming a new field of battle in politics. *See* Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. Times, August 8, 2008 (describing the planned campaign of liberal nonprofit group Accountable America, which planned "to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions"); *see also* Associated Press, *John Kerry Grills Belgium Ambassador Nominee Over Swift Boat Donation*, FoxNews.com, February 28, 2007 ("A Senate hearing that began with glowing tributes to a St. Louis businessman and his qualifications to become ambassador to Belgium turned bitterly divisive Tuesday after he was criticized for supporting a controversial conservative group.").

The rising acceptance of this type of political retribution is already generating anecdotal evidence of a chilling effect on political speech and association. For instance, in West Virginia's most recent race for state attorney general, a newcomer challenged the incumbent, a man described by the Wall Street Journal as "a case study of abuse in office." Kimberley A Strassel, *Challenging Spitzerism at the Polls*, Wall St. J., August 1, 2008. Because of the effect of mandatory reporting requirements, the challenger alleged he faced a significant uphill battle in fundraising:

> [Incumbent Attorney General Darrell McGraw's] other main asset is fear. [Challenger] Mr. Grear admits a big hurdle is fund

> raising, even among a business community that is desperate to throw out Mr. McGraw. "I go to so many people and hear the same thing: 'I sure hope you beat him, but I can't afford to have my name on your records. He might come after me next.'" This is a frightening example of how the power of an attorney general can corrupt even the electoral process.

Id.

Reprisals for political contributions can also come in forms unrelated to the donation itself. Gigi Brienza discovered this when her name and address appeared on the website of an animal-rights organization, which had culled FEC records for donors whose employers perform animal testing. *See* Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared.*, Wash. Post, July 1, 2007 at B03.

Quite simply, the easy accessibility of information about one's political leanings, address, employer, and occupation suggests that it is time for this Court to reexamine its conclusions about the cost of mandatory disclosure rules. In 2009, a person wishing to harass citizens with a different viewpoint no longer needs to visit a government office to sift by hand through published data to access political information. Now, data regarding one's political leanings, address, employer, and occupation are searchable from any computer, day or night. In such an environment, it is perfectly understandable that

reasonable individuals fear the implications of publicizing their political positions.

C. The FEC's Regulations Violate the First Amendment

In *McIntyre v. Ohio Elections Commission*, this Court struck down a law that required the disclosure of one's identity on written election communications. 514 U.S. 334, 357 (1995). This Court held that individuals have a right to anonymous speech and that a law requiring them to disclose their views on controversial issues did so in violation of that right. *Id.* "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* This Court also emphasized the importance of anonymity in protecting rights to speech and association. "Anonymity is a shield from the tyranny of the majority" which "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.*

Disclosure Costs (supra), the first study to question the general presumption that mandatory disclosures are cost-free, demonstrates that this Court's conclusions in *McIntyre* were not only correct, they

may have understated how mandatory disclosure of political activity negatively affects the vibrancy of political discourse in this country. The empirical findings discussed above, as well as the anecdotal evidence from a broad range of sources, demonstrate that mandatory reporting and disclosure requirements unquestionably chill the exercise of fundamental First Amendment freedoms. Chilling the exercise of free speech and associational rights is a substantial burden on the First Amendment.

As noted above, it is the FEC's burden in this case to provide a compelling interest and demonstrate that its mandatory reporting and disclosure regulations are narrowly tailored to meet that interest. *WRTL,* 127 S.Ct. at 2664. This means the FEC must demonstrate through evidence, rather than speculation, that there is an actual harm that the reporting requirements are designed to address. *Turner Broad. Sys.* 512 U.S. at 664. Further, the FEC must demonstrate that, in burdening free speech and association rights, the regulations do not impose more burdens than are absolutely necessary. *MCFL*, 479 U.S. at 265.

The FEC has failed to meet any of these burdens. It has not demonstrated the existence of an actual harm, rather than a speculative one, and even assuming the Court accepts the FEC's speculative harm as real, it has not bothered to provide any evidence that the reporting requirements do anything in the real world to ameliorate that harm. *See* Mot. to Dismiss at

14-22. Thus, the FEC has failed to meet its burden in this case.

II. BURDENSOME REPORTING REQUIREMENTS CHILL SPEECH

The fear of retribution is not the only disincentive created by mandatory disclosure rules. Even in the unlikely event that a candidate or position is so innocuous that there is no chance of retribution, the process of mandatory disclosure creates a significant disincentive to the vigorous exercise of First Amendment rights.

This Court has previously recognized that campaign finance regulations may place significant and unconstitutional burdens on First Amendment rights. *See, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251-56 (1986) (plurality opinion) (analyzing the burdens imposed by Massachusetts campaign finance restrictions). Even state governments have been known to identify the potential burdens they imposed through extensive reporting and disclosure requirements: In 2000, a bipartisan commission appointed to study California's campaign finance laws conducted a number of focus group sessions to assess the public's view of that state's laws. One of its focus groups gave an apt description of the effect of complicated laws:

> The unintended consequence of this is that the price of admission into politics becomes

> too high. People do not want to become candidates or treasurers because of the potential liability. Thus the regulations have injured grassroots democracy and have essentially professionalized politics so that you have to have lawyers and accountants on your campaign staff.

Bipartisan Comm'n on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* at 62, http://www.fppc.ca.gov/McPherson.pdf (last visited January 12, 2009).

Dr. Jeffrey Milyo observed similar reactions when he conducted an experiment in 2007 using 255 subjects who attempted to comply with disclosure laws from three states regulating ballot issue committees. Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate* at 27, Institute for Justice, October 2007 http://www.ij.org/publications/other/campaign-finance-red-tape.html (last visited January 12, 2009). Dr. Milyo is a professor in the Truman School of Public Affairs and the Department of Economics at the University of Missouri in Columbia. *Id.* He has taught and written extensively on campaign finance laws and conducted research and statistical analysis of the effects of political regulations and institutions. *Id.* Dr. Milyo's research has been recognized and supported by the National Science Foundation and is frequently cited in the national media. *Id.*

To analyze the potential difficulties of complying with mandatory reporting and disclosure laws, Dr. Milyo used a simple hypothetical scenario involving the formation of a ballot issue committee and scored only basic tasks:

> The scenario include[d] only one expenditure item and a handful of small and large contributions, including non-monetary and anonymous donations . . . . This scenario was given to 255 experimental subjects, who were asked to complete the disclosure forms for a particular state, using the actual instructions and handbooks. Subjects had 90 minutes to complete the forms and were paid for their participation. To give participants an incentive to fill out their forms correctly, subjects were paid $20 for participating and up to an additional $20 based on their performance.
>
> The experimental subjects in this study were recruited primarily from graduate students in political science, public affairs and economics at the University of Missouri and from non-student adults (age 25-64) in Columbia, Mo.; a few undergraduate students, mostly graduating seniors in economics or political science and all at least 20 years old, also participated.

Id. at 5-6. *Not one subject completed all of the tasks correctly*; on average they managed to correctly complete 41% of the tasks, and no one completed more than 80% correctly. *Id.* at 8. As Dr. Milyo noted,

"It is particularly disconcerting that subjects could not complete half of the disclosure tasks that were scored . . . ; after all, the subject pool was composed of mostly college-educated people, many of whom were pursuing advanced degrees in political science and public affairs." *Id.*

After making some adjustments "to account for subject characteristics that could affect performance (such as age, voter registration status, education and whether the subject completed the form)" it became clear "that there are few differences across subject types; all subjects had difficulties across the board and regardless of their background." *Id.* As Dr. Milyo explained, "it is telling that ordinary people without special expertise struggle to follow these procedures. . . . [T]he effect of campaign finance regulations should not be to reserve politics to a professional elite; the political process should be open to all citizens." *Id.* at 10.

The inability of *every single subject* to complete even basic campaign finance reporting tasks is significant because failure to perfectly comply with reporting requirements leads to potentially devastating consequences.

> A ballot issue committee that omits or misreports even one transaction is subject to fines that can cumulate with each oversight. For even a very small group with just a few contributors and expenditures, missing one filing deadline might generate hundreds of thousands of dollars in fines, or more.

> California hit a political committee that spent just over $100,000 with $808,000 in fines, even though the maximum fine was $2,000 per violation: The state tallied each missing name, address and employer name as a separate violation.

Id. at 3. Based on this experience, the subjects had little doubt that the burdens of compliance, particularly when combined with the potential for severe penalties, would chill participation in the political process:

> Subjects were sincerely frustrated in their attempts to complete the disclosure forms – and believed these difficulties would deter political activity. . . . About two-thirds of respondents agreed that the disclosure requirements would deter many people from engaging in independent political activity. That figure rose to 85% to 89% when the specter of fines and punishment for incorrect compliance was raised. Also, about a quarter to one-half of the respondents expressed strong reluctance about making contributions to political groups because of public disclosure.

Id. at 14-16.

To ensure a full understanding of subjects' feelings about their experience, they were given a voluntary opportunity to comment. 94 subjects chose to provide comments, and by a ratio of more than 20 to one, the comments were negative. Some examples typifying these comments are:

> "A lawyer would have a hard time wading through this disclosure mess and we read legal jargon all the time."
>
> "Good Lord! I would never volunteer to do this for any committee."
>
> "Worse than the IRS!"
>
> "Seriously, a person needs a lawyer to do this correctly."
>
> "This is horrible!"
>
> "This was awful. I feel bad for anyone who encounters these forms in real life."

Id. at 17. Interestingly, one subject turned out to be a campaign treasurer for a political action committee in Missouri and was generally sympathetic to the concept of disclosures. Even she did not successfully complete the tasks in the study. In her post-experiment comments she noted,

> Even with [my] limited experience I found this exercise to be complicated and mentally challenging. I took nearly the alloted [sic] amount of time to complete the forms and still made two major errors. The burdensome paper work and fines imposed for errors in reporting proved to be a hurdle that prevented the formation of our PAC . . . for a number of years.

Id. at 18. Dr. Milyo concluded:

> There should be no doubt that state disclosure laws for ballot measure committees are

> indeed "overly burdensome and unduly complex"; the compliance experiment demonstrates that ordinary citizens, even if highly educated, have a great deal of difficulty deciphering disclosure rules and forms.

Id. at 21.

Professor Elizabeth Garrett of the University of Southern California Gould School of Law, who specializes in the legislative process and the study of democratic institutions, has also recognized that "[d]isclosure is not costless. It imposes burdens on those who must comply with complex laws," it "may place a heavy penalty on groups that face retaliation when their support for unpopular positions becomes public, and it may undermine the ability of disliked or distrusted groups to influence policy in ways consistent with their interests." Elizabeth Garrett, *Commentaries on Bruce Ackerman and Ian Ayres's Voting with Dollars: A New Paradigm for Campaign Finance Reform: Voting with Cues*, 37 U. Rich. L. Rev. 1011, 1011 (May 2003). Professor Garrett, having recognized that the potential for costs exists, also acknowledged the lack of systematic research up to that point examining the issue of costs: "[t]hese costs may be worth paying if the benefits of disclosure are substantial. But before we can reach that conclusion, we must have a better sense of costs and benefits." *Id.*[5]

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[5] Moreover, the empirical data demonstrates that, in the ballot issue context at least, citizens do not pay attention to the

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Here, the FEC requests that, in order to run a television commercial promoting a movie about Hillary Clinton, Citizens United should compile and disclose the names and addresses of all individuals who have donated, in the aggregate, $1,000 or more toward the airing of the commercials since the first day of the preceding year. This means that Citizens United must track every single donation it receives (just in case they later add up to the trigger amount), it cannot accept any anonymous donations (because how would it otherwise be able to track the aggregates), and it faces penalties if a clerical or mathematical error occurs in the aggregation of donations. What may seem on paper an innocuous regulation is in reality a considerable burden that carries with it the potential for sizeable penalties.

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data compiled and disseminated from disclosures (except perhaps for purposes of retaliation). *See Disclosure Costs* at 11-12. Further, the availability of this information has not improved journalists' reporting on issues such as potentially improper contributions. *See* Raymond LaRaja, *Sunshine Laws and the Press: The Effect of Campaign Disclosure on News Reporting in the American States*, 6 Election L. J. 236 (2007) (comparing print news coverage of campaign finance in states with disclosure requirements to those without requirements). If neither journalists nor citizens tend to access and use this information, certainly there is no need for the information to be made publicly available. Conceivably the government could address its enforcement needs by accumulating this data without widespread dissemination. This would not solve the problem of burdensome compliance, however.

III. THE GOVERNMENT SHOULD CARRY THE BURDEN TO DEMONSTRATE THE NEED FOR DISCLOSURE INSTEAD OF SPEAKERS BEARING THE BURDEN TO PROVE THE NEED TO REMAIN ANONYMOUS

Despite the burdens on First Amendment rights created by mandatory disclosure requirements, the FEC nonetheless argues in favor of extremely broad mandatory disclosures: "legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence occurs outside the election context," Mot. Dismiss at 19, and that "compelled disclosure of financing information may be permissible even when the disbursements in question have *nothing* to do with any candidate election." Mot. Dismiss at 20. The First Amendment demands more than that the government should get the information because the government wants it.

It is well-established in the First Amendment context that the government always bears the burden of justifying its intrusion into the rights of free speech and association. Yet, in this one area, the courts have routinely reversed that burden to rest on citizens' shoulders. This Court has previously held that minor parties may avoid mandatory disclosure rules because of their small contributor base and the fact that small fringe parties may have little influence on policy. *See McConnell,* 540 U.S. at 198; *Brown v. Socialist Workers' '74 Campaign Comm.*, 459 U.S. 87, 94 (1982); *Buckley,* 424 U.S. at 74. Such parties, this

Court has held, may avoid disclosure if they are able to show "a reasonable probability that the compelled disclosure of a party's contributors names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley,* 424 U.S. at 74.

The Institute respectfully suggests that it is time to bring this area in line with the rest of First Amendment jurisprudence by switching this burden from the speaker to the government and requiring the agency seeking to collect and post information regarding a citizen's political activity and personal information to prove that such disclosure and dissemination will *not* result in threats, harassment, or reprisals. There are three compelling reasons demonstrating the need for this change.

First, as discussed above, the Internet allows such information to be disseminated around the world for almost no cost. It is simply impossible for a speaker to identify the potential sources of threats, harassment, or reprisals, regardless of whether they are reasonable or unreasonable. It should be enough for a speaker to identify that they are speaking about a controversial topic – such as abortion, affirmative action, same-sex marriage – or a controversial political figure to create a presumption that their speech should remain anonymous.

Second, this Court's current test requires a speaker to experience, or have a reasonable fear of experiencing, threats, harassment, or reprisals before

they may be relieved of mandatory disclosure requirements. Quite frankly, by the time such threats, harassment, or reprisals occur, or by the time a speaker can reasonably expect them to occur, it is already too late and the harm to First Amendment rights has already probably happened. Certainly for speakers who are new to public discussions, the safe harbor discussions of *Buckley, Brown,* and *McConnell* provide no comfort because they assume the speaker is already controversial.

Finally, placing the burden on the speaker to prove the need for the protections of the First Amendment is profoundly in tension with this Court's First Amendment jurisprudence, which requires the *government* to prove the need for a regulation that interferes with First Amendment rights.

Before opening the floodgates to ever-increasing reporting and disclosure requirements, reaching, as the FEC argues, well beyond any election or campaign context, courts should ensure the burden for justifying such requirements rests squarely where it should: on the government. In this particular area, First Amendment jurisprudence has been turned on its head, with courts requiring citizens whose rights are infringed to bear the burden of proving – with ever-increasing degrees of particularity – harm. This is exactly wrong. It is the government's job to justify its intrusion into the speech and associational rights of the citizens.

Too many legislatures and courts discount entirely the chilling effect that compelled disclosure has on political speech. But the Institute's empirical data indicates that, for grassroots political groups, disclosure is often the *most* burdensome aspect of campaign-finance regulation. At the same time, the benefits of disclosure – often of information increasingly attenuated from anything this Court has recognized as corruption[6] – appear vastly oversold. Accordingly, this Court should provide appropriate guidance to the lower courts that takes account of this new empirical data and the modern realities of online disclosure, and examine disclosure with the same level of scrutiny applied to all other burdens on core political speech. At the very least, this Court should require the FEC to prove that disclosure of Citizen United's donors has some impact on deterring corruption or the appearance of corruption.

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[6] Indeed, there have even been recent calls for "grassroots lobbying disclosure," which would require disclosure of donors and compelled registration for anyone assisting citizens in their efforts to contact and organize other citizens. *See* Stephen M. Hoersting and Bradley A. Smith, *Policy Primer: Grassroots Lobbying Proposals Seem Not to Further Congress' Interest in Correcting Lobbying Abuses* at 1, *available at* http://www.campaignfreedom.org/docLib/20060607_PolicyPrimer.pdf.

CONCLUSION

The First Amendment was intended to limit the government's authority to infringe on the rights of American citizens to only the most compelling of circumstances, and even then in only the most narrow of ways. This long-standing basis of First Amendment jurisprudence dictates that the FEC must bear the burden in this case, and must provide actual data to meet that burden. The Institute's empirical data, however, definitively demonstrates that, contrary to broad, previously unchallenged assumptions by legislatures, the FEC, and many courts, mandatory disclosure and reporting requirements constitute a significant infringement on the First Amendment rights of free speech and association. The FEC's burden is indeed a high one and arguably insurmountable in the face of the conclusions derived from the Institute's empirical research.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	9
I. BCRA'S RESTRICTION OF NONPROFITS' CORE POLITICAL EXPRESSION FUNDED BY INDIVIDUALS IS INCOMPATIBLE WITH THE FIRST AMENDMENT	9
II. NONPROFITS CURRENTLY REMAIN STIFLED BECAUSE ANY "SAFE HARBORS" THEY MIGHT INVOKE ARE ILLUSORY	17
A. Political Action Committees Cannot Speak Adequately For Nonprofit Advocacy Groups and Their Individual Supporters	18
B. The *MCFL* Exception Is Grudgingly Administered and Difficult To Satisfy In Practice	22
C. The *WRTL* Exception Is Subject To Uncertainty and Disagreement As Applied In Particular Cases	25

TABLE OF CONTENTS – Continued

Page

III. THIS IS AN APPROPRIATE CASE IN WHICH TO STRIKE DOWN THE WELLSTONE AMENDMENT AND VINDICATE THE FIRST AMENDMENT RIGHTS OF NONPROFIT ORGANIZATIONS AND THE INDIVIDUALS WHO SUPPORT THEM 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) 3, 12, 27

Chamber of Commerce v. Moore, 288 F.3d 187 (5th Cir. 2002) 26

Connally v. General Constr. Co., 269 U.S. 385 (1926) 27

FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) 26

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*

FEC v. NCPAC, 470 U.S. 480 (1985) 12, 14, 15

FEC v. NRA, 254 F.3d 173 (D.C. Cir. 2001) 24, 30

FEC v. Survival Educ. Fund, Inc., 65 F.3d 285 (2d Cir. 1995) 24

FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) ..... *passim*

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003) ..... *passim*

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 20

North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000) 24

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND LEGISLATIVE MATERIALS

2 U.S.C. § 434(f)(3)(A)(ii) 26

26 U.S.C. § 501(c)(4) ..... *passim*

11 C.F.R. § 114.1 19

11 C.F.R. § 114.5(b) 14

11 C.F.R. § 114.7 19

11 C.F.R. § 114.10(b)(3)(i)(A) 23

11 C.F.R. § 114.10(c)(1) 22

11 C.F.R. § 114.10(c)(2) 23

11 C.F.R. § 114.10(c)(3)(ii) 23

11 C.F.R. § 114.10(c)(3)(ii)(B) 24

11 C.F.R. § 114.10(c)(4)(ii) 24

143 CONG. REC. S10,105 (daily ed. Sept. 29, 1997) 20

143 CONG. REC. S20,505 (1997) 10

144 CONG. REC. H4787 (daily ed. June 18, 1998) 21

144 CONG. REC. S868 (daily ed. Feb. 24, 1998) 10

144 CONG. REC. S917 (daily ed. Feb. 24, 1998) 21

144 CONG. REC. S10,169 (daily ed. Sept. 10, 1998) 21

145 CONG. REC. H3174 (daily ed. May 14, 1999) 9

145 CONG. REC. S12,608-09 (daily ed. Oct. 14, 1999) 21

TABLE OF AUTHORITIES – Continued

Page

147 CONG. REC. S2704-13 (daily ed. Mar. 22, 2001) 26

147 CONG. REC. S2847 (daily ed. Mar. 26, 2001) 6, 9, 11, 13

147 CONG. REC. S2848 (daily ed. Mar. 26, 2002) 12, 13

147 CONG. REC. S2882 (daily ed. Mar. 26, 2001) 13

147 CONG. REC. S3073 (daily ed. Mar. 29, 2001) 6, 12, 13

147 CONG. REC. S3116 (daily ed. Mar. 29, 2001) 27

148 CONG. REC. H424 (daily ed. Feb. 13, 2002) 9

148 CONG. REC. S2117 (daily ed. Mar. 20, 2002) 21

OTHER

Michael Luo, *Obama Hauls in Record $750 Million for Campaign*, N.Y. TIMES, Dec. 4, 2008 20

INTEREST OF *AMICUS CURIAE*[1]

The NRA is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its nearly four million members are individual Americans bound together by a common desire to ensure the preservation of the Second Amendment right to keep and bear arms. *McConnell v. FEC*, 251 F. Supp. 2d 176, 298 (D.D.C. 2003). "The NRA's frequent references to candidates for federal office and the programming it broadcasts throughout the election cycle – including the period immediately preceding primaries and general elections – are essential to its political mission of educating the public about Second Amendment and related firearm issues." *Id.* at 316. In 2000, for example, the NRA paid for more speech on television – over 300,000 minutes – than all other issue-advocacy groups and unions combined.

The NRA's political speech furthers a variety of purposes: the NRA educates and informs its members and the public about specific legislative threats to Second Amendment rights, as well as broader political and cultural pressures on gun rights; the NRA also defends itself against attacks on its positions and reputation made by the media and by anti-NRA

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

politicians; and the NRA recruits members and raises funds throughout the year. In almost all of this speech, the NRA refers to federal officeholders and candidates. *Id.* And yet the bulk of its political speech that furthers these purposes is not intended to influence a federal election.

The NRA funds its speech almost exclusively with dues and contributions from individual members. The organization does not accept business corporations as members and the contributions that it receives from such corporations are negligible. *Id.* at 317. The average individual annual contribution to the NRA is $35. In short, the NRA is an organization comprised of ordinary Americans of moderate means who join their voices in a common effort to defend, promote, and enjoy a constitutional freedom that is precious to them.

SUMMARY OF ARGUMENT

Donations received by nonprofit advocacy groups from individual members and supporters are not the same as "resources in the treasury of a business corporation." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quotation marks omitted) (upholding constitutionality of regulating campaign expenditures funded largely by business corporations). Simply put, the voluntary donation box of a nonprofit organization must be distinguished from the cash register of a business when it comes to

regulating political expression. For like-minded individuals lacking great wealth, pooling their donations to fund a political message is, in a real sense, the only way for them to find meaningful voice in the marketplace of ideas. There is nothing pernicious, problematic, or distorting about individuals banding together in this fashion to express shared political values and make themselves heard. Yet campaign-finance law continues, at least presumptively, to equate donations received by the NRA from individual supporters with the funds amassed by Exxon from shareholders and profits. The law muzzles political speech of the nonprofit advocacy group no differently from that of the multinational corporation.

This procrustean regulatory approach claims core political speech as its casualty without meaningful justification. Unexamined inclusion of nonprofit advocacy groups alongside for-profit corporations within the same speech-restrictive dragnet cannot be squared with the notion, consistent with the First Amendment, that "the benefit of the doubt" must go "to speech, not censorship," *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2674 (2007) ("*WRTL II*") (opinion of Roberts, C.J.), or that "'debate on public issues should be uninhibited, robust, and wide-open,'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The instant case illustrates the continuing peril, and the continuing chill, suffered by nonprofit organizations that want simply to broadcast speech on

behalf of their individual members around election time. As things presently stand, the NRA and other nonprofits remain prohibited from funding any "electioneering communication" except to the extent that they (i) whisper through a sister PAC, or (ii) successfully litigate fact-specific, as-applied constitutional exemptions carved out in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*") and *WRTL II*. Going the PAC route is artificially constraining and enervating: by design, PACs are tightly limited in their mission, fundraising, and overall activities so as to drain them of efficacy relative to nonprofit advocacy groups' actual, underlying support from individuals. Going the as-applied exemption route is inherently risky and costly: the Federal Election Commission typically, if not invariably, finds reason to contest any claim of exemption; as a practical matter, electioneering communications cannot be safely uttered, and the First Amendment often cannot be vindicated, unless and until a separate federal case has been brought and adjudicated with respect to a particular speaker or speech, typically well after the window for relevant speech has closed. The safe harbors, such as they are, are too hotly contested at their borders to be obtained short of pitched warfare, and any victory won on the battlefield is likely to be Pyrrhic – secured at great cost, only after the fact. Constitutional protections for speech such as *Hillary: The Movie* are subject to guesswork and obtained only through litigation.

While supporting the arguments of Citizens United as to why its speech is not subject to restriction (up to and including the argument that *Austin* should be overruled rather than extended), *amicus* here draws attention to one crucial aspect of BCRA that has long been overlooked – the provision applying the ban on corporate electioneering communications specifically to 501(c)(4) corporations funded by individuals. This provision is unconstitutional as applied to such corporations, and it is due to be severed. Once it has been, the entitlement of nonprofits such as Citizens United and the NRA to fund electioneering communications with donations from individuals will be clear to all; case-by-case adjudication of challenges such as this may then be dispensed with, to the lasting benefit of the courts, the parties, the polity, and the First Amendment.

Ironically, BCRA itself has always housed a ready solution to the constitutional problems it poses for nonprofits' political expression. BCRA's principal sponsors had conscientiously differentiated, via the "Snowe-Jeffords" exemption of section 203(b), nonprofit corporations funded by individuals and exempted them from the ban on corporate electioneering. Congress initially crafted a provision exempting 501(c)(4) membership organizations from the ban on corporate funding of electioneering communications, provided funds were derived solely from individuals' contributions and maintained in an account segregated from any corporate contributions. In this way, an advocacy organization's political message would be legally

tethered to its popular support in the political marketplace. The late Senator Wellstone and his supporters, however, wanted to go further still; they successfully insisted on painting over nonprofits' political speech with a broader regulatory brush. The "Wellstone Amendment" took aim specifically at the NRA, the Sierra Club, and similar advocacy groups, *see* 147 CONG. REC. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone); it was designed to prevent them and other nonprofits from funding electioneering communications with *individual* donations. Recognizing that the constitutionality of the Wellstone Amendment was dubious, however, Congress made sure it would be cleanly severable from the remainder of BCRA. 147 CONG. REC. S3073 (statement of Sen. Feingold) (daily ed. Mar. 29, 2001).

This Court should now hold that, whatever *Austin*'s vitality and application may be with respect to for-profit corporations, *Austin*'s anti-distortion rationale supplies no justification for regulating *amicus*, Citizens United, and their nonprofit brethren along the lines of the Wellstone Amendment, which cannot be constitutionally applied to them. Instead, the original Snowe-Jeffords exception is the less restrictive – and therefore constitutionally compelled – alternative by which to pursue any operative regulatory interest associated with *Austin*. By so holding, this Court would do much to repair the harm that campaign-finance regulation has wrought upon core political speech and to restore nonprofits and their

individual supporters to their proper standing within our polity.

Meaningful examination of this point has thus far eluded the Court. In *McConnell v. FEC*, although a challenge to the constitutionality of the Wellstone Amendment was squarely posed by *amicus* and other nonprofits, the Court appeared to sidestep it. All the Court offered, while rejecting a facial challenge, was a terse parenthetical: "As so construed [to incorporate an *MCFL* exception], the provision [banning corporate funding of electioneering communications] is plainly valid. *See Austin,* 494 U.S., at 661-665 (holding that a segregated-fund requirement that did not explicitly carve out an *MCFL* exception could apply to a nonprofit corporation that did not qualify for *MCFL* status)." *McConnell v. FEC*, 540 U.S. 93, 210 (2003). There was no meaningful treatment of extensive arguments that had been made to the Court about the disconnect between *Austin*'s specific concern with for-profit corporations and the Wellstone Amendment's restriction of nonprofits, or about how the Wellstone Amendment had inexplicably displaced the less-restrictive alternative of Snowe-Jeffords. Then, two Terms ago, in *Wisconsin Right to Life*, the Chief Justice's opinion expressly acknowledged the question as posed by some *amici*, but found no need to "pass on this argument" given the record presented in that "as-applied challenge." *WRTL II*, 127 S. Ct. at 2672 n.10 (opinion of Roberts, C.J.). *Amicus* respectfully urges the Court to address it here.

In the instant case, the Wellstone Amendment can and should be struck down and the bright-line safe harbor of Snowe-Jeffords restored for nonprofit advocacy corporations funded by individual members and supporters. As discussed in Appellant's brief, Citizens United received only *de minimis* contributions from for-profit corporations, *see* Citizens United Br. 7; JA 244a, 251a-52a, which surely do not implicate *Austin*'s concern about funds amassed in the economic marketplace potentially infecting and taking control over the political marketplace. The same $1 million-plus behind *Hillary* would have materialized, and the same speech would have resulted, irrespective of the *de minimis* contributions by business corporations.

This Court should thus hold that a 501(c)(4) corporation that complies with Snowe-Jeffords by funding an electioneering communication exclusively with individual donations is, by virtue of the First Amendment, categorically beyond reach of the corporate ban to the extent it might otherwise apply. Thus, *Austin*'s application would be properly limited to its rationale, and nonprofit corporations otherwise eager to weigh in around election time would enjoy the clear safe harbor that remains both necessary and wanting.

ARGUMENT

I. BCRA'S RESTRICTION OF NONPROFITS' CORE POLITICAL EXPRESSION FUNDED BY INDIVIDUALS IS INCOMPATIBLE WITH THE FIRST AMENDMENT.

Title II of BCRA is, by operation and design, anti-speech. It is no accident that Title II restricts political speech by nonprofit organizations that are devoted to political missions echoing the political views of individual supporters.[2] Congress was very clear about its reasons for restricting nonprofits' ability to draw upon their treasury funds to fund political expression. Its reasons were, to be sure, patently unconstitutional, but they were reasons all the same. Even as a majority of the Court in *McConnell* elided reams of legislative history reflecting that Members of Congress specifically targeted disfavored speech (negative attack ads) precisely because they feared its content (criticism of Members of Congress), Justice Scalia's

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[2] Notably, the NRA was singled out by name in relevant legislative debates as an especially worthy target. *See* 147 CONG. REC. S2847 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) (referencing the NRA and Sierra Club as prototypical organizations whose ads should be restricted); 145 CONG. REC. H3174 (daily ed. May 14, 1999) (statement of Rep. Schakowsky) ("If my colleagues care about gun control, then campaign finance reform is their issue so that the NRA does not call all the shots."); 148 CONG. REC. H424 (daily ed. Feb. 13, 2002) (statement of Rep. Pickering) (quoting Scott Harshberger, the President of Common Cause, who championed BCRA by saying: "'A vote for campaign finance reform is a vote against the second amendment gun lobby.'").

dissenting opinion observed without rejoinder that "the most passionate floor statements during the debates on this legislation pertained to so-called attack ads, which the Constitution surely protects, but which Members of Congress analogized to 'crack cocaine,' 144 Cong. Rec. S868 (Feb. 24, 1998) (remarks of Sen. Daschle), 'drive-by shooting[s],' *id.*, at S879 (remarks of Sen. Durbin), and 'air pollution,' 143 Cong. Rec. 20505 (1997) (remarks of Sen. Dorgan)." *McConnell*, 540 U.S. at 260 (Scalia, J., dissenting). This notion combined with a congressional concern "that there is too much money spent on elections" to serve as the animating purposes behind Title II. *Id.* at 257. Of course, with those purposes in mind, it made little, if any, difference whether electioneering communications came from wealthy businesses or from nonprofit organizations funded by millions of individual contributors. Electioneering communications themselves were bad, and Congress set out to minimize what it viewed as noxious "negative attack ads" across the board.

Still, some sponsors of BCRA recognized the need to take due account of this Court's precedents regarding constraints posed by the First Amendment. Because the Court in *MCFL* displayed First Amendment solicitude for nonprofits and their individual donors, but in *Austin* expressed concern specifically with for-profit business corporations dominating political debate, Congress initially saw fit to draw a clear line differentiating one type of corporation from the other for purposes of Title II's ban on corporate

electioneering. Thus, the Snowe-Jeffords provision of section 203(b) of BCRA exempted 501(c)(4) membership organizations from the law's ban on funding electioneering communications with general treasury funds, provided the relevant funds were derived solely from contributions from individuals and maintained in an account segregated from any corporate contributions. The upshot of Snowe-Jeffords was to ensure that an organization's political message would reflect its popular support in the political marketplace. At that point, the threat identified in *Austin* – namely, that business corporations or their 501(c)(6) trade associations might use wealth generated in the economic marketplace to unfairly distort the political arena with electioneering communications having "little or no correlation to the public's support for the corporation's political ideas," 494 U.S. at 660-61 – had been wholly contained.

That ultimately was not enough to satisfy Congress, which proceeded to broaden the ban on corporate electioneering communications to include nonprofits funded by individuals. The Wellstone Amendment was added solely to nullify section 203(b) of Snowe-Jeffords – without regard for any *Austin* rationale: Congress was *not* attempting to ensure that corporations' political speech properly correlated with political support from individuals; it was trying to restrict corporations' political speech *notwithstanding* political support from individuals. Aimed specifically at the NRA, the Sierra Club, and similar advocacy groups, *see* 147 CONG. REC. S2847

(daily ed. Mar. 26, 2001) (statement of Sen. Wellstone), the Wellstone Amendment was meant to prevent *individuals* from combining their voices with others of like mind "in organizations which serve to 'amplif[y] the voice of their adherents,'" *FEC v. NCPAC*, 470 U.S. 480, 494 (1985) (quoting *Buckley*, 424 U.S. at 22).[3] Under this regime, a billionaire can spend the dividends he receives from stock investments on political speech, but Americans of ordinary means cannot pool their resources to make themselves heard through nonprofits.

Fully grasping that the Wellstone Amendment was "susceptible to a constitutional challenge," 147 CONG. REC. S3073 (daily ed. Mar. 29, 2001) (statement of Sen. Feingold), BCRA's sponsors opposed its adoption, but opponents of BCRA rallied behind it (presumably for the same reason), and it was passed. To ensure that it would not doom Title II as a whole, however, BCRA's sponsors provided that the Wellstone Amendment could, as the three-judge district court put it in *McConnell*, be "cleanly struck from the law." *McConnell v. FEC*, 251 F. Supp. 2d 176, 216 (D.D.C. 2003) (per curiam).

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[3] *See* 147 CONG. REC. S2848 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) ("individuals with all of this wealth" will "make their soft money contributions to these sham issue ads run by all of these . . . organizations, which under this loophole can operate with impunity" to run "poisonous ads"); *id.* at S2850 (noting that only .002% of Americans donate more than $10,000 to candidates, and explaining, "I have an amendment that tries to make sure . . . this big money doesn't get" through.).

As Senator Feingold explained:

> I voted against adding th[e Wellstone] amendment. I thought and still think that it makes Snowe-Jeffords more susceptible to a constitutional challenge, but it passed when many Senators who oppose the bill and the Snowe-Jeffords provision voted for it. In any event, the Wellstone amendment was written to be severable from the remainder of the Snowe-Jeffords provision. That gives even more significance to the vote we will have today on severability. But if we win that vote, Snowe-Jeffords will survive even if the Wellstone amendment is held to be unconstitutional.

147 CONG. REC. S3073 (statement of Sen. Feingold) (daily ed. Mar. 29, 2001).[4]

Notwithstanding that Congress expressly contemplated severance of the Wellstone Amendment, it has (rather incredibly) remained operative from *McConnell* forward – even in the absence of any cogent

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[4] *See also* 147 CONG. REC. S2882 (daily ed. Mar. 26, 2001) (statement of Sen. Edwards) ("[T]he reason Senator Feingold and Senator McCain are opposing th[e Wellstone] amendment is the same reason that I oppose this amendment: It raises very serious constitutional problems."); *id.* at S2847-48 (daily ed. Mar. 26, 2001) (statement of Sen. Wellstone) ("I have drafted this amendment to be fully severable. In other words, no one can suggest that even if the court finds this amendment unconstitutional, it would drag down the rest of this bill or even jeopardize the other provisions of Snowe-Jeffords.").

analysis or explication of its constitutionality.[5] The result has been a series of challenges and continued litigation by 501(c)(4) organizations that would otherwise be wholly unnecessary. Due to the continuing

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[5] After rounds of legislation and litigation, no plausible constitutional justification has emerged for the Wellstone Amendment – not even *post hoc*. Some would posit a "fungibility of money" theory whereby the Wellstone Amendment guards against the prospect that nonprofit groups might otherwise use corporate contributions to offset their expenses, thereby freeing up individual contributions to fund "electioneering communications." That phenomenon is an independent, persisting feature of campaign finance law, however, as corporations remain free to fund the administrative and operating expenses of their PACs out of general treasury funds. *See* 11 C.F.R. § 114.5(b). Moreover, this Court's teaching is simply that Congress may require a corporation's expenditures to bear a meaningful "correlation," *Austin*, 494 U.S. at 660, or to constitute a "rough barometer" of the public's support for its political views, *MCFL*, 479 U.S. at 258. Others would posit that the Wellstone Amendment is an "internal governance" measure that prevents advocacy groups from using general treasury monies to fund political messages with which some individual contributors may disagree. Again, that departs from this Court's teaching that political expression need only "correlate" with or be a "rough barometer" of public support. Insisting upon *perfect* correlation would prevent nonprofit advocacy groups from making essential executive decisions on behalf of their members; it would thereby effectively disable individuals of modest means from participating meaningfully in our democracy by "delegat[ing] authority" to nonprofit organizations that spend their donations "in a manner that best serves the shared political purposes of the organization and contributor," *MCFL*, 479 U.S. at 261; *see also NCPAC*, 470 U.S. at 494-95. Finally, had any such concern truly motivated Congress, it could "be met . . . by . . . simply requiring that contributors be informed that their money may be used for [an electioneering] purpose." *MCFL*, 479 U.S. at 261.

operation of the Wellstone Amendment, nonprofit advocacy groups must struggle under the corporate ban and attempt to vindicate their constitutional right to fund electioneering communications on an election-by-election, ad-by-ad basis.

A return to first principles would spell the end of this unfortunate saga. The Wellstone Amendment runs directly contrary to this Court's consistent First Amendment teaching: "To say that [individuals'] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *FEC v. NCPAC*, 470 U.S. at 495. And the only pre-*McConnell* decision of this Court ever to uphold an expenditure limit, *Austin*, 494 U.S. 652, could not possibly support the corporate ban at issue. By the most charitable (and constitutionally sanitized) account of Title II's purpose, Congress intended merely to ensure that spending on electioneering communications "reflect[s] actual public support for the political ideas espoused by corporations" and unions, rather than their success in the economic marketplace. *Id.* at 660. Such reasoning cannot justify a speech restriction that extends any further than might be necessary to ensure that a nonprofit advocacy group's independent political spending bears a fair and reasonable "correlation to the public's support for the corporation's political ideas." *Id.*

Austin's rationale finds no application here. Citizens United, like *amicus* and unlike trade or business associations, has derived only a miniscule portion of its relevant funding from corporate contributions. Yet Citizens United, like *amicus* and other nonprofit advocacy groups, remains generally prohibited from using individual contributions in its general treasury to fund independent electioneering communications. Thus, far from preventing a nonprofit advocacy group's political voice from being unfairly *inflated* by funds derived from the economic marketplace, Title II artificially *mutes* that political voice when compared to actual public support in the political marketplace.

Under traditional strict scrutiny, the Wellstone Amendment was doomed at birth (as many of BCRA's key supporters foresaw) and is (over)due to be struck down. It is unconstitutional either because it serves an illegitimate – and certainly not compelling – content-based purpose, or because any anti-corruption – or, more accurately, anti-distortion – purpose that it may serve per *Austin* could be achieved through the less restrictive alternative of Snowe-Jeffords. However the holding may be couched, *amicus* respectfully urges the Court to hold that Title II's ban on corporate funding of electioneering communications is unconstitutional as presently constituted and/or that Title II cannot constitutionally be applied to 501(c)(4) corporations to the extent they fund electioneering communications with individuals' donations.

II. NONPROFITS CURRENTLY REMAIN STIFLED BECAUSE ANY "SAFE HARBORS" THEY MIGHT INVOKE ARE ILLUSORY.

It has been suggested that Title II poses no real problems for *amicus* and other nonprofits given the availability of (i) PACs to fund electioneering communications, (ii) the *MCFL* exception for which some nonprofits may qualify, and/or (iii) the *WRTL II* exception for ads susceptible of any "reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). By that account, the continuing controversy and litigation manifested in this case and others like it is, in the grand scheme of things, really much ado about nothing: the contours of proper regulation of corporate speech, so the argument goes, can be entrusted to the FEC's sound discretion to administer, with political speech by political speakers in fact left untrammeled.

When the FEC reaches this Court, it understandably presents its regulatory scheme in the most reasonable, benevolent light, insisting that all is going well below. That *Hillary* – which is no 30-second exhortation to vote, but a 90-minute documentary complete with in-depth interviews about a prior Presidential administration, the career of a sitting Senator, and the course of a Presidential candidacy – is now alleged to be beyond the scope of the Constitution's protection and subject to criminal prohibition

should itself give the lie to any such notion. Lest there be any doubt about the problems posed by the existing regime, *amicus* wishes to emphasize that the avenues theoretically available for nonprofit advocacy groups to fund electioneering communications are, in practice, illusory.

A. Political Action Committees Cannot Speak Adequately For Nonprofit Advocacy Groups and Their Individual Supporters.

Defenders of Title II invariably emphasize that it merely restricts the *source* from which corporations may fund electioneering communications, with corporations left free to fund the very same speech through their PACs. According to them, Congress's intent for the Wellstone Amendment to stem the tide of negative attack ads by nonprofit advocacy groups was folly; the same ads would continue to run uninhibited, only funded by PACs rather than general treasuries. Congress, of course, knew better, and so should this Court.

A battery of regulatory and practical hurdles precludes groups such as the NRA from using their PACs to make independent expenditures commensurate with public support for their political message.

> These regulations [governing PACs] are more than minor clerical requirements. Rather, they create major disincentives for speech, with the effect falling most heavily on

> smaller entities that often have the most difficulty bearing the costs of compliance. Even worse, for an organization that has not yet set up a PAC, spontaneous speech that "refers to a clearly identified candidate for Federal office" becomes impossible, even if the group's vital interests are threatened by a piece of legislation pending before Congress on the eve of a federal election. . . . Couple the litany of administrative burdens with the categorical restriction limiting PACs' solicitation activities to "members," and it is apparent that PACs are inadequate substitutes for corporations in their ability to engage in unfettered expression.

McConnell, 540 U.S. at 332 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The NRA is, to be sure, a sophisticated and well-practiced political speaker. It has a PAC and knows how to use it. But the NRA's PAC, the Political Victory Fund ("PVF"), is strictly barred from soliciting beyond the NRA's membership for contributions, and no portion of an NRA member's membership fees may be allocated to PVF. *See* 11 C.F.R. § 114.7; *id.* at § 114.1. Thus, as Judge Henderson explained in the *McConnell* case: "While NRA PVF raised $17.5 million during the 2000 election cycle, the NRA received over $300 million in contributions from individuals during the same period. The disparity stems from the inability of NRA members – most of whom are individuals of modest means – to pay the NRA's membership fees and then contribute beyond that amount

to NRA PVF." *McConnell,* 251 F. Supp. 2d at 318 (internal citations omitted). Title II deprives millions of ordinary individuals who cannot afford this increased financial burden of their ability to join collectively in making "electioneering communications" to support and preserve the Second Amendment. *Id.*

Although some would justify restricting independent expenditures on political speech as necessary "to democratize the influence that money itself may bring to bear upon the electoral process," *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring), Title II stands that reasoning on its head. By requiring a group's political speech to be channeled through its PAC, BCRA ensures that the voices of members of modest means will be muffled.[6]

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[6] The recent general election no doubt demonstrated that people of moderate means can still pool their monies by contributing directly to a candidate. *See* Michael Luo, *Obama Hauls in Record $750 Million for Campaign*, N.Y. TIMES, Dec. 4, 2008, at A29. But many of the methods President-Elect Obama used to collect three-quarters of a billion dollars in this election cycle are unavailable to PACs, which are restricted to soliciting only their membership. Thus, effective use of broad-based Internet, television, and direct-mail solicitations – which, in 2008, set a record for bringing money into politics despite BCRA – are all out of bounds for anyone but the candidates themselves. And, of course, candidate speech is no substitute for speech by outside interests, and funding a candidate one generally agrees with is not the same thing as collectively funding a specific, shared message. Indeed, one of Congress's main purposes in enacting BCRA was to ensure that politicians themselves, especially incumbent politicians, control the terms of political debate. *See, e.g.*, 143 CONG. REC. S10,105 (daily ed. Sept. 29, 1997) (statement

(Continued on following page)

For this reason, Title II works a similar inversion of the *Austin* Court's reasoning. There, the Court upheld a limit on corporate independent expenditures as justified to prevent wealth generated in the economic marketplace from unfairly *inflating* the strength of the corporation's political voice beyond the "public's support for the corporation's political ideas." 494 U.S. at 660. The NRA's wealth, like that of typical advocacy groups, is attributable to its success in the political marketplace, not the economic marketplace, and its general treasury "accurately reflects members' support for the organization's political views. . . ." *Id.* at 666. By requiring an advocacy group's political speech to be channeled through a PAC, Title II *deflates* the strength of the organization's voice in the political marketplace vastly below its "contributors' support for the corporations' political views." *Id.* at 660-61. Far from ensuring that "resources amassed in the economic marketplace [are not] used to provide

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of Sen. McCain) ("These groups often run ads that the candidates themselves disapprove of."); 144 CONG. REC. S10,169 (daily ed. Sept. 10, 1998) (statement of Sen. Boxer) ("[O]utside special interest groups regularly spend millions of dollars . . . often leaving those candidates mere spectators in their own election campaigns."); 144 CONG. REC. H4787 (daily ed. June 18, 1998) (statement of Rep. Wamp) ("Pretty soon we as candidates will not even be able to control the message in our own campaigns."); 145 CONG. REC. S12,608-09 (daily ed. Oct. 14, 1999) (statement of Sen. Boxer) ("It brings in other issues that the two candidates themselves do not even want to talk about."). *See also* 144 CONG. REC. S917 (daily ed. Feb. 24, 1998) (statement of Sen. Jeffords); 148 CONG. REC. S2117 (daily ed. Mar. 20, 2002) (statement of Sen. Cantwell).

an unfair advantage in the political marketplace," *MCFL*, 479 U.S. at 257, Title II ensures that resources amassed in the political marketplace cannot be put to use in the very place from whence they came. Characterizations of Title II as a mere "source" restriction cannot disguise this reality.

B. The *MCFL* Exception Is Grudgingly Administered and Difficult To Satisfy In Practice.

As administered by the FEC, the existing *MCFL* exception is but a narrow aperture through which few nonprofit advocacy groups may squeeze. While providing relief for a limited subset of "qualified nonprofit corporations," the FEC's regulations employ procrustean criteria to minimize that subset; in the FEC's hands, the existing exception is substantially narrower than this Court's decisions in *MCFL* and *Austin* warrant. Specifically, the FEC has fashioned and imposed four requirements purportedly drawn from *MCFL* dicta, each of which unnecessarily limits the universe of speakers afforded the protections of the First Amendment.

First, the FEC would deny First Amendment protection to any voluntary membership corporation that did not have as its "*only* express purpose . . . the promotion of political ideas." 11 C.F.R. § 114.10(c)(1) (emphasis added). Of course, many nonprofit issue groups, including the NRA, not only advocate for the preservation of certain fundamental rights, but also

sponsor programs designed to further the exercise and enjoyment of those rights. According to the FEC, such diversity of purpose beyond that which is expressly and exclusively political can itself be disqualifying.

Second, the FEC denies the protection of the First Amendment to any nonprofit that "engage[s] in business activities." 11 C.F.R. § 114.10(c)(2). Such activities are defined to include "*any* provision of goods or services that results in income to the corporation." *Id.* at § 114.10(b)(3)(i)(A) (emphasis added). Although the NRA sells numerous items that bear its name, such as hats and shirts, and generates advertising revenue from its magazines, those who purchase such items are plainly supporters of the organization. Thus, its "political resources reflect political support," *MCFL*, 479 U.S. at 264, and do not present the dangers identified in *MCFL* or *Austin*, even though it falls within the FEC ban. Moreover, the NRA *loses money* on the sales of these items, such that these "business activities" drain corporate wealth rather than amass it. But such "business activities," as construed by the FEC, can be disqualifying even so.

Third, the FEC denies First Amendment rights to any corporation whose members "receive *any* benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue." 11 C.F.R. § 114.10(c)(3)(ii) (emphasis added). The FEC would silence corporations that provide "[t]raining" and

"education" that are not "necessary to enable recipients to engage in the promotion of the group's political ideas." *Id.* at § 114.10(c)(3)(ii)(B). In contrast, however, the Court in *Austin* asked whether an advocacy organization's "political agenda is sufficiently distinct from its educational and outreach programs," 494 U.S. at 663 – not whether the organization's educational programs are designed to teach recipients how to advance the group's political agenda. Yet the FEC employs the latter inquiry as a ground for disqualification from *MCFL* status.

Fourth, FEC regulations deny *MCFL* status to any nonprofit that "accept[s] donations of anything of value from business corporations, or labor organizations." 11 C.F.R. § 114.10(c)(4)(ii). The lower courts have consistently rejected this ironclad prohibition on the acceptance of corporate donations, which precludes advocacy groups, however large they may be, from engaging in express advocacy if they accept so much as a penny of corporate contributions. *See FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995). The courts of appeals, however, remain divided as to whether it is the percentage or the absolute amount of corporate donations that counts, and where precisely the line is to be drawn. As a result, potential entitlement to *MCFL* status remains that much cloudier.

In sum, it is a rare 501(c)(4) corporation, from among the wide field whose expression is restricted by the Wellstone Amendment, that can find shelter under the FEC's administration of the *MCFL* exception. It is therefore disingenuous to claim that *MCFL* solves the problems outlined herein, even as the operative law purposely leaves a body of 501(c)(4) corporations funded by individuals to be ground under its heel no differently from for-profit corporations.

C. The *WRTL* Exception Is Subject To Uncertainty and Disagreement As Applied In Particular Cases.

For the mine run of speakers who cannot satisfy the FEC that they qualify for the *MCFL* exemption, the only available protection is that provided by the test enunciated in *WRTL II*: An electioneering communication may be prohibited as "the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667 (opinion of Roberts, C.J.). This is, by design, a speech-protective standard, and it is a welcome one. But the standard is not a bright line that would remove the chilling specter of an FEC enforcement action. As the dispute in this case demonstrates, an ad's "reasonable interpretation" may be subject to competing glosses. Within the hotly-contested realm of campaign finance litigation, the

test is liable to serve largely as a jumping off point for lawyers and judges of differing views to stake out opposing positions. When disputes arise, resolution takes years, by which time the relevant elections have passed and the speech at issue has fallen stale; the mounting lesson of recent cases could not be clearer in this regard.

It bears noting that the *WRTL II* standard closely resembles the back-up definition of electioneering communications that Congress included in Title II of BCRA. Under that definition, an "electioneering communication" would have been "any broadcast . . . communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office . . . and which is also suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. § 434(f)(3)(A)(ii). That backup definition had, in turn, been modeled upon a test the Ninth Circuit formulated in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). *See* 147 CONG. REC. S2704-13 (daily ed. Mar. 22, 2001) (statement of Sen. Specter) (introducing the backup definition and explaining it was derived from *Furgatch*).

Suffice it to say that tests such as these, which depend upon vague words and the Government's tin ear to differentiate between speech that is criminal and speech that is constitutionally protected, have long been thought to be suspect. *See, e.g.*, *Chamber of Commerce v. Moore*, 288 F.3d 187, 194 (5th Cir. 2002) (finding the *Furgatch* standard unconstitutionally

vague and citing other cases to the same effect). The record in *McConnell* reflects the difficulties of crafting a safe harbor that depends upon the content of an ad. *McConnell*, 251 F. Supp. 2d at 802 (opinion of Leon, J.) (finding the final clause of the backup definition unconstitutionally vague because "it is extremely difficult, if not impossible, for a speaker to determine with any certainty *prior* to airing an ad that it" is "suggestive of no plausible meaning other than an exhortation to vote") (internal quotation marks omitted).[7] In an "area permeated by First Amendment interests" any restriction on speech requires "'precision.'" *Buckley*, 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). *Buckley* warned against "supposedly clear-cut distinction[s]" that nonetheless "put[ ] the speaker . . . wholly at the

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[7] As the deposition testimony in *McConnell* made plain, people "of common intelligence" are left to "guess at [the fallback definition's] meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). For example, when shown an ad that referred to candidate Al Gore and broadcast within sixty days of the 2000 general election, Senator Feingold was unsure whether the ad was pro-Gore or anti-Gore, while Senator McCain called it a "damning indictment" of Gore, and Representatives Meehan and Shays believed it promoted Gore. *See* Br. for Appellants/Cross Appellees Senator Mitch McConnell et al., *McConnell*, 540 U.S. 93 (2003) (No. 02-1674) at 59-60 (citing the record for this and other examples). Thus, as Senator McCain himself stated regarding materially identical statutory language: "I am not a lawyer, but I have been involved so long and so engaged in these issues that words do have meaning, and this amendment is very vague." 147 CONG. REC. S3116 (daily ed. Mar. 29, 2001).

mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." 424 U.S. at 43.

The *WRTL II* exception certainly marks an improvement over prior law. But it still requires a speaker to divine what "reasonable interpretation" will be ascribed to any given ad, and empowers government censors to push the outer limit of an imprecise, subjective, shifting line. Uncertainty, and therefore the chilling of core political speech, persist under *WRTL II*. By contrast, a speaker-based safe harbor promises clear, stable boundaries that protect and promote free speech.

III. THIS IS AN APPROPRIATE CASE IN WHICH TO STRIKE DOWN THE WELLSTONE AMENDMENT AND VINDICATE THE FIRST AMENDMENT RIGHTS OF NONPROFIT ORGANIZATIONS AND THE INDIVIDUALS WHO SUPPORT THEM.

Since BCRA became law in 2002, this Court has yet to squarely address the constitutionality of the Wellstone Amendment as it applies to nonprofit advocacy groups that would draw upon individual donations to fund their electioneering communications.

In *McConnell*, the NRA and others argued the facial unconstitutionality of the Wellstone Amendment specifically (along with Title II generally). All the majority opinion said on this point was this: "As

so construed [to incorporate an *MCFL* exception], the provision [banning corporate funding of electioneering communications] is plainly valid. *See Austin,* 494 U. S., at 661-665 (holding that a segregated-fund requirement that did not explicitly carve out an *MCFL* exception could apply to a nonprofit corporation that did not qualify for *MCFL* status)." *McConnell,* 540 U.S. at 211. Thus, the Court read into the law an *MCFL* exception that was irreconcilable with the express prescription and clear legislative history of the Wellstone Amendment. The Court then stopped short of offering any analysis as to why the Snowe-Jeffords exception that Congress itself had crafted was not a less restrictive alternative to the Wellstone Amendment. The pertinent question loomed large: Why – consistent with *MCFL* and *Austin* – should 501(c)(4) corporations that might fail to qualify for any *MCFL* exception not still be permitted to fund their political speech, including electioneering communications, with donations they received from individual supporters for that very purpose? The Court said nothing apart from the parenthetical citation to *Austin* quoted above. *Amicus* submits, therefore, that *McConnell* either contains no holding on this point or contains a holding so passing and unexamined that it falls at the lowest ebb of the already weak *stare decisis* applicable to constitutional rulings.

The Court has yet to return to the question. The controlling opinion in *WRTL II* did, however, bracket it, saying there was "no[need to] pass on this

argument," as urged by some *amici*, given the record presented in that "as-applied challenge." 127 S. Ct. at 2673 n.10. There is compelling reason to pass on the question here and now. Some six years and three election cycles have elapsed since the Court decided *McConnell*, during which time nonprofit advocacy groups have remained subject to criminal prosecution simply for broadcasting the political speech their individual members support in the periods preceding elections. All the while, the threshold question of whether and how the Wellstone Amendment is constitutional has remained dangling.

As discussed in Appellant's brief, Citizens United received only *de minimis* contributions from for-profit corporations, *see* Citizens United Br. 7; JA 244a, 251a-52a, which should not impact the constitutional calculus. *Cf. FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001) (finding a $1,000 contribution to be *de minimis* and thus concluding that the Federal Election Campaign Act of 1971 "cannot constitutionally be applied to the NRA" for the relevant election cycle). If this case does not suffice to provoke a decision by this Court, it seems that none will, for there is an obvious chicken-and-egg problem: Absent the protections of the Snowe-Jeffords exception or something similar, a putative nonprofit corporate speaker lacks incentives to strictly limit itself to individual donations for purposes of funding a electioneering communication that would, as the law presently stands, be destined for prohibition in any event. This Court should therefore hold that the First Amendment protects a 501(c)(4)

corporation that *does* comply with Snowe-Jeffords and funds its electioneering communications exclusively with individual donations.

Were the Court to deem *McConnell*'s holding inconsistent with the safe harbor sought here by *amicus*, it should at least clear the way for a narrower version of the approach suggested by Snowe-Jeffords. Specifically, in order to meet the concerns of *Austin*, the safe harbor could be limited to speech funded by individual contributions to 501(c)4's whose donors were on notice that their contributions would be used for political purposes. *MCFL* itself suggests that, "if political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities." 479 U.S. at 264. This standard was not before the Court in *McConnell*, and thus *stare decisis* could not possibly counsel against its adoption here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and Title II's prohibition on corporate funding of electioneering communications should be held unconstitutional as applied to 501(c)(4) advocacy groups to the extent they fund their political speech with donations from individuals.

Respectfully submitted,

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Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court
For The District Of Columbia

Brief *Amicus Curiae* of The Reporters Committee for Freedom of the Press in Support of Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Criticism and advocacy of candidates for office has always been a role of the American press 3

II. The Court has long safeguarded the editorial independence of the news media. 5

III. By allowing the suppression of a documentary film, the district court obliterated the bright-line distinction between commentary and prohibited express advocacy. 8

IV. The news exemption alone provides inadequate protection, because news media commentary is increasingly distributed in ways the exemption does not contemplate 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Austin v. Mich. Chamber of Commerce,
494 U.S. 652 (1990) 7

CBS v. Democratic National Committee,
412 U.S. 94 (1973) 6

Buckley v. Valeo,
424 U.S. 1 (1976) 9

McConnell v. FEC,
540 U.S. 93 (2003) ..... *passim*

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974) 6, 7

Mills v. Alabama,
384 U.S. 214 (1966) 1, 5, 6

NAACP v. Button,
371 U.S. 415 (1963) 8

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 2

Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376 (1973) 7

Shulman v. Group W Productions, Inc.,
18 Cal. 4th 200 (1998) 12

Thomas v. Collins,
323 U.S. 516 (1945) 9

STATUTES AND REGULATIONS

2 U.S.C. § 431 1

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WTMJ-TV launches News on Demand' with Time Warner Cable, April 7, 2006 11

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FEC Advisory Op. 2004-30 11

Jonathon Elliot, *Debates on the Federal Constitution* (2d ed. 1876).. 6

N.Y. Times, *Endorsements through the Ages*, http://www.nytimes.com/interactive/2008/10/23/opinion/20081024-endorse.html 4

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W. David Sloan & Lisa Mullikin Parcell *American Journalism: History, Principles, Practices* (2002). 3, 4

William Blackstone, *Commentaries on the Laws of England* (1769) 6

STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The Reporters Committee has an interest in ensuring that the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 431 *et seq.*, is not used to suppress this feature-length political documentary, as it would be an "obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

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[1] Pursuant to Sup. Ct. R. 37, counsel for the Reporters Committee declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations made a monetary contribution to the preparation and submission of this brief; that counsel for all parties were given timely notice of the intent to file this brief; and that written consent of all parties to the filing of the brief *amicus curiae* (aside from those who have given general consent to all *amici*) has been filed with the Clerk.

SUMMARY OF ARGUMENT

Amicus curiae The Reporters Committee for Freedom of the Press (the "Reporters Committee") urges the Court to reverse the decision below and clarify that the suppression of a feature-length political documentary is an impermissible abridgment of the First Amendment's protection of freedom of the press.

Throughout American history, the news media's coverage of government affairs has included commentary as well as reporting. This commentary "include[s] vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) It also has included endorsements that expressly advocate the election of named candidates. Time and again, the Court has protected the freedom of the press to publish such commentary.

The Bipartisan Campaign Reform Act of 2002 ("BCRA") does not purport to suppress news media commentary – indeed, it includes an express exemption for media commentary. 2 U.S.C. § 434(f)(3)(B)(i). This exemption, however, excludes a growing number of non-traditional journalists distributing their work in new ways, including the video on-demand technology used by Appellant. The incompleteness of the news exemption has had little import until now, given the clear-cut distinction between the archetypical 30-second political advertisement and the sort of commentary that journalists have historically provided. But the decision below, suppressing a documentary that is objectively indistinguishable from

other news media commentary, removes this intuitive bright-line distinction that allowed journalists to do their jobs without fear of the criminal penalties associated with violating Federal Election Commission ("FEC") regulations. By criminalizing the distribution of a long-form documentary film as if it were nothing more than a very long advertisement, the district court has created uncertainty about where the line between traditional news commentary and felonious advocacy lies. All that is certain is that the line will depend on a subjective determination of the FEC.

ARGUMENT

I. CRITICISM AND ADVOCACY OF CANDIDATES FOR OFFICE HAS ALWAYS BEEN A ROLE OF THE AMERICAN PRESS.

Appellant produced and sought to distribute *Hillary: The Movie* – a critical, feature-length documentary about Senator Hillary Clinton. *Hillary: The Movie* does not differ, in any relevant respect, from the critiques of presidential candidates produced throughout the entirety of American history. In every American election since George Washington's uncontested bid for the presidency in 1789, the press has reported on the candidates' qualifications for office, distributing commentary that often attacks one candidate and favors another. *See* John Allen Hendricks & Shannon K. McCraw, *Coverage of Political Campaigns*, in *American Journalism: History, Principles, Practices* 181 (W. David Sloan & Lisa Mullikin Parcell eds., 2002). Though the method of news delivery

has changed, the news media's long tradition of taking stances for and against candidates has not. *Id.*

The simplest example of this is the editorial endorsement. Since at least the 1800 presidential race, American newspapers have endorsed candidates and provided commentary praising their favored candidate (and often denigrating the opponent). Edward J. Larson, *The Tumultuous Election of 1800, America's First Presidential Campaign: A Magnificent Catastrophe* 206-07 (2008). In every American presidential election, newspapers have played an important role by advocating for endorsed candidates.[2]

For just as long, the news media has criticized candidates for office, often publishing indictments of their experience and qualifications. In 1824, often considered the first election in which the candidates actively campaigned against one another, newspapers critiqued the backgrounds of candidates John Quincy Adams and Andrew Jackson. *See* Hendricks & McCraw, *supra*, at 181. Similarly, Edward R. Murrow's *See it Now* (sponsored by Alcoa Inc.) in 1954 essentially accused Senator Joseph McCarthy of treason, asserting that "[t]he actions of the junior Senator from Wisconsin have caused alarm and dismay amongst our allies abroad, and given considerable comfort to our enemies." *See* Philip Hamburger, *Matters of State: A Political Excursion* 91 (2003).

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[2] *See, e.g., Endorsements through the Ages*, http://www.nytimes.com/interactive/2008/10/23/opinion/20081024-endorse.html (reprinting *New York Times* presidential endorsements from 1860 to the present).

Half a century later, *Hillary: The Movie* criticized Senator Hillary Clinton's qualifications and fitness for office – providing precisely the type of commentary the American news media has always provided. Like an increasing number of media organizations, Appellant sought to distribute its documentary using new technology. Editorial tastes and political affiliations aside, the only *objective* distinction between the critiques of Senators Adams, McCarthy, and Clinton is the medium in which each was distributed.

II. THE COURT HAS LONG SAFEGUARDED THE EDITORIAL INDEPENDENCE OF THE NEWS MEDIA

The BCRA excludes from regulation, among other things, speech that "[a]ppears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 434(f)(3)(B)(i). This news exemption recognizes that editorial regulation of the news media would muzzle "one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free." *Mills*, 384 U.S. at 219.

This nation was founded on the idea that "[t]he liberty of the press is ... essential to the nature of a free state," *McConnell v. FEC*, 540 U.S. 93, 286 n. 17 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting 4 W. Blackstone, Commentaries on the Laws of England 151 (1769)), and a free press is "one of the greatest bulwarks of liberty." *Id.* at 286

(quoting 1 J. Elliot, Debates on the Federal Constitution 335 (2d ed. 1876)).

Recognizing these principles more than forty years ago, the Court invalidated an Alabama law that made it a crime for newspapers to publish editorials on Election Day, finding "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," which "of course includes discussions of candidates." *Mills*, 384 U.S. at 218. The Court concluded that it would be "difficult to conceive of a more obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press" than a criminal statute that "silences the press at a time when it can be most effective." *Id.* at 219.

The Court reiterated the need for editorial autonomy in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974). *Tornillo* struck down "right of access" laws intended to encourage diverse viewpoints in the media, refusing to "intru[de] into the function of editors" by interfering with "the exercise of editorial control and judgment." *Id.* at 258. The Court ruled that "[t]he choice of material to go into a newspaper ... and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment," adding that "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." *Id.; see also CBS v. Democratic National Committee*, 412 U.S. 94, 117 (1973) (plurality opinion) ("[t]he power of a privately owned newspaper to advance its own political, social,

and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers – and hence advertisers – to assure financial success; and, second, the journalistic integrity of its editors and publishers"); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 391 (1973) ("we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial").

Mindful of this constitutional interest in "ensur[ing] that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events," several federal statutes have drawn a distinction "between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *McConnell*, 540 U.S. at 208 (quotation omitted).

Campaign finance statutes have likewise drawn this distinction. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667 (1990) (statutes may exempt media companies from campaign finance restrictions because of "the unique role that the press plays in informing and educating the public, offering criticism, and providing a forum for discussion and debate"); *id.* at 712 (Kennedy, J., dissenting) ("It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications."); *McConnell*, 540 U.S. at 156 n.51 ("Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate"); *id.* at 355 (Rehnquist, C.J., dissenting in

part) (doubting "the Court would seriously contend that we must defer to Congress' judgment if it chose to reduce the influence of political endorsements in federal elections").

III. BY ALLOWING THE SUPPRESSION OF A DOCUMENTARY FILM, THE DISTRICT COURT OBLITERATED THE BRIGHT-LINE DISTINCTION BETWEEN COMMENTARY AND PROHIBITED EXPRESS ADVOCACY

Congress contemplated the BCRA governing what it saw as a surge of political advertisements flooding the airwaves. *McConnell*, 540 U.S. at 260 (Scalia, J., concurring in part and dissenting in part) ("the most passionate floor statements during the debates on this legislation pertained to so-called attack ads"). Likewise, earlier decisions upholding the BCRA focused on traditional 30-second political advertisements. *See id.* at 207 (discussing a "virtual torrent of televised election-related ads").

Regulation of traditional political advertising, whatever its other constitutional infirmities, has posed little risk of affecting editorial endorsements or other news media commentary. As long as the distinction between regulated advertising and exempt news commentary was relatively intuitive and objective, it provided the "breathing space" reporters need to perform their constitutionally-protected role. *See NAACP v. Button*, 371 U.S. 415, 433 (1963). Reporters could do their jobs without worrying that an endorsement or exposé might lead to felony charges if the FEC deemed that it was too laudatory or too

critical of a candidate for office. *But c.f. McConnell*, 540 U.S. at 284 (Thomas, J., concurring in part and dissenting in part) ("One would think that *The New York Times* fervently hopes that its endorsement of Presidential candidates will actually influence people. What is to stop a future Congress from determining that the press is 'too influential,' and that the 'appearance of corruption' is significant when media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties?").

The decision below creates uncertainty, replacing a bright-line distinction with the subjective determinations of the FEC. Such an uncertain line between the constitutionally-protected and the felonious "offers no security for free discussion," and thus "compels the speaker to hedge and trim." *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Nor is the worry of FEC action speculative, since the traditional news media regularly engages in "express advocacy" by explicitly urging readers or viewers to vote for an endorsed candidate.

IV. THE NEWS EXEMPTION ALONE PROVIDES INADEQUATE PROTECTION, BECAUSE NEWS MEDIA COMMENTARY IS INCREASINGLY DISTRIBUTED IN WAYS THE EXEMPTION DOES NOT CONTEMPLATE.

With the FEC purporting to regulate even traditional news media commentary, journalists who wish to advocate or criticize a candidate are left to rely

only on the news media exemption. *See* 2 U.S.C. § 434(f)(3)(B)(i). But the exemption applies only to speech that "[a]ppears in a news story, commentary, or editorial distributed through the facilities of [a] broadcast, cable, or satellite television or radio station." *Id.* A growing number of journalists distribute their work in ways that do not appear to fall within this exemption.

The technology journalists use to disseminate their content is rapidly changing, and there is an accompanying resurgence in independent content – blogs, documentaries, non-profit journalism, and niche publications of many sorts. For example, many newspapers have been forced by the economy and new technology to publish only in electronic formats. *See, e.g.*, David T. Cook, *Our first century*, Christian Science Monitor, Nov. 25, 2008. Even news networks such as ABC and CBS are supplementing their broadcasts of Barack Obama's inauguration with additional Internet coverage. *See* David Bauder, *TV News Goes All Out Online, Too*, The Wash. Post, January 12, 2009, at C5.

Likewise, news reporting in one of its classic forms – the 30 minute local television newscast – is now often distributed in the same fashion as Appellant planned to distribute *Hillary: The Movie*. Local television stations throughout the country have contracted with local cable providers to distribute their newscasts via video on-demand – the same technology that Citizens United sought to use in this case. *See, e.g., WTMJ-TV launches 'News on Demand' with Time Warner Cable*, Business Journal (Milwaukee, Wis.), April 7, 2006; *Replays of local news available*

on cable, San Antonio Express-News, Nov. 11, 2005, at E1.

Other documentary films are likewise distributed via video on-demand, including Michael Moore's *Fahrenheit 9/11*. *See* FEC Advisory Op. 2004-30 (Smith, concurring) ("under the expansive definition of 'express advocacy' favored by some of my colleagues, the production and promotion of Michael Moore's movie *Fahrenheit 9/11* may have been banned completely, if these activities were financed by corporations"). But the decision below would exclude these from the media exemption as well.

Nor is the example of video on-demand distribution unique. As technology evolves, more distribution platforms will fall *beyond* the scope of the media exemption as interpreted by the FEC. For example, subscribers to TiVo, a service that allows households to digitally record television shows, can access video content from *The New York Times* on their television sets. *See* David Lieberman, *TiVo diversifies its lineup with Web video*, USA Today, June 7, 2006 at B1. If *The Times* posts endorsements and commentary – what many would call the quintessential example of the American press – it may run the risk of criminal liability because it is not clear that such content would be "distributed through the facilities of any broadcast, cable, or satellite television or radio station." *See* 2 U.S.C. § 434(f)(3)(B)(i).

CONCLUSION

Many editors would choose not to run the type of commentary seen in *Hillary: The Movie* for a variety of reasons – its political viewpoint, its length, or its tone, for example. These editorial decisions, though, cannot create legally meaningful distinctions without forcing the courts to "sit as superior editors of the press." *See Shulman v. Group W Productions, Inc.*, 18 Cal. 4th 200, 229 (1998).

Justice Thomas in *McConnell* warned of the risk that overbroad campaign finance regulations pose to the news media, saying that would-be censors of the press "need only argue that the press 'capacity to manipulate popular opinion' gives rise to an 'appearance of corruption,'" and that "laws regulating media outlets in their issuance of editorials would be upheld under the" Court's opinion in *McConnell*. 540 U.S. at 285 (Thomas, J., concurring in part and dissenting in part). The court below has made this a reality, directly suppressing the type of political commentary that has long been the right and responsibility of the news media. For this reason, that application of the BCRA to *Hillary: The Movie* is an unconstitutional abridgment of the First Amendment's protection for freedom of speech and of the press.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From the United States District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, FORMER REPRESENTATIVE CHRISTOPHER SHAYS, and FORMER REPRESENTATIVE MARTIN MEEHAN IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The First Amendment Does Not Protect Citizens United's Use of Corporate Funds to Finance the Functional Equivalent of Express Advocacy. 4

A. This Court Should Reject Citizens United's Suggestion That It Overrule *Austin v. Michigan Chamber of Commerce*. 4

B. Citizens United's Communications Are Not Protected by the Principles of *MCFL*. 9

C. Citizens United's Position That Justifications for Limits on Corporate Electioneering Vanish When Voters Must Choose to Expose Themselves to It Is Incorrect. 15

II. The Application of BCRA's Disclosure and Disclaimer Requirements to Electioneering Communications That Are Not Functionally Equivalent to Express Candidate Advocacy Is Constitutionally Permissible. 19

A. The Justifications for Disclosure Requirements That This Court Has Accepted Are Not Limited to Express Advocacy and Its Functional Equivalent. 20

B. Citizens United's "Burdensomeness" Arguments Are Unfounded. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases:

Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192 (1997) 10

Brogan v. United States, 522 U.S. 398 (1998) 17

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981) 13

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 26

Davis v. FEC, 128 S. Ct. 2759 (2007) 25

FEC v. Beaumont, 539 U.S. 146 (2003) 6, 8, 9, 13, 14

FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 13

FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) 6, 8, 13, 14

FEC v. Wisc. Right to Life, Inc., 127 S. Ct. 2652 (2007) ..... *passim*

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 7, 8, 26, 27

Harris v. United States, 536 U.S. 545 (2002) 7

IBP, Inc. v. Alvarez, 546 U.S. 21 (2005) 5

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 26, 27

Planned Parenthood of Southeastern Pa. v. Casey,
505 U.S. 833 (1992) 8

Rumsfeld v. Forum for Academic & Institutional Rights, 547 U.S. 47 (2006) 18

TRW Inc. v. Andrews, 534 U.S. 19 (2001) 10

United States v. Harriss, 347 U.S. 612 (1954) 27

Wisc. Right to Life, Inc. v. FEC,
546 U.S. 410 (2006) 22

Statutes and Regulations:

2 U.S.C. § 434(c) 28, 29, 30

2 U.S.C. § 434(f)(3)(A)(i) 19

2 U.S.C. § 441b 11

Bipartisan Campaign Reform Act of 2002,
Pub. L. No. 107-155, 116 Stat. 81

§ 201 20

§ 311 20

11 C.F.R. § 100.29(b)(3)(ii) 18

11 C.F.R. § 100.29(b)(7)(i)-(iii) 18

11 C.F.R. § 114.10 10

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Senators John McCain and Russell Feingold and former Representatives Christopher Shays and Martin Meehan, were the principal sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA). Working together over the course of their public careers, they have devoted enormous time and energy to ensuring that our federal campaign finance laws are meaningful and not subject to wholesale evasion. *Amici* worked for seven years to enact BCRA to close loopholes in the then-existing system. They participated as intervening defendants in *McConnell v. FEC*, 540 U.S. 93 (2003), to defend the constitutionality of those loophole-closing measures. Senator McCain and former representatives Shays and Meehan also participated as *amici curiae* and, later, intervenors in the litigation commenced as *Wisconsin Right to Life, Inc. v. FEC*, which led to two decisions of this Court.[2] Messrs. Shays and Meehan have also been plaintiffs in a series of lawsuits in the federal courts of the District of Columbia seeking to compel the FEC to carry out its duty to promulgate regulations properly implementing BCRA.

Amici McCain, Feingold, Shays, and Meehan submit this brief because the arguments advanced by Citizens United threaten to undo much of what they accomplished in achieving the enactment of BCRA, to roll back long-

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[1] *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Senator Feingold did not participate in that case because he was the subject of the ads at issue.

standing provisions of the Federal Election Campaign Act (FECA) that predate BCRA, and even to jeopardize statutes requiring disclosure of corporate and union political and lobbying expenditures outside the field of candidate elections. *Amici* urge the Court to reject Citizens United's far-reaching positions and instead apply settled principles establishing that restrictions on the use of corporate and union funds for express candidate advocacy and its functional equivalents are constitutionally permitted, and that the interest in informing voters of the moneyed interests behind candidate-related election-season advertising is sufficient to sustain application of BCRA's disclosure provisions to the entire range of electioneering communications defined in BCRA, as eight members of this Court held in *McConnell*.

SUMMARY OF ARGUMENT

Beyond the dispute over whether the contents of *Hillary: The Movie* are the functional equivalent of express advocacy—a factbound question that was thoroughly considered by the district court, with whose decision we agree for the reasons stated by the FEC and the court itself, and that we do not address further—this case presents several issues of great importance for the ongoing enforcement and administration of federal campaign finance laws. Acceptance of Citizens United's positions would open the door to essentially unlimited corporate- and union-funded election advocacy and would eviscerate disclosure provisions designed to alert the electorate to the interests that finance election-related messages.

Citizens United contends that even assuming that *Hillary: The Movie* contains the functional equivalent of express advocacy, it should have been permitted to finance cable transmissions of the movie outside the constraints of BCRA. To support this position, it advocates

that the Court either overrule its decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), significantly expand the scope of its holding in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), or hold that regulation of the financing of "on-demand" cable transmissions of video programming containing candidate advocacy falls outside the justifications this Court has previously accepted for restrictions on funding of electioneering communications by business corporations and labor unions.

None of these submissions has merit. Merely overruling *Austin* would not avail Citizens United because the application of BCRA to corporate- and union-financed communications that are the functional equivalent of express advocacy is supported not only by *Austin*, but also, much more directly, by this Court's more recent decisions in *McConnell* and *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL II*), neither of which the Court has been asked to overrule. Nor, in any event, does Citizens United offer the special justification necessary to support the overruling of this Court's precedents. As for *MCFL*, Citizens United's arguments would tear it from its moorings as a narrow ruling allowing advocacy by nonprofit corporations that do not accept donations from business corporations and unions, turning it into a loophole that would allow substantial use of corporate and union funds to support express advocacy and its equivalent. And Citizens United's argument that candidate advocacy via on-demand video is so different from traditional advertising that it should be open to no-holds-barred corporate and union financing of electioneering messages overlooks that such advocacy poses the same threats to the electoral system as does corporate funding of more traditional forms of election advocacy.

With respect to the advertisements for *Hillary: The Movie*, Citizens United's arguments are just as unfounded and would be equally destructive of settled principles of campaign finance jurisprudence. With near unanimity, this Court has approved requirements for disclosure of the sources of funding of election-related messages because disclosure serves the electorate's significant informational interests. Citizens United's assertion that those interests are only present when the messages in question involve express advocacy or its equivalent are unsupported by any of this Court's precedents. Rather, those interests are implicated by the full range of electioneering communications under BCRA, specifically including Citizens United's ads bearing derogatory messages about a presidential candidate, targeted at voters in states in which she was competing in primary elections. And Citizens United's hollow claims that it would be burdened by the disclosure and disclaimer requirements applicable to its ads under BCRA are flatly contradicted by this Court's precedents.

ARGUMENT

I. The First Amendment Does Not Protect Citizens United's Use of Corporate Funds to Finance the Functional Equivalent of Express Advocacy.

A. This Court Should Reject Citizens United's Suggestion That It Overrule *Austin v. Michigan Chamber of Commerce*.

In its merits brief, Citizens United suggests for the first time that this Court resolve this case by overruling *Austin v. Michigan Chamber of Commerce*, in which the Court upheld a Michigan statute requiring for-profit corporations and unions to use segregated funds rather than treasury funds to finance express advocacy. Citizens United makes this request despite the failure of its

Jurisdictional Statement in this case to present any such issue. Indeed, the Jurisdictional Statement did not even cite *Austin*, and it limited the questions Citizens United wished to present to as-applied challenges to BRCA's restriction on Citizens United's use of its funds to transmit *Hillary: The Movie* by cable or satellite, and as-applied challenges to BCRA's reporting and disclosure requirements (the same as-applied challenges Citizens United advanced in the district court).

Even overlooking this omission, Citizens United's current suggestion that repudiating *Austin*—the only decision its brief asks this Court to overrule—would be sufficient to decide this case in its favor is incorrect. Citizens United contends that even as to communications that are the functional equivalent of express advocacy—indeed, even as to express advocacy itself—BCRA's restriction on the use of corporate or union treasury funds to finance electioneering communications is unconstitutional. That is not, as Citizens United would have it, a conclusion the Court could reach by overruling *Austin* alone. Rather, to arrive at that holding, the Court would have to overrule its more recent decision in *McConnell v. FEC*, because it was *McConnell* (not *Austin*) that held that the funding restrictions imposed by BCRA are facially constitutional, and the thrust of Citizens United's argument is that those restrictions have *no* constitutional application to the use of corporate or union treasury funds to finance electioneering communications. Notably, overruling *McConnell* is a step that Citizens United does *not* ask the Court to take, despite extensively discussing various aspects of *McConnell*'s holdings. And it is a well-settled principle that this Court generally declines to overrule one of its decisions when no party has asked it to do so. *See, e.g., IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005).

Moreover, the *McConnell* majority's holding that BCRA's restrictions on the use of corporate and union treasury funds to finance electioneering communications are facially constitutional did not rest only, or even principally, on *Austin*. Rather, the majority invoked the Court's campaign finance jurisprudence from *Buckley v. Valeo*, 424 U.S. 1 (1976), onward, with special emphasis on *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), and *FEC v. Beaumont*, 539 U.S. 146 (2003). *See McConnell*, 540 U.S. at 203-06. The Court based its holding that there is a compelling interest supporting application of funding restrictions to express advocacy, and hence to its functional equivalent, on "our precedents," *id.* at 205, not just on *Austin*. In light of *McConnell*'s reasoning as well as its holding, it is untenable to suggest that a surgical overruling of *Austin*, as opposed to a wholesale overruling of *McConnell* and the line of precedents on which it relied, would suffice to resolve this case.

Citizens United's suggested disposition of the case would also make a mockery of the controlling opinion in *WRTL II*. That opinion went to great pains to explicate a test for distinguishing electioneering communications that are not the functional equivalent of express advocacy (and hence, it held, may not be subjected to the funding restrictions of BCRA Title II), from those that are the functional equivalent of express advocacy, and hence fall within *McConnell*'s undisturbed holding that the funding restrictions are constitutional "to the extent that ... ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206; *see WRTL II*, 127 S. Ct. at 2670 (opinion of Roberts, C.J.).

The controlling opinion in *WRTL II* explicitly described its holding as "draw[ing] ... a line" between impermissible applications of the funding restrictions and permissible ones, *id.* at 2659, and establishing a "test to distinguish constitutionally protected political speech from *speech that BCRA may proscribe.*" *Id.* at 2665 (emphasis added). Moreover, the opinion defended the line it drew not only against arguments that it was insufficient to serve BCRA's goals of preventing actual and apparent corruption, but also against the contention of the concurring Justices that it was *too restrictive* of speech. *Id.* at 2669 n.7. The controlling opinion roundly rejected the latter view, insisting that a test that "affords protection unless an ad is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate" is adequate to protect First Amendment interests. *Id.* (emphasis in original). To erase that line only two years later with a holding that unlimited corporate and union funds may be used even for communications that are express advocacy or its functional equivalent would be, in the words of *WRTL II*, "a constitutional 'bait and switch.'" *Id.* at 2673.

In any event, Citizens United's argument for overruling *Austin* fails to identify the "special justification" required for this Court to overrule one of its precedents. *Harris v. United States*, 536 U.S. 545, 557 (2002). Citizens United's brief argument for overruling *Austin* rests principally on its alleged inconsistency with the principles of *Buckley v. Valeo* and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Such claimed doctrinal inconsistency is hardly a "special justification," *see Harris*, 536 U.S. at 557, especially when the supposedly inconsistent decisions preceded and were thoroughly considered in the decision at issue. *See Austin*, 494 U.S. at 657-58 (extensively discussing *Buckley* and *Bellotti*).

That the Court in *McConnell* (in an opinion coauthored by one of the *Austin* dissenters) reaffirmed the principle that the use of corporate funds for express candidate advocacy may be restricted and again specifically addressed both *Buckley* and *Bellotti* underscores that those decisions offer no special justification for overruling precedents of this Court. *See McConnell*, 540 U.S. at 206 n. 88.

In light of the 60-year history of the prohibition on use of corporate or union treasury funds for express advocacy and the string of this Court's precedents that were either premised on or explicitly affirmed the constitutionality of this restriction—including *Buckley*, *National Right to Work Committee*, *MCFL*, *Austin*, *Beaumont*, *McConnell*, and *WRTL II*—it can hardly be suggested that the "evolution of legal principle" has "implicitly or explicitly left [*Austin* or *McConnell*] behind as a mere survivor of obsolete constitutional thinking." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992).

Indeed, when this Court first considered BCRA in *McConnell*, Citizens United's current counsel, who was then defending BCRA, repeatedly endorsed *Austin*'s holding and argued that it was "clear that the Constitution permits source-of-funding limits on corporate expenditures in connection with candidate elections." Brief for the FEC, at 78, *McConnell* (No. 02-1674). Indeed, counsel told the Court that the record developed in *McConnell*, far from indicating some change in circumstances that undermined *Austin*, provided support for restrictions on corporate and union election expenditures that "dwarfed" the showing accepted in *Austin*, *id.* at 85-86, and rejected the suggestion that *Austin* should be overturned even in part. *Id.* at 116.

Little more than five years later, the holding of *McConnell* and the reasoning of such cases as *Austin* and *Beaumont* that supported it remain fully valid. There is no basis for suggesting that concerns about the potentially overwhelming, distorting, and corrupting influence of unleashing massive corporate and union war chests for use in unfettered express candidate advocacy are no longer compelling. That our electoral process would soon be dominated by corporate and union spending if the Court were to use this case as the occasion to roll back the longstanding prohibition on express advocacy by business corporations and unions is beyond serious question.

B. Citizens United's Communications Are Not Protected by the Principles of *MCFL*.

Beyond its frontal assault on the proposition that the use of corporate funds for express advocacy or its equivalent may be restricted, Citizens United asks the Court to rewrite its precedents to permit Citizens United to engage in such advocacy as long as the corporate funds used for that purpose are outweighed by funds contributed by individuals. According to Citizens United, this Court's holding in *MCFL* that ideological nonprofit organizations that accept *no* money from for-profit corporations may use their treasury funds for express advocacy should also protect Citizens United's use of funds contributed by business corporations, as long as its communications are "funded predominantly by individuals." Citizens United Br. 31.

Citizens United made no such argument in this case before its merits brief in this Court. Nowhere in its papers in the district court or in its Jurisdictional Statement did it contend that the sources of funding on which it relied brought its speech within the protection of

MCFL. Indeed, Citizens United expressly informed the district court that it is "not a 'qualified nonprofit corporation' because it receives corporate donations and engages in business activities." Plaintiff's Statement of Undisputed Material Facts at 1, *Citizens United v. FEC*, No. 07-2240, D.E. 52 (D.D.C. filed May 16, 2008).[3] It made no effort to establish that, despite its acknowledged failure to meet the regulatory criteria for the exception embodying the *MCFL* principle, it nonetheless should receive the benefit of *MCFL*'s holding. Having failed to make the argument in the district court or in its Jurisdictional Statement, Citizens United has waived it. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 207-08 (1997); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 33-34 (2001).[4]

Even if entertained, Citizens United's belated reliance on *MCFL* should be rejected because it would transform a narrowly limited doctrine designed to protect groups that are truly independent of the interests of for-profit corporations and unions into an avenue for

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[3] "Qualified nonprofit corporation" is the FEC's regulatory nomenclature for an *MCFL* corporation. *See* 11 C.F.R. § 114.10.

[4] Citizens United's failure to advance this argument in the district court inhibited the creation of a complete record that would have unearthed the full extent to which it has relied on corporate funds. Citizens United's brief cites the organization's interrogatory responses, which purport to establish that only two business corporations made contributions of $1000 toward *Hillary: The Movie* (*see* Citizens United Br. 7), but those responses not only are apparently limited to earmarked contributions, but also reveal that significant contributions came from some "other noncorporate persons" who were not individuals. *Id.* Presumably those "noncorporate persons" were other organizations, which may in turn have been passing through funds donated by business corporations.

wholesale circumvention of restrictions on corporate electioneering expenditures and contributions.

This Court's decision in *MCFL* did not, as Citizens United suggests, establish the principle that funding of candidate advocacy by for-profit corporations is constitutionally protected as long as it is combined with a larger quantity of dollars contributed by individuals. Rather, the Court in *MCFL* identified "three features *essential* to our holding that [MCFL] may not constitutionally be bound by [2 U.S.C.] § 441b's restriction on independent spending." *MCFL*, 479 U.S. at 263-64 (emphasis added). The third of those essential features was:

> MCFL was not established by a business corporation or a labor union, *and it is its policy not to accept contributions from such entities.* This *prevents* such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.

Id. at 264 (emphasis added). In other words, what the Court considered essential in *MCFL* was not that the organization received *only a little* corporate money or that its funding was *mostly* from individuals, but that it accepted *no* contributions from business corporations or labor unions, as a matter of policy.

Similarly, in *Austin*, the Court rejected the argument that funding restrictions on candidate advocacy could not be applied to a non-profit corporation that received money from business corporations. The Court reiterated that each of the three characteristics identified in *MCFL* was "crucial," 494 U.S. at 662, and it found the organization at issue (the Michigan Chamber of Commerce) ineligible for *MCFL*'s constitutional exemption from restrictions on candidate advocacy expenditures in part "[b]ecause the Chamber accepts money from for-profit

corporations," and therefore "it could ... serve as a conduit for corporate political spending" if permitted to use its treasury funds for advocacy. *Id.* at 664. The Court thus found it permissible to relegate the Chamber to advocacy through a segregated fund, which "*cannot* receive contributions from corporations." *Id.* at 664 n.3 (emphasis added).

McConnell, too, emphasized that *MCFL* exempts only a "carefully defined category of entities," 540 U.S. at 210, from the requirement that candidate advocacy by corporations be paid for from segregated funds contributed by individuals. And it repeated that one of the "central" requirements of *MCFL* is that an organization have a policy of not accepting contributions from business corporations or labor unions. *Id.* at 210-11. Similarly, in *WRTL II*, the controlling opinion declined to consider the argument that *MCFL* supported the as-applied challenge in that case "because WRTL's funds for its ads were not derived *solely* from individual contributions." 127 S. Ct. at 2673 n.10 (emphasis added).

Accepting Citizens United's argument that a little corporate funding of candidate advocacy must be permitted—or even a substantial amount, as long as it is not "predominant"—would have serious deleterious effects on federal campaign finance law and allow widespread circumvention of critical provisions previously upheld by this Court. Citizens United's argument would apply equally to express advocacy as well as to electioneering communications that are the functional equivalent of express advocacy. *Cf. McConnell*, 540 U.S. at 210 (noting that *MCFL* necessarily applies both to electioneering communications under BCRA and to traditional express-advocacy expenditures under FECA). Thus, the implication of Citizens United's argument is not only that non-

profit organizations may freely finance candidate advocacy with a mix of funds contributed by business corporations and individuals as long as most of the money comes from the latter, but also that (1) business corporations and unions may pay for express advocacy through accounts to which they have contributed their own treasury funds, as long as contributions from individuals predominate; (2) independent political committees that engage in express advocacy (and possibly multicandidate committees that make contributions to candidate committees) must be free to accept corporate funds as long as individual contributions predominate; and (3) BCRA's prohibitions on the use of "soft money" by political parties for federal election activity (upheld in *McConnell*) must be modified to allow some corporate soft-money contributions toward such activity as long as they do not predominate over individual contributions.

In short, Citizens United's argument would upset both the requirements that election expenditures be funded through truly "segregated" funds and the prohibitions on use of corporate and union funds for expenditures by political committees—provisions that are supported by a long line of this Court's decisions. *See McConnell*, 124 S. Ct. at 204-11; *Beaumont*, 539 U.S. at 162-63; *Austin*, 494 U.S. at 658-65; *Nat'l Right to Work Comm.*, 459 U.S. at 201-202; *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981). The effect of accepting Citizens United's view would be to permit the mobilization and unleashing of "political war chests funneled through the corporate form," *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985), as corporations would be free to use essentially unlimited amounts of their treasury funds to back candidate advocacy, as long as those funds were parceled out among nonprofit organizations or political committees in such a way that any par-

ticular piece of advocacy was not paid for "predominantly" with corporate funds. In effect, *MCFL* would be transformed into little more than a "matching" requirement: Every dollar of corporate or union funds supporting express advocacy would have to be matched by something more than a dollar (how much more is unclear) contributed by an individual.

The compelling interest in preventing corruption and the appearance of corruption that is served by "barring corporate earnings from being converted into political 'war chests,'" *Beaumont*, 539 U.S. at 154, as well as the interest in preventing nonprofit organizations from becoming conduits for the evasion of campaign finance law, *id.* at 155, thus demand rejection of Citizens United's proposed expansion of *MCFL*. As in *Beaumont* and *National Right to Work Committee*, the Court should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Beaumont*, 539 U.S. at 157 (quoting *Nat'l Right to Work Comm.*, 459 U.S. at 210).

Respect for Congress's judgment in this respect is counseled not only by the interests served by the funding restriction, but also by the absence of any principled and workable basis on which a court that accepted Citizens United's invitation to allow *some* corporate or union funding could proceed to determine *how much* corporate or union money is too much. Moreover, because both the amount and percentage of corporate or union contributions to any particular organization would vary from year to year—and even from communication to communication—the quest to determine "predominance" would become, at least, an annual event. The Court should therefore adhere to the bright-line constitutional principle established by its precedents: Congress may disallow

any use of funds from business corporations or labor unions to pay for express advocacy and its equivalent.

C. Citizens United's Position That Justifications for Limits on Corporate Electioneering Vanish When Voters Must Choose to Expose Themselves to It Is Incorrect.

Leaving aside its pleas for overruling *Austin* or dramatically extending *MCFL*, Citizens United's principal argument seems to be that the justifications for restrictions on corporate and union funding of express advocacy or communications that are its functional equivalent vanish when the advocacy takes the form not of broadcast ads that are imposed on television viewers, but "narrowcast" advocacy that members of the public must first choose to view (enticed, at least in this case, by ads that are themselves electioneering communications).[5] Although the principal focus of the congressional deliberations leading to passage of BCRA's electioneering communications provisions was traditional ads, the interests that provide constitutional justification for the funding restriction are fully applicable to communications that recipients must choose to receive.

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[5] Citizens United also questions whether its particular advocacy would threaten to create actual or apparent corruption because Senator Clinton's principal opponent in the primaries, President Obama, likely would not perceive Citizens United's communications as supportive of his own candidacy. *See* Citizens United Br. 41. But this Court has never suggested that the justifications for limits on corporate express advocacy and its equivalent depend on whether one can identify a specific candidate who would likely be corrupted by a particular expenditure. In any event, Citizens United's argument assumes, wrongly, that only Senator Clinton's primary opponents, and not potential Republican opponents in the general election, would be favorably influenced by Citizens United's spending to defeat her.

Indeed, that ads are imposed on viewers unwillingly is *not* one of the reasons that this Court has relied on in holding that corporations and unions can be prohibited from using their treasury funds to finance candidate advocacy. The Court has identified two principal justifications for that restriction: that there is a significant potential for corruption or its appearance if candidates benefit from large-scale corporate or union expenditures supporting them or targeting their opponents, and that the electoral process should be protected from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *McConnell*, 540 U.S. at 205 (quoting *Austin*, 494 U.S. at 660). Both are equally applicable to means of electoral persuasion that voters must take some initiative to access.

Acceptance of Citizens United's argument would have potentially far-reaching and undesirable consequences. The argument, like the *MCFL* argument, cannot be confined to electioneering communications, but would extend to independent expenditures for express advocacy as well. Thus, Citizens United's reasoning would appear equally applicable, for example, to full-scale express advocacy over the Internet (where access to content is typically user-initiated), and it would thereby open the door to unlimited corporate and union expenditures using the web to explicitly urge votes for and against candidates.[6] The same would be true of any cor-

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[6] As the FEC notes (FEC Br. 26 n.8), the FEC has been cautious in extending FECA's and BCRA's provisions to the Internet, and the electioneering communications provisions do not apply to the web. The regulations cited by the FEC, however, do *not* exempt

(*Footnote continued*)

porate- or union-funded express advocacy in any form—written, audio, or video—where a voter exercised choice before receiving it. Indeed, Citizens United's reasoning would seem to protect corporate-funded telephone banks that called voters, asked if they were interested in hearing a message about Candidate X, and then, if the voter said yes, launched into express advocacy.

The majority in *McConnell* observed that when it comes to elections, "Money, like water, will always find an outlet." 540 U.S. at 224. Congress cannot, of course, always anticipate precisely what that outlet will be. But when, as here, it has enacted legislation principally motivated by one practice (corporate and union funding of broadcasts and cablecasts of ads containing candidate-related advocacy) that is equally applicable by its terms to another practice (corporate and union funding of on-demand cablecasting of programming containing candidate-related advocacy), and when that other practice poses exactly the same threats of potential corruption of the electoral process, there is no reason to limit Congress's enactment to the precise evil that prompted its passage. *Cf. Brogan v. United States*, 522 U.S. 398, 403 (1998) ("[T]he reach of a statute often exceeds the precise evil to be eliminated").

Although its constitutional arguments are unfounded, Citizens United has also raised a question about whether on-demand cable "narrowcasting" of *Hillary: The Movie*

Internet communications from the restriction on the use of treasury funds of business corporations and unions to finance "expenditures" (i.e., express advocacy). Citizens United's reasoning, by contrast, would place any Internet site accessed at the choice of a user constitutionally off-limits from any restrictions on the use of corporate or union funds.

would have met the FEC's regulatory definition of transmission of an electioneering communication. According to Citizens United, each individual on-demand transmission of the program would have been received only by the household that ordered it, but the regulatory definition of an electioneering communication requires that a transmission be capable of receipt by 50,000 persons in the state where the election is imminent. *See* Citizens United Br. 26-27 n.2 (citing 11 C.F.R. § 100.29(b)(3)(ii)). Because this Court's consideration of the constitutionality of a statutory or regulatory restriction may require, as an antecedent, determining what the challenged law actually provides, *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 56 (2006), Citizens United's failure to raise this point before does not necessarily bar this Court from reaching it.

As the FEC points out, however, if *Hillary: The Movie* had been distributed through an on-demand cable channel, it would have been available to all subscribers of a cable system with access to on-demand programming, and the regulatory definition of what it means for a transmission to be capable of being viewed by the requisite number of persons is based primarily on the number of subscribers of the system. *See* FEC Br. 23-24 n.7; 11 C.F.R. § 100.29(b)(7)(i)-(iii). The FEC's interpretation of its own regulation appears reasonable even though the Commission may not have specifically considered application of the regulations to on-demand programming when promulgating them.

To the extent that there may be some ambiguity in the applicability of the regulations, the Court could possibly conclude that it is sufficiently doubtful that on-demand viewing of *Hillary: The Movie* would have been within the scope of the FEC's current regulations that

the Court should withhold judgment on the constitutional issue until such time as the FEC made a more specific regulatory determination to include such transmissions within the regulatory definition of electioneering communications. In no event, however, should the Court accept Citizens United's broad constitutional arguments that would place even express advocacy beyond the bounds of regulation if it is accessed at the choice of the viewer.

II. The Application of BCRA's Disclosure and Disclaimer Requirements to Electioneering Communications That Are Not Functionally Equivalent to Express Candidate Advocacy Is Constitutionally Permissible.

Citizens United's proposed broadcast advertisements for *Hillary: The Movie*, though not containing the functional equivalent of express advocacy within the meaning of *WRTL II*, prominently mentioned Senator Clinton and were intended to be aired shortly before primary elections in which she was a candidate for office and/or the national party convention that would determine the nomination for that office. The ads would thus, without question, have been electioneering communications under BCRA, *see* 2 U.S.C. § 434(f)(3)(A)(i), and the FEC's implementing regulations. Equally unquestionable is that the ads commented negatively on Senator Clinton's character and fitness for office, either explicitly or by insinuation. Nothing in this Court's decisions suggests that measures aimed at disclosing to the public the origin of these broadcast messages and the identity of those who financed them are unconstitutional.

A. The Justifications for Disclosure Requirements That This Court Has Accepted Are Not Limited to Express Advocacy and Its Functional Equivalent.

Citizens United's basic submission is that unless a communication falls within the class as to which Congress may permissibly impose restrictions on corporate funding—that is, express advocacy or its functional equivalent—there is no legitimate justification for disclosure provisions, either. Citizens United's position is flatly at odds with this Court's jurisprudence.

In *McConnell*, eight Justices voted to uphold the facial constitutionality of § 201 of BCRA, the basic provision requiring those who disseminate electioneering communications to disclose contributions made to support them. The five-Justice majority found disclosure to be justified by "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196. The three concurring Justices did not believe that either the enforcement or anti-corruption rationales applied to electioneering communications, but they agreed that the disclosure requirement "does substantially relate to" the interest in providing the electorate with information, and that this substantial relationship "assures its constitutionality." *Id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part).[7]

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[7] What Citizens United refers to as the "disclaimer" requirement of BCRA § 311—which requires electioneering communica-

(*Footnote continued*)

Notably, the three Justices who concurred on this point did so even though they saw *no* interests sufficient to justify the application of corporate funding restrictions to electioneering communications—a position directly at odds with Citizens United's view that the justifications for disclosure extend only to communications as to which funding restrictions are also justified. Similarly, the majority opinion nowhere suggested that the justification for the disclosure requirements was limited to electioneering communications that are the functional equivalent of express advocacy. In short, eight Justices accepted the disclosure requirements in *McConnell* without intimating any support for Citizens United's position that Congress's power to impose disclosure requirements is coextensive with its power to restrict funding of communications.

Moreover, the majority's treatment of the disclosure requirements was quite different from its analysis of the corporate funding restriction, where it limited its holding that the restriction was facially constitutional by noting that the justifications for the restriction are applicable "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy." 540 U.S. at 206. By contrast, the majority identified no such limits on the justifications for the disclosure provisions, and concluded that they were facially constitutional because, absent evidence that their appli-

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tions not authorized by candidate committees to identify who paid for them and state that they were not authorized by a candidate committee—was similarly upheld by eight Justices who found that it "bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." 540 U.S. at 231 (opinion for the Court of Rehnquist, C.J.).

cation in a particular case was reasonably likely to lead to threats, harassment, or reprisals against contributors (*id.* at 198-99), the interests served by disclosure "amply suppor[t] application of [the] disclosure requirements to the entire range of 'electioneering communications'"—not just those that are equivalent to express advocacy. *Id.* at 196.

McConnell did not, of course, decide as-applied challenges that were not before it. *See Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006). But the *reasoning* used by the Court in rejecting the facial challenge to BCRA's disclosure provisions is inconsistent with *this particular* as-applied challenge. In contrast, the controlling opinion in *WRTL II* held that *McConnell*'s reasoning in rejecting the facial challenge to BCRA's funding restrictions for electioneering communications was *not* inconsistent with the as-applied challenge in *WRTL II*.

With respect to the funding restrictions, the Court held in *McConnell* that the statute was not facially overbroad because it could be validly applied to communications that were the functional equivalent of express advocacy, and the Court was not convinced that the possible unconstitutional applications outside that realm were substantial in relation to the statute's legitimate sweep. *See* 540 U.S. at 207. In *WRTL II*, the controlling opinion concluded that that holding necessarily left room for an as-applied challenge to application of the restrictions to communications that were asserted not to be functionally equivalent to express advocacy. *See* 127 S. Ct. at 2659-60.

By contrast, with respect to disclosure, the reason that *McConnell* rejected the facial challenge was not simply that there were a substantial number of permissible applications of the disclosure provision, but that the justifications for disclosure applied to the "entire range

of 'electioneering communications,'" *McConnell*, 540 U.S. at 196, except where the result would be harassment, threats or reprisals. That reasoning is inconsistent with the as-applied challenge advanced here, and there is nothing novel in recognizing that the reasoning of a decision finding a statute facially constitutional may determine the outcome of subsequent as-applied challenges. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2664 (recognizing that resolution of an as-applied challenge is "informed by our precedents" and that *McConnell*'s holding would doom an as-applied challenge to the application of BCRA's electioneering communication funding restrictions to "express advocacy or its functional equivalent").

Nor does the Court's holding in *WRTL II* call into doubt the constitutionality of applying the disclosure provisions to electioneering communications that fall short of being the functional equivalent of express advocacy. The controlling opinion in *WRTL II* acknowledged that advertisements that are not the functional equivalent of express advocacy may be intended to influence elections and may have actual effects on elections, and that it may be exceedingly difficult to distinguish ads with that intent and effect from electorally neutral ones. 127 S. Ct. at 2664-69. But because the Court was considering what the controlling opinion regarded as a prohibition on speech by corporate speakers, it adopted a narrow, objective test for determining when a communication constitutes the functional equivalent of express advocacy, premised on the notion that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor," and that "[d]iscussion of issues cannot be *suppressed* because the issues may also be pertinent in an election." *Id.* at 2669 (emphasis added). In short, the controlling opinion in *WRTL II* was determining what justifications would support a "ban" on protected

speech, and its conclusions reflected the view that in deciding such an issue "we give the benefit of the doubt to speech, not censorship." *Id.* at 2674.

The controlling opinion's conclusion that speech must be the functional equivalent of express advocacy before the interests identified as compelling in *McConnell*, *Austin*, and *Buckley* justify a *prohibition* on corporate funding by no means suggests that lesser measures can only be sustained for the same type of speech. Rather, the undoubted electoral effects of advertisements that discuss candidates in proximity to an election, which were described in detail in the majority opinion in *McConnell*, 540 U.S. at 126-30, 193-94, and nowhere denied in the controlling opinion in *WRTL II*, are more than sufficient to support *disclosure* requirements on informational grounds alone. An electorate bombarded with messages about candidates in the run-up to an election has an obvious interest in knowing what moneyed interests lie behind them so that it can evaluate in a more informed manner whether, and to what extent, the messages should influence voting. *See Buckley*, 424 U.S. at 66 (relying on the interest of the voting public in knowing "where political campaign money comes from"). Indeed, that is undoubtedly why eight Justices of this Court saw little difficulty in upholding the disclosure provision (and even less difficulty in sustaining the so-called "disclaimer" provision) in *McConnell*.

In this specific case, the interest in disclosure is evident. The advertisements in question were to be run during the primary season in states where Senator Clinton was on the presidential primary ballot. Each advertisement either contained direct negative statements about Senator Clinton's political views or insinuated that there was negative information that members of the public

could learn more about if they viewed *Hillary: The Movie*, which, as the district court found, is itself a thoroughgoing critique with the theme that Senator Clinton was unfit for the office for which she was running. Moreover, the ads themselves discuss no "issues" other than the "issue" of Senator Clinton herself, a subject pertinent first and foremost to the imminent elections.

Under such circumstances, viewers of the ads would have an obvious and legitimate interest in knowing who was—and was not—behind them. It would be important, for example, to know that the ads were *not* the work of the campaigns of either her Democratic rivals in the primaries or her potential Republican opponents in the general election (hence the disclaimer). Beyond that, there would be an obvious interest in finding out both who paid for the ads (Citizens United) and who supplied the money behind that innocuous-sounding name, so that members of the public could help place Citizens United "in the political spectrum" (*Buckley*, 424 U.S. at 67) and identify the interests it represents—all with the goal of providing themselves more information to assist in evaluating the credibility of its critique of the Senator and determining whether to seek more information from this source. Nothing in this Court's jurisprudence suggests that such interests are insufficient to justify disclosure here.[8]

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[8] The Court's recent decision in *Davis v. FEC*, 128 S. Ct. 2759 (2007), notwithstanding Citizens United's repeated citations, does not suggest that the interests that support disclosure here are insufficient. In *Davis*, the *only* interest served by the disclosure provisions the Court struck down was to make possible implementation of the substantive provisions of the "Millionaire's Amendment," which, the Court held, were themselves unconstitutional. *See id.* at 2775. That implementation of unconstitutional restrictions is not a suffi-

(*Footnote continued*)

Indeed, the Court has long recognized the legitimacy of disclosure requirements much further removed from express candidate advocacy than the ones at issue here. For instance, in *Bellotti*,—the very decision that sustained the right of corporations to engage in issue advocacy and that lies at the core of *WRTL II*'s holding that corporate funding of speech that is not the functional equivalent of express candidate advocacy cannot be prohibited—the Court recognized that where corporate issue advertising is concerned, "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected," and that the government may rely on "the prophylactic effect of requiring that the source of communication be disclosed." *Bellotti*, 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 66-67). Similarly, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (*CARC*), while holding that limits on contributions to a committee formed for ballot measure issue advocacy were unconstitutional, the Court stressed that, even absent those limits, the government could protect the interest in informing voters of the committee's sources of funding by enforcing disclosure provisions. *Id.* at 298-99.

Citizens United characterizes these statements in *Bellotti* and *CARC* as "dicta," Citizens United Br. 55-56, but they were nonetheless important to the Court's explanations of its holdings. Moreover, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), where the Court

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cient justification for *anything* should go without saying, but that does not advance Citizens United's claim that the different interests served by the provisions at issue here are insufficient to meet constitutional demands.

upheld the right of an individual to distribute self-published, anonymous pamphlets on ballot measure issues, the Court was careful to reconcile its holding with the "dicta" from *Bellotti* and took pains not to call into doubt regulations requiring disclosure of corporate campaign expenditures and contributions, whether issue or candidate-related. *See id.* at 353-56. Moreover, "dicta" or not, these statements by the Court are far more persuasive than the authority Citizens United musters for the proposition that disclosure of expenditures and sources of funding for issue advocacy may *not* be required—that is to say, no authority at all.

Indeed, the notion that disclosure requirements applicable to political speech must be limited to express candidate advocacy or its equivalent is directly at odds with the holding in *United States v. Harriss*, 347 U.S. 612 (1954). There, the Court upheld disclosure requirements as to nonelectoral issue advocacy—that is, lobbying—based on the informational interest in disclosing to the public and to members of Congress "who is being hired, who is putting up the money, and how much," information that it found essential to "maintain[ing] the integrity of a basic governmental process." *Id.* at 625.

In each of these cases, the Court asserted the validity of disclosure requirements as to the amount and source of expenditures notwithstanding that (1) the expenditures themselves could not be prohibited, and (2) the expenditures involved issue rather than candidate advocacy. The decisions thus demonstrate the fallacy of Citizens United's two related submissions that disclosure requirements cannot be imposed upon its communications unless they are the type of communications as to which corporate funding may be prohibited and/or they are express candidate advocacy or its equivalent.

Whatever the limits may be to the imposition of disclosure requirements when citizens pool their money to address matters of public interest, the provisions of BCRA at issue here do not approach them. When a corporation such as Citizens United collects and expends funds to broadcast messages about a candidate on the eve of an election, this Court's precedents indicate that the public interest in knowing whose money is behind those messages is more than sufficient to justify reporting and disclosure requirements.

B. Citizens United's "Burdensomeness" Arguments Are Unfounded.

Citizens United's assertion that the disclosure and disclaimer requirements are unduly burdensome is unpersuasive and unsupported by this Court's precedents. As to disclosure, Citizens United's argument is refuted by the very authority on which it relies—*MCFL* (*see* Citizens United Br. 54). *MCFL*, to begin with, expressly stated that even though an ideological nonprofit corporation that accepts no contributions from business corporations cannot be restrained from expending its own funds for express candidate advocacy or forced to bear the burden of establishing a "separate segregated fund" subject to the detailed reporting and disclosure requirements applicable to a "political committee," it must nonetheless report its political expenditures and contributors. *Compare* 479 U.S. at 253-54 (discussing burdens of political committee requirements) *with id.* at 262. Specifically, the Court in *MCFL* stated that, under FECA's provision for disclosure of independent expenditures (2 U.S.C. § 434(c)),

> MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to

> specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.

479 U.S. at 262.

MCFL's discussion on this point has twofold significance. First, it provides yet another refutation of Citizens United's position that disclosure obligations cannot be imposed on it if its funding of the speech itself is constitutionally protected, for the *MCFL* Court acknowledged the existence of sufficient justifications for disclosure even in circumstances where it could not find constitutional justification for prohibiting the use of the corporation's funds for the expenditures at issue. Second, it is fatal to Citizens United's undue burden argument. While finding the requirements of political committee status generically too burdensome for *MCFL* corporations, the Court obviously thought that compliance with FECA's standards for disclosure of independent expenditures created no similarly excessive burden. Moreover, as the majority in *McConnell* observed, BCRA's disclosure requirements for electioneering communications are "actually somewhat *less* intrusive than the comparable requirements that have long applied to persons making independent expenditures [under 2 U.S.C. § 434(c)]." *McConnell*, 540 U.S. at 196 n.81 (emphasis added). If, as

MCFL recognized, the requirements of § 434(c) are not too burdensome for a true *MCFL* corporation, it follows that the *less* onerous reporting requirements of BCRA are not excessive for a corporation that does not even qualify under *MCFL*.

As for Citizens United's contention that the four-second disclaimer requirements applicable to its ads under BCRA are excessively burdensome, it, too, is untenable. Four seconds is obviously a minimal requirement for conveying any information, and Citizens United cites no authority for the proposition that its own decision to use ads so abbreviated that the disclaimer cannot fit comfortably with everything else it wants to cram into the short timeframe it has selected renders the disclaimer requirement unduly burdensome. The significant public interest in knowing who is and is not behind such election-eve, candidate-related messages is more than sufficient to justify the minimal burden of a four-second disclaimer and to outweigh Citizens United's interest (if any) in making its messages so short that it has no time for a disclaimer.

CONCLUSION

This Court should affirm the decision of the three-judge district court.

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Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* THE WYOMING LIBERTY GROUP AND THE GOLDWATER INSTITUTE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Appeal to Vote Standard Must be Clarified or Eliminated 10

A. *Buckley*, the First Amendment, and the Import of Speech Protective Principles 11

B. The Confusion over *McConnell* and the *Wisconsin Right to Life* Clarification 15

II. The Federal Election Commission's Heads You Speak, Tails You Don't Approach 17

A. The Safe Harbor 18

B. Speech Outside the Harbor: Not so Safe 20

III. The Friendly Regulators: The Tie Goes to the Commission 28

A. The National Right to Life Committee Advisory Opinion 28

B. The *Wisconsin Right to Life* Question 33

TABLE OF CONTENTS – Continued

Page

CONCLUSION 35

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Chamber of Commerce v. Moore, 288 F.3d 187 (5th Cir. 2002) 7

Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174 (10th Cir. 2000) 7

Connecticut v. Proto, 526 A.2d 1297 (Conn. 1987) 7

Davis v. FEC, 128 S. Ct. 2759 (2008) 6

Elections Bd. v. Wisconsin Mfr. & Commerce, 597 N.W.2d 721 (Wisc. 1999) 7

Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991) 6

FEC v. Beaumont, 539 U.S. 146 (2003) 14

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 6

FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) ..... *passim*

Fla. Right to Life v. Lamar, 238 F.3d 1288 (11th Cir. 2001) 7

Grayned v. City of Rockford, 408 U.S. 104 (1972) 15

Houston v. Hill, 482 U.S. 451 (1987) 8

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) 19

TABLE OF AUTHORITIES – Continued

Page

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (1995) 4

John v. Tribune Co., 24 Ill.2d 437 (1962)....16

Maine Right to Life Committee v. FEC, 98 F.3d 1 (1st Cir. 1996)....6

McConnell v. FEC, 540 U.S. 93 (2003)....15

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)....19

Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129 (8th Cir. 1997)....6

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)....11

NAACP v. Button, 371 U.S. 415 (1963)....15

New York Times v. Sullivan, 376 U.S. 254 (1964)....4

Pacific Gas & Electric Co. v. Public Util. Comm'n of California, 475 U.S. 1 (1986) 26

Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000) 7

Randall v. Sorrell, 126 S. Ct. 35 (2005)....7

Rapanos v. U.S., 547 U.S. 715 (2006) 35

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997)....20

Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 787 (1988)....26

Solaia Technology, LLC v. Specialty Pub. Co., 221 Ill.2d 558 (2006) 16

TABLE OF AUTHORITIES – Continued

Page

Thomas v. Collins, 323 U.S. 516 (1945).....14, 22

Thornhill v. Alabama, 310 U.S. 88 (1940).....33

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....26

Wash. State Republican Party v. Wash. State Public Disclosure Comm'n, 4 P.3d 808 (Wash. 2000).....7

STATUTES AND REGULATIONS

2 U.S.C. § 431 3

2 U.S.C. § 431b(b).....4

2 U.S.C. § 431b(c) 4

2 U.S.C. § 434(f).....8

11 C.F.R. § 100.29 8

11 C.F.R. § 114.15(b).....5, 18

11 C.F.R. § 114.15(c) 21

OTHER AUTHORITIES

Explanation and Justification for Electioneering Communications, Final Rule; 72 Fed. Reg. 72899 (F.E.C. Dec. 26, 2007).....5, 17, 18, 19

Notice of Proposed Rulemaking, Electioneering Communications, 72 Fed. Reg. 50261 (F.E.C. August 31, 2007) 25

TABLE OF AUTHORITIES – Continued

Page

In the Matter of National Right to Life Committee, Inc., Advisory Opinion Request 2008-15 (September 23, 2008) 28

In the Matter of National Right to Life Committee, Inc., October 23, 2008 Certification (F.E.C. Oct. 23, 2008) 29

INTEREST OF *AMICI CURIAE*[1]

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they involve the fundamental, and threatened, right of citizens to freely participate and share their point of view in the electoral and political process.

The Goldwater Institute, established in 1988, is a nonprofit, independent, nonpartisan research and educational organization dedicated to the study of

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

public policy. Through its research papers, editorials, policy briefings and forums, the Institute advances public policies founded upon the principles of limited government, economic freedom and individual responsibility. A core purpose of the Goldwater Institute and its Scharf-Norton Center for Constitutional Litigation is the preservation of constitutional liberties, including the right of political speech and association connected to elections.

SUMMARY OF ARGUMENT

1. Since this Court's pronouncement in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), substantial confusion has arisen over the "appeal to vote" test. In *Wisconsin Right to Life*, Chief Justice Roberts explained that an advertisement could not be regulated under the Federal Election Campaign Act as the functional equivalent of express advocacy unless it is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Still, the Court conducted an extensive application of that test, leading some to believe that the Court's lengthy application represented the test itself. Clarification must be given to the appeal to vote test, ensuring that speech-protective rules carry the day.

2. The Federal Election Commission has mocked the First Amendment and this Court's earlier instruction in *Wisconsin Right*

to Life. By focusing on this Court's application of the appeal to vote test, the Commission established its own two-prong, 11-factor test to regulate speech. It cannot be trusted with such open-ended discretion again.

3. What the Federal Election Commission created in theory is even worse in practice. The Commission charged with interpretation of federal election law itself cannot decide how to apply the law. This leaves citizens wholly at the mercy of an excitable Commission and places speech rights in jeopardy.

ARGUMENT

Before this Court is yet another blow to the American experiment of self-governance rooted in a citizenry free to voluntarily speak and associate. A now-regular source of irritation to that liberty, the Federal Election Commission (the "FEC" or "Commission"), is before this Court defending the failed concoction of campaign finance reform efforts in the Republic. Since 1974, the Commission has haphazardly expanded categories of speech it deemed prohibited, regulated, or just not too sure about, leaving citizens at its prosecutorial mercy. During each election cycle, those who might speak must learn to hop through the FEC's elaborate rules. And since 1976, this Court has stricken key provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, and the Bipartisan Campaign Reform

Act ("BCRA"), 2 U.S.C. § 431b(b)(2) and (c)), recognizing the Commission's penchant for defending its own authority instead of speakers' natural rights to speak. Once again, this Court finds itself in familiar territory.

Just last term, some observers of election law described the Court's opinion in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), as a return to clarity and longstanding First Amendment principles that favored speech. In *Wisconsin Right to Life*, the Court announced its fidelity to the speech-protective rules described in *Buckley v. Valeo*, 424 U.S. 1 (1976), and set out several foundational approaches for ensuring that political speech remain protected. As a guiding tenet, any distinction between regulable and non-regulable speech would need to "reflec[t] our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Id.* at 14 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The standards for determining regulable speech would need to be objective, *Wisconsin Right to Life*, 127 S. Ct. at 2666, focus on the communication itself and not the intent and effect of the speaker, *id.*, and should eschew the "open-ended rough-and-tumble of factors." *Id.* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995)). These principles favor more speech, not less, limit the Commission's authority, and give the benefit of the doubt to speakers, not speech

regulators. Still, simple truths are sometimes difficult to digest.

Having received the clear instruction of this Court, the Commission commenced rulemaking to instruct citizens about what the FEC termed "permissible" speech. Explanation and Justification for Electioneering Communications ("Explanation and Justification"); Final Rule; 72 Fed. Reg. 72899 (F.E.C. Dec. 26, 2007). In doing so, the Commission developed its own rules of interpretation that are contradictory to the Chief Justice's repeated admonitions to favor speech over censorship and offer speakers clear guidance, not prolix regulation, about the line between regulated and non-regulated speech. The FEC set out to instruct citizens within what boundaries they might safely speak by creating a safe harbor in the regulations. *See* 11 C.F.R. § 114.15(b). Still, deciding that some other speech might still be tolerable, the Commission reasoned that it would "consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate in order to determine whether, *on balance*, the communication is susceptible of no other reasonable interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate." Explanation and Justification at 72905 (emphasis added) (hereinafter the "Heads You Speak, Tails You Don't Approach"). The Commission's approach flies in the face of this Court's "no reasonable interpretation

other than as an appeal to vote for or against a specific candidate" test. *Wisconsin Right to Life*, 127 S. Ct. at 2667.

This is not the first time the Congress or the Commission has played the proverbial role of Dr. Frankenstein with the body of speech rights enjoyed by citizens. Since *Buckley* in 1976, the FEC has been on the losing end of several significant challenges. In *Buckley*, the Court struck down, among other sections, the expenditure limits applicable to candidates and their committees and the $1,000 limit on independent expenditures. 424 U.S. at 51. Later, the Commission lost in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), with the Court deciding that banning corporate expenditures by some nonprofit corporations would serve as a disincentive to speak and would infringe on First Amendment activities. More recently, the Commission gave the benefit of the doubt to censorship over speech and lost in *Wisconsin Right to Life*. Later, this Court struck provisions of the "Millionaires' Amendment" of the BCRA as well. *Davis v. FEC*, 128 S. Ct. 2759 (2008). The FEC has been no stranger to continued losses over unconstitutional infringements at the federal appellate level, either. *See, e.g.*, *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991), *Maine Right to Life Committee v. FEC*, 98 F.3d 1 (1st Cir. 1996), *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997). Of course, nationwide, speech regulators have lost time and time again when states sought to regulate beyond the scope of the First Amendment. *See,*

e.g., Randall v. Sorrell, 126 S. Ct. 35 (2005); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Fla. Right to Life v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *see also Connecticut v. Proto*, 526 A.2d 1297 (Conn. 1987); *Wash. State Republican Party v. Wash. State Public Disclosure Comm'n*, 4 P.3d 808 (Wash. 2000); *Elections Bd. v. Wisconsin Mfr. & Commerce*, 597 N.W.2d 721 (Wisc. 1999). No matter how inventive the speech regulators become, the Constitution rebuffs their efforts.

The *Buckley* Court recognized a truth consistent with the First Amendment. While government possesses authority over the regulation of elections, such exercise must be carried out in a manner protective of speech. U.S. Const. Art. I, § 4; U.S. Const. amend. I. The Court established a simple point of demarcation between regulable election-related activity and constitutionally protected political speech. Consistent with *Buckley*, government may regulate action that is "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. Why? Unambiguously campaign connected communications share a connection to government's interest in preventing corruption.

Since *Buckley*, this Court has recognized but two narrow categories of speech that are unambiguously related to the campaign of a particular candidate. First, communications that in "express terms

advocate the election or defeat or a clearly identified candidate" for public office may be regulated consistent with this approach. *Id.* at 44. Second, this Court has permitted a limited class of speech, the "functional equivalent of express advocacy," to be regulated as well. *Wisconsin Right to Life*, 127 S. Ct. at 2667. Both classes are highly circumscribed to be certain that other speech not be swept in its regulatory ambit or that regulators be given too broad of authority to attack unwelcome speech. *Houston v. Hill*, 482 U.S. 451 (1987).

To be regulated as the "functional equivalent of express advocacy," two requirements must be met. Under the FECA, a communication may constitute an electioneering communication which is a "broadcast, cable, or satellite communication" and refers to a "clearly identified candidate" within sixty days of a general election or thirty days of a primary election. *See* 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29. Next, the communication must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisconsin Right to Life*, 127 S. Ct. at 2667. This Court took great pain in *Wisconsin Right to Life* to explain the constitutional significance of this test by referencing the fact that it must ignore contextual references, "eschew 'the open-ended rough-and-tumble of factors,'" which invite burdensome discovery and lengthy litigation, and give the "benefit of the doubt to speech, not censorship." *Id.* at 2666.

Following *Wisconsin Right to Life*, the Commission drafted regulations that seized upon the application of Chief Justice Roberts' test instead of its bright-line principles. While the Court instructed the FEC that only speech which had no other reasonable interpretation as an appeal to vote for or against a specific candidate could be regulated as the functional equivalent of express advocacy, the Commission elected to design a test that would look to whether speech "on balance" was an appeal to vote for or against a specific candidate. Shifting the analytical focus from "no other reasonable interpretation" to "on balance" carefully shifted authority back to the Commission, ensuring more speech regulation. On balance, the FEC may conduct extensive weighing of contextual factors. On balance, the Commission may make linguistic comparisons. On balance, the FEC may pay little heed to the strict dictates of the First Amendment.

Like Homer's Sisyphus – a man whose existence consisted of bitter pains due to his toil as he pushed a boulder up a hill in perpetuity – the Commission continues to resist the rather straightforward instruction of the First Amendment, and this Court's patience, by advancing unworkable and unconstitutional regulations. Enough is enough. The real victims of this practice are the citizens of this Republic whose speech is stifled and shutdown as a result of the Commission's failure to heed basic constitutional requirements. When the Commission charged with enforcement of federal election law establishes vague

and labyrinthine tests, cloaking itself in power, First Amendment rights continue to stand in peril, as citizens remain hesitant to speak. It now stands as this Court's obligation to render justice to the Commission's repudiation of the First Amendment and this Court's earlier instruction. Afford citizens bright-line standards that are easily applied and that are not dependent on a hope that the FEC might just get it right this time. As is demonstrated below, it will not.

I. The Appeal to Vote Standard Must be Narrowed or Eliminated

Inventing speech standards is difficult business. Because of the confusion created by the Commission in interpreting the appeal to vote test, this Court should revisit its earlier instruction. In *Wisconsin Right to Life*, Chief Justice Roberts explained that the appeal to vote test was both simple and speech-protective. *Id.* at 2666-2669. He reasoned that under the appeal to vote test:

1. There can be no free-ranging intent-and-effect inquiry.
2. There generally should be no discovery or inquiry into contextual factors.
3. Discussion of issues cannot be banned merely because the issues might be relevant to an election.
4. In a debatable case, the tie is resolved in favor of protecting speech.

Id. at 2669 n.7.

After noting these constitutional considerations, speech may be deemed the functional equivalent of express advocacy, and thus subject to regulation, only if "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. As with other judicial considerations, the *Wisconsin Right to Life* Court then considered a variety of factors in determining whether the speech at issue there was the functional equivalent of express advocacy. The Court included inquiries such as mentioning an election or exhorting the public to adopt a policy position as an application of the appeal to vote test. *Id.* Today, there rests great confusion over the test described by Chief Justice Roberts. While many considered this a test protective of speech, the Commission viewed it as more of a two-prong, 11-factor, Heads You Speak, Tails You Don't test.

A. *Buckley*, the First Amendment, and the Import of Speech Protective Principles

The most essential purpose of the First Amendment is to protect individuals' rights to freely discuss, debate, and criticize their elected representatives. During elections, when individuals are most interested in political speech, the First Amendment has its "fullest and most urgent application." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Where the First Amendment was once thought to vigorously guard the sanctity of political speech, erosion of that protection has steadily occurred since this Court's

pronouncement of exceptions since *Buckley*, 424 U.S. 1.

In *Buckley*, rather than treat contributions to political candidates as a directly protected form of speech and association, the Court deemed them tainted and receptive of less protection because the "expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21. The Court even found that direct speech that was coordinated received less protection out of a concern rooted in corruption and a perceived control of candidates. Of course, *Buckley* sought to preserve independent speech because of its higher value and lower threat of corruption. *Id.* at 45. Still, it permitted limited regulation of a class of communications known as independent expenditures, which constituted express advocacy of the election or defeat of a clearly identified candidate. The Court, and lower courts throughout the nation, held fast to the *Buckley* framework, as offering the only workable rule that would protect free speech while permitting limited regulation. That rested on respect of a simple rule: "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. While *Buckley* involved a strained reading of the First Amendment and permitted government intrusion into the most sacred area of protected speech, it did so by drawing narrow and

bright-line boundaries. Citizens could, at a minimum, understand the boundaries and be able to produce a great deal of speech without running afoul of the law.

The analytical framework established in *Buckley* proved effective. It offered a narrow class of easily-identifiable, regulable speech, while preserving the full freedom of the First Amendment for other categories of speech. The test was objective in nature and examined the actual words of the communication as its point of focus. *Id.* at 44 n.52 ("communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'"). Speakers understood the test, which meant they would not need to hedge and trim, but could speak freely and robustly without fearing a test focused on the intent of the speaker or the effect of the message on its audience. As explained by the *Buckley* Court:

> [W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss the mark is a question both of *intent* and of *effect*. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever

> inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

Of course, the express advocacy construction protects issue advocacy – that is, the free discussion of citizens – and the distinction was necessary because candidates, "especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Id.* at 42. In short, issue advocacy that includes a discussion about candidates and issues of the day is a core function of citizens' participation in representative democracy. And it should continue to receive the highest constitutional protection.

The limited *Buckley* rationale for government regulation of political speech expanded over time to include preventing the circumvention of other campaign finance restrictions. Indeed, this Court's reliance on corruption as a basis for regulation has been pushed beyond its logical extent to define corruption "not only as quid pro quo agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence." *FEC v. Beaumont*, 539 U.S. 146, 156 (2003) (citation omitted). Post-*Buckley*, appearances matter, even more so than protected liberties.

B. The Confusion over *McConnell* and the *Wisconsin Right to Life* Clarification

By the advent of *McConnell v. FEC*, this Court expanded the concept of regulable political speech to include communications that were the "functional equivalent" of express advocacy, and thus subject to regulation. 540 U.S. 93, 206 (2003). What was once deemed high-value, independent speech with little or no concerns about corruption or its appearance now received less protection by the Court. Still, the Court left open the possibility that future, as-applied challenges might narrow, and better define, the class of communications known as the functional equivalent of express advocacy.

There is considerable tension in the accepted standards developed for distinguishing regulable from non-regulable political speech in this Court's jurisprudence. The cause of tension is easy to identify. Favor speech, through narrow rules and objective guidelines, and ensuing regulations will be underinclusive. Favor regulation, through broad rules and flexible standards, and the ensuing regulations will be overinclusive. Fortunately, there is a solution found in this Court's jurisprudence. Chief Justice Roberts expressed a truth central to the First Amendment – err on the side of speech. Government officials should never be trusted with enforcement of open-ended, ill-defined, speech codes. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963). Otherwise, along comes

two-prong, 11-factor, Heads You Speak, Tails You Don't tests.

Regulatory lines, if to be drawn at all, must be drawn to err on the side of the speaker. This is the truth of *Wisconsin Right to Life*, *Buckley*, and the general body of this Court's First Amendment case law. Government officials cannot be expected to place individual liberty above the exercise of government authority. *Buckley's* express advocacy test and *Wisconsin Right to Life's* appeal to vote test, narrowly construed, realize this principle. Other courts approaching difficult-to-decide speech issues have recognized the need for speech-protective, bright-line approaches as well. In Illinois, for example, courts apply the innocent construction test in analyzing libel claims. *John v. Tribune Co.*, 24 Ill.2d 437, 442 (1962). In those situations, an "article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law." *Id.* Stated differently, a "statement 'reasonably' capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions." *Solaia Technology, LLC v. Specialty Pub. Co.*, 221 Ill.2d 558, 580 (2006). Like the appeal to vote test, once one reasonable, nondefamatory construction of the speech is found, the analysis ends and speech remains protected.

The simplest reading of Chief Justice Roberts' appeal to vote test is that once one reasonable interpretation of an advertisement is found other than an appeal to vote for or against a specific candidate, speech is not the functional equivalent of express advocacy. The unspoken concern about this test is that it limits government authority and does not perfectly "capture" the entire class of regulable speech.

II. The Federal Election Commission's Heads You Speak Tails You Don't Approach

Deciding to go it alone, the FEC fashioned its own test for determining whether speech was subject to regulation as electioneering communications post-*Wisconsin Right to Life*. It involves a "multi-step analysis for determining whether [electioneering communications] that do not qualify for the safe harbor nevertheless qualify for the general exemption." *Explanation and Justification*, 72 Fed. Reg. at 72902. In other words, a communication must fit into a "safe harbor" to receive protection, otherwise, speakers are subject to the prolix, and ill-defined, set of Commission determinations in deciding whether they may communicate. Stated more concretely, speech is deemed impermissible outside the harbor unless the Commission decides a speaker might fit within an exemption. Life vests are heartily encouraged.

A. The Safe Harbor

Most citizens hoping to comply with the FEC regulations will attempt to hedge and trim their speech into a protected safe harbor. Speech is safe, and permissible, if it does not mention "any election, candidacy, political party, opposing candidate, or voting by the general public," and does not take a position on the candidate's "character, qualifications, or fitness for office." *Id.* at 72903; *see also* 11 C.F.R. § 114.15(b)(1)-(3). It is not just that speech may not discuss certain issues; it must also reference specific government-approved topics if it is to be deemed safe and categorically protected. Such speech is required to focus "on a legislative, executive, or judicial matter or issue" or propose a "commercial transaction." *Id.*

To be helpful, the Commission penned several examples of speech likely falling outside of the safe harbors during its rulemaking. Some articles of potentially repressed speech include: "pictures of a ballot or voting booth," "Bob Jones is running for the Senate," "Bob Smith supports our troops; Bill Jones cut veteran's benefits by 20%," and even implied references to incumbents, like, "It's time to take out the trash, select real change with Bob Smith," or "This November, we can do better." *Explanation and Justification*, 72 Fed. Reg. at 72903. Steering clear, far clear, of these subjects ensures government permission, while selecting the content of your own speech ensures increased scrutiny and the likelihood of an enforcement action.

Not only must speech focus on a "legislative, executive, or judicial matter or issue," it must also "urge the candidates themselves to take a position, or urge the public to take a position and contact the candidates." *Id.* Speakers wishing only to educate the public or increase awareness about an issue and whose speech is captured by the electioneering communications regulations are compelled to craft their message according to the "best practices" of the Commission. A safe harbor just ignores the truth that speakers, not government bureaucrats, are best equipped, and constitutionally protected, to make those sorts of determinations. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995)). After all, "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Id.* (internal quotations and citations omitted).

The problem with employing a safe harbor is that it signals citizens that some speech is clearly authorized, leaving speakers to take their chances with the rest. Every solemn promise of the Commission notwithstanding, most citizens will forgo the opportunity to meet the Enforcement Division of the FEC. Being uncertain just how the Commission might balance and weigh speech outside the harbor, playing safe, or not speaking at all, ensures protection against an excitable Commission. Combining the vagueness and overbreadth of the FEC's regulations at issue here

raises special First Amendment concerns due to their chilling effect. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997).

B. Speech Outside the Harbor: Not so Safe

Like international waters, few speakers will dare leave the harbor of safety created by the Commission. This is understandable. Citizens have no way to balance the multitude of factors like the ill-defined "indicia of express advocacy" or how the Commission might interpret what their speech really means. Indeed, even the FEC itself cannot accomplish this mighty task.[2] To avoid investigation and enforcement actions, citizens will turn away from expressing themselves in a manner most conducive to their mission and seek the cold comfort of government-sanctioned speech. For the few speakers who leave the harbor, citizens will find that the balancing, weighing, and intricate considerations conducted by the FEC bear little resemblance to the test developed in *Wisconsin Right to Life* – one carefully constructed with constitutional safeties in mind.

When speech finds itself outside the harbor, the Commission asks "whether the communication includes any indicia of express advocacy and whether

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[2] On October 23, 2008, the Commission could not determine whether an advertisement presented before it constituted a prohibited electioneering communication. *See generally* Section III, *infra*.

the communication has an interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate in order to determine whether, *on balance*, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified [f]ederal candidate." 11 C.F.R. § 114.15(c) (emphasis added). Asking whether speech, on balance, might be regulable does not comport with this Court's appeal to vote test.

The Commission's approach to determining whether speech constitutes an electioneering communication is flawed in at least three ways. First, the FEC asks the wrong question to decide whether speech should be regulated. The Commission states that it will determine whether speech has an interpretation other than as an appeal to vote for or against a candidate ("A"), by asking whether there is indicia of express advocacy ("B") and whether the speech has an interpretation other than as an appeal to vote for or against a candidate ("A"). In short, if A + B = A, then regulate. This strange sort of constitutional logic, to the extent it makes sense, collapses internally and finds no support in this Court's First Amendment jurisprudence.

Second, the Commission did not rely on the First Amendment principles discussed in *Wisconsin Right to Life* to create its test. Instead, it seized upon the Chief Justice's application of the appeal to vote test as a measure to differentiate regulated from non-regulated speech.

In reading *Wisconsin Right to Life*, one may come away with several operational tests for determining the validity of restrictions affecting speech. A first approach examines the broad principles described by the Chief Justice and which guide the outcome reached in that challenge. As the Chief Justice understood, the First Amendment enjoys a preferred place because it supports our "indispensable democratic freedoms." *Collins*, 323 U.S. at 530. That preference "gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice." *Id.*

These guiding principles led the Chief Justice to formulate the appeal to vote test and explained a "court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Wisconsin Right to Life*, 127 S. Ct. at 2667. In the very same area of the opinion, the Chief Justice explained the importance that this test is objective, focuses on the communication itself and not intent-and-effect, involves "minimal if any discovery," and must eschew the "open-ended rough-and-tumble of factors." *Id.* at 2666. This approach gives the benefit of any doubt to "protecting rather than stifling speech." *Id.*

Another reading of *Wisconsin Right to Life* is found by placing emphasis on the particular analysis used by the Court and adopting this as the formal

rule. After discussing the First Amendment principles in effect, Chief Justice Roberts applied the test to demonstrate why the speech in question was not regulable:

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 2667.

The temptation to rely on the *application* of the appeal to vote test is understandable. It offers regulatory-minded officials a lengthy set of criteria to apply, while permitting a great deal of speech to be captured in the regulatory ambit. Yet, the list was proffered as an example of why regulation was not warranted in a particular example before this Court. To be consistent with overarching First Amendment truths, this two-prong, 11-factor list cannot be what the Court had in mind as a guiding principle when it explained that we could no longer rely on an "open-ended rough-and-tumble" of factors to decide free speech rights. Doing so empowers bureaucrats, not citizens, in making decisions about speech.

Third, in fashioning a two-prong, 11-factor test out of the *Wisconsin Right to Life* holding, the FEC created a balancing test that favors regulation and prohibition as the operating norm. No speakers know in advance, for example, whether speech might trigger regulation because it discusses the character, qualifications, or fitness of a candidate. Few citizens possess the prescience to predict whether inferences, implications, or even photographs might trigger the Commission's regulations. After all, if one seriously believes that the Chief Justice's *application* of the appeal to vote test is the test itself, all sorts of speech would be captured by that approach. In issuing its Notice of Proposed Rulemaking, the Commission took these considerations seriously. It included what can only be considered risible examples as possible triggers for prohibited speech:

- Dressing a candidate up as "Rocky" the prizefighter.
- "Support gun rights this November 5."
- "Vote for liberty when picking your Senator!"
- "Remember the House Bank scandal? This November, let's do better."
- Candidates appearing in mock settings of government offices, which amount to an implied reference to candidacy.
- "The War party in Washington," elephants, or donkeys.

- "It's time to take out the trash, select real change with Bob Barry."
- Allegations about the candidate's patriotism, or lack thereof.
- The candidate's "history or absence of public, military, or community service."
- The "medical, psychological or mental fitness of the candidate."
- Even peer's "recollection of candidate's reputation (e.g. "hardworking," "scandalous," "faithful public servant," "philanderer," tenacious").

Notice of Proposed Rulemaking, Electioneering Communications, 72 Fed. Reg. 50261 (F.E.C. August 31, 2007).

All in all, the Commission included more than forty some examples of possible speech that might transform communication into a prohibited electioneering communication. With a two-prong, 11-factor test, citizens would have to take care to make advertisements that convey their message in the blandest manner. Including references to the "liberals in Washington," accidently referencing a challenger by implication, or being so bold as to discuss the Rotary activities of a candidate may just summon the attention of an excitable Commission. No one knows the significance of each element. All that is known is that at some point, free speech becomes banned speech. The safe course is to not speak at all or to speak as the Commission has instructed you.

Where is the tipping point between banned and free speech under the Commission's approach? Will mentioning the Rotary activities of a candidate while discussing a legislative issue trigger fines? Might dressing up the hometown hero in Rocky the prize-fighter's garb be enough, by itself, to turn protected speech into banned speech? Could the discussion of a public scandal connected with the candidate change the otherwise permissible communication into the impermissible? Outside of the harbor, speakers must guess at how six commissioners will scry the meaning of their communication. The First Amendment has never been so dependent upon a crystal ball.

Citizens possess a right not only to speak, but also to decide the most effective manner in which to speak. *See, e.g., Pacific Gas & Electric Co. v. Public Util. Comm'n of California,* 475 U.S. 1, 11 (1986) (plurality opinion); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988); *McIntyre*, 514 U.S. at 341-342. By failing to comport with the First Amendment and this Court's earlier instruction in *Wisconsin Right to Life*, citizens are forced to hedge and trim their speech into a circumscribed harbor established by the state. But citizens need not trim and adjust their speech to make it palpable to government bureaucrats. This approach removes respect for the inherent dignity and authority of the individual to decide what form of speech to produce and what content is best to include the communication. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770

(1976) ("There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them"). Above all else, it is plain to see that individuals, not six commissioners, should be deciding these matters if freedom of speech should retain any import in this Republic.

In contrast with the Chief Justice's appeal to vote test, the Commission's Heads You Speak, Tails You Don't Approach is seriously flawed. Instead of giving priority to speech through a plain application of the "no reasonable interpretation" language found in *Wisconsin Right to Life*, the FEC balances considerations (with elements of import only it knows) to decide the line between regulation and freedom. Under the appeal to vote test, there is no balancing of reasonable interpretations of speech. Under the Commission's Heads You Speak, Tails You Don't Approach, it expressly balances a variety of elements, departing from the speech-protective principles designed by Chief Justice Roberts.

If the FEC's approach seems bad in theory, it is even worse in practice. Not surprisingly, the Commission vested with authority over federal election law has difficulties applying its two-prong, 11-factor test.

III. The Friendly Regulators: The Tie Goes to the Commission

The FEC has enjoyed several opportunities to clarify and improve its approach to speech-friendly policies regarding the regulation of electioneering communications. But in each instance, the Commission has shown a dedication to the inverse of Chief Justice Roberts' now infamous rule: The tie goes to the speaker. Under the Commission's vision, when matters come before it, the operative rule is that the tie goes to the Commission, favoring government authority over liberty and the exercise of arbitrary power over First Amendment rights. And though this Commission has been instructed for more than thirty years to be sensitive to freedom and wary of its own authority, that lesson has not taken root. This Commission can no longer be trusted with hopeful, open-ended tests devised by this Court to protect speech.

A. National Right to Life Committee Advisory Opinion

In the midst of the 2008 election season, the National Right to Life Committee, Inc. ("NRLC") submitted an advisory opinion request AOR 2008-15 with the Commission on September 26, 2008. The Commission's October 28, 2008 Open Meeting to discuss this matter is included as an appendix.[3] The

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[3] The transcript of the October 23, 2008 Open Meeting is included along with Advisory Opinion Request 2008-20 that discusses the matter.

advisory opinion request included the script of two advertisements NRLC hoped to air. Both discussed Barack Obama's commitment to pro-life principles and characterized Obama as being wrong on his characterizations. The first advertisement ended by asking, "Will Obama now apologize for calling us liars when we are the ones telling the truth?" The second included the end line, "Barack Obama: a candidate whose words you can't believe in." *See* App. 13.

After just under a month spent in careful consideration about whether the ads constituted prohibited electioneering communications, the FEC could not reach a conclusion about its own application of the law. Though two draft advisory opinions had been issued, the Commission failed by two separate votes of three to three on October 23, 2008 to approve either approach. *See In the Matter of National Right to Life Committee, Inc.*, October 23, 2008 Certification (F.E.C. Oct. 23, 2008) (available at http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2808&START=1004842.pdf, http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2808&START=1005408.pdf).

And while it appeared there were five commissioners ready to approve the first of the two ads as "permissible" speech, the Commission was unable to reach a conclusion in that manner.

A brief glimpse into the operating principles of the FEC commissioners can be gleaned from the available transcript for the October 23, 2008 Open Meeting in which this advisory opinion request was

discussed. The meeting begins with a frank acknowledgement of just how very difficult the issue is to decide. One commissioner began to run through the two-prong, 11-factor Heads You Speak, Tails You Don't Approach and admitted that the ad focuses on a legislative issue related to abortion. The commissioner continued by noting that the ad takes a position on the issue, but did not "exhort the public to adopt that position or urge the public to contact public officials with respect to the matter." She concluded by expressing her doubt that the ad might not be a genuine issue ad since not all four factors were present. *See* App. 16. The second ad included a tag line of "Barack Obama, a candidate whose word you can't believe in." After explaining in some detail the nature of recent litigation faced by the Commission, the commissioner asked, "What would any normal person do with that information? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in." App. 19. Crucial to this commissioner's analytical approach was an examination of audience reaction and the effect of the speech.

Going further, the same commissioner explained that the ad attacked the character of Obama because it stated that a person's word cannot be believed in. App. 19-20. After a lengthy discussion of the importance of character in raising children, the commissioner reasoned that mentioning a person's dishonesty is a "very direct attack" on character. App. 20. Significantly, the commissioner then exclaims that the citizens requesting the advisory opinion "wouldn't

need a 20-day AO [advisory opinion] if it was just an issue ad, and he wasn't seeking to affect the election." App. 21.

At the end of this analysis, the Commission's Chairman explained how analyzing the speech in question devolves "into sort of an ink blot test kind of thing where you either see the vase or the two people talking to each other; and once you see one or the other, you're never going to see the other." App. 22. The Chairman also read the test in *Wisconsin Right to Life* correctly – "[m]erely because you mention that someone is a candidate doesn't convert the ad into something" else and just because citizens requested the answer before the election does not make the speech the functional equivalent of express advocacy. As reasoned by the Chairman, the *Wisconsin Right to Life* test is a bright-line test. If "you can read the ad as something other than an appeal to vote, that sort of begins and ends the analysis." App. 24.

A third commissioner later suggested that while *Wisconsin Right to Life* protects against protracted litigation, "there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly." App. 30. Apparently, under this third approach, speakers enjoy an ample remedy found in litigating their rights if they can do so in a speedy, non-protracted fashion.

Examining these widely different approaches embraced by different commissioners at the FEC should give this Court some pause about the clarity of

its instruction in *Wisconsin Right to Life*. One commissioner examined contextual factors of the ad – timing – in deciding whether the speech was prohibited or not. For her, filing an expedited advisory opinion request during the heat of the electoral season meant that the speaker had intended to affect the election. Of course, what *Buckley* announced and what this Court reiterated in *Wisconsin Right to Life* remains true. Speech cannot be regulated or prohibited based on "the speaker's intent to affect an election." 127 S. Ct. at 2665. All such attempts to scry into the intent of speakers wreaks constitutional havoc by affording "no security for free discussion." 424 U.S. at 43 (internal quotations omitted). Despite this clear instruction, scrying remains an important approach for some at the Commission to decide whether speech is prohibited.

Then again, the same commissioner also supported examining how a "normal person" would react to the speech as a cornerstone of analysis. Yet, *Buckley* and *Wisconsin Right to Life* remain clear that such tests put speakers "wholly at the mercy of the varied understanding of his hearers." *Id.* "It would also typically lead to a burdensome, expert-driven inquiry, with an indeterminate result," causing to "chill a substantial amount of political speech." *Wisconsin Right to Life*, 127 S. Ct. at 2666. Under at least one commissioner's approach, speakers must decide in effect how a "normal person" would interpret the communication. Of course, that really means scrying

to determine how a "normal commissioner" would give meaning to the speech.

The Commission, nearly another month later, was able to render a decision approving one draft advisory opinion that came too late. Because of Commission delay, between October 28 and November 24, 2008, NRLC Political Action Committee, a separate legal entity, was forced to spend some $69,000.00 to broadcast the first advertisement. Currently before the Commission is Advisory Opinion Request 2008-20, asking that NRLC be able to refund NRLCPAC for running its advertisement while it waited for the Commission to reach a decision – that is, make sense of its own regulations.

B. The *Wisconsin Right to Life* Question

Briefly examining the litigation position assumed by the FEC during *Wisconsin Right to Life* helps illustrate just how far the FEC will go to show why speech is prohibited. No intent is too small and no inferential clue will be left unturned in unmasking the true motives of speakers. It is this sort of Inspector Clouseau approach to speech regulation that must be abolished.

It should be remembered that freedom of "discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Just

because issues are important in an election does not mean they may be banned. Unfortunately, this is precisely the approach embraced both now and in the past by some elements of the Commission.

During the course of briefing in *Wisconsin Right to Life*, the Commission suggested that it could infer the intent of speakers through the use of an expert political consultant. Douglas L. Bailey, veteran political consultant, provided expert testimony on how to infer the true intent and "implicit message" of advertisements. The expert reasoned that the ads were subtle and focused on issues instead of "exhorting the electorate to vote against Senator Feingold." *Wisconsin Right to Life*, 127 S. Ct. at 2668. Where one might not readily discern the intent of a speaker, the Commission will rely on experts to scry ever so effectively.

The FEC also sought to demonstrate that the real purpose of a communication could be found from its timing. Since electioneering communication ads always run just before a primary or general election, the Commission deemed this evidence that the speech was designed to influence them. Fortunately, this Court understood that citizens certainly possess the freedom to run an issue ad when public interest is high, such as in the time around an election, instead of when it is low. Indeed, it would constitute a perverse understanding of the First Amendment that citizens must wait until public interest has waned so they may have permission to speak. Unfortunately, reliance on timing and contextual factors to interpret

speech as being prohibited has been a steadfast approach of the FEC.

These sorts of freewheeling determinations are the stuff regular Inspector Clouseau investigations and formal opinions of the Commission are made of. This practice puts speakers at risk and permits the Commission to exercise the "discretion of an enlightened despot," relying on expert intuition, timing, context, or other activities of the speaker to interpret what speech before it really means (both pre- and post-*Wisconsin Right to Life*). *Rapanos v. U.S.*, 547 U.S. 715, 719 (2006) (plurality opinion). And it is this sort of freewheeling discretion and disregard for free speech by the Commission that this Court must end.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be reversed and clarification given to the speech-protective appeal to vote test described in *Wisconsin Right to Life*.

Respectfully submitted,

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December 1, 2008

AOR 2008-20

Re: Advisory Opinion Request

Thomasenia P. Duncan
Office of General Counsel
Federal Election Commission
999 E Street NW (Filed Dec. 1, 2008)
Washington, DC 20463
By email & 1st Class Mail

Dear Ms. Duncan,

On behalf of the National Right to Life Committee, Inc. ("NRLC"), we respectfully request an Advisory Opinion ("AO") from the Federal Election Commission ("FEC"), pursuant to 2 U.S.C. 437f of the Federal Election Campaign Act ("FECA"). NRLC seeks guidance as to whether it may reimburse its separate segregated fund, National Right to Life Political Action Committee ("NRLPAC"), for the costs of broadcasting a radio advertisement that was declared by the FEC, *see* AO 2008-15, not to be subject to the corporate prohibition at 2 U.S.C. § 441b ("Prohibition").

Facts

On September 26, 2008, NRLC submitted AOR 2008-15, in which NRLC "request[ed] an immediate response" (or within the 20 days provided in 11 C.F.R. § 112.4(b) for candidates) as to whether NRLC would be prohibited from broadcasting two radio advertisements (*Apology #1* and *Apology #2*). The reason for

the haste, of course, was the fact that public interest in this issue was at a peak prior to the November 4 election, so NRLC "want[ed] to begin to run its ads immediately." AOR 2008-15 at 4. NRLC added the following note regarding urgency:

> NRLC recognizes that 11 C.F.R. § 112.4(b) only provides for a shorter response period when the requester is a "candidate" and NRLC is not a candidate. But it is inexcusable that this special benefit afforded to politicians should not also be afforded to private citizens and citizen groups.

AOR 2008-15 at 4.

The Supreme Court has placed some reliance on the availability of advisory opinions to mitigate burdens on free speech and association and to mitigate vagueness concerns. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003). And in *Citizens United v. FEC*, a case now on appeal in the United States Supreme Court (No. 08-105), the FEC argued against a preliminary injunction to protect ads that also met the statutory "electioneering communication" definition on the basis that advisory opinions were available and could be obtained on an expedited basis: "When necessary, the Commission expedites its response to an urgent request for an advisory opinion, providing an answer in well under sixty days." Defendant Federal Election Commission's Memorandum in Opposition to Plaintiff's Second Motion for Preliminary Injunction at 10 n.8, *Citizens United v. FEC*,

No. 1:07-cv-2240-RCL (D.D.C. Jan. 8, 2008) (Doc. 33 on PACER).

The FEC set the AOR for its October 23, 2008 open meeting.

In preparation for the October 23 meeting, the General Counsel submitted a draft AO stating that *Apology #1* was not subject to the Prohibition, either as an independent expenditure or an impermissible electioneering communication. *See* Agenda Doc. 08-32. The General Counsel's draft AO identified *Apology #2* as containing express advocacy. Chairman McGahn submitted a draft AO stating that neither ad was subject to the Prohibition. *See* Agenda Doc. 08-32-A.

At the October 23 meeting, comments by the commissioners indicated that three commissioners would have found that NRLC could permissibly broadcast both ads, Transcript ("TS")[1] at 19-20, 22, two commissioners would have followed the General Counsel's Report by finding *Apology #1* permissible and *Apology #2* impermissible, TS at 6, 28, and one commissioner would have found both ads impermissible. TS at 26-27. *See also* TS at 30-31 (votes).

Although there were apparently five commissioners (and at least the requisite four commissioners necessary for a decision) who indicated that they would have found *Apology #1* permissible, the FEC

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[1] A transcript of the open meeting is appended.

did not immediately issue an AO permitting NRLC to pay for that ad. Because an AO was not immediately issued permitting NRLC to broadcast *Apology #1*, NRLC's registered political committee NRLPAC began broadcasting it instead, starting on October 28.[2]

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[2] The version of *Apology #1* broadcast by NRLPAC slightly differs from the script included in AOR 2008-15. Instead of including the actual clip of Barack Obama's statement, NRLPAC simply read the quote, and NRLPAC removed the reference to a specific journalist in the first paragraph. These changes do not alter the substance of *Apology #1* in any legally significant way for purposes of this AOR. The complete text of *Apology #1* as broadcast by NRLPAC is as follows:

> **Male:** The following is paid for by National Right to Life PAC at nrlpac.org. Not authorized by any candidate or candidate's committee, NRLPAC is responsible for the content of this advertising.
>
> **Female 1:** In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, *and* that he later misrepresented the bill's content.
>
> **Male:** When Obama was asked about National Right to Life's charges in a televised interview, he replied: (quote) " . . . I hate to say that people are lying, but here's a situation where folks are lying."
>
> **Female 1:** We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:
>
> **Female 2:** (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's

(Continued on following page)

On November 24, the FEC approved AO 2008-15, which found *Apology #1* permissible for NRLC to broadcast and reached no conclusion on *Apology #2*. Between October 28, when NRLPAC began broadcasting *Apology #1*, and November 24, when AO 2008-15 was finally issued, NRLPAC spent $69,271.56 broadcasting *Apology # 1*.

Discussion

The FEC's AO 2008-15 means that *Apology #1* was in fact permissible when NRLC requested the opinion on September 26 (when the AO was requested), on October 22 (when the General Counsel submitted her draft AO), and on October 23 (when sufficient commissioners to issue an AO indicated that they believed the ad to be permissible). But NRLC could not rely on the General Counsel's initial draft (which was not approved in any event) or on the positions indicated at the October 23 meeting (especially since there were indications of attempted negotiations as to NRLC's First Amendment rights),

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claims that Obama is misrepresenting the contents of [Senate Bill] 1082."

Female 1: Was Obama afraid that the public would learn about his extreme position – that he opposed merely defining *every* baby born alive after an abortion as deserving of protection?

Will Obama now apologize for calling us liars when we were the ones *telling the truth*?

TS 31-32, because only an official AO provides legal protection. *See* 2 U.S.C. § 437f(c).

So an issue-advocacy citizen group and its members were deprived of protection by the FEC for their right to engage in First Amendment-protected, core-political, amplified speech, *see Buckley v. Valeo*, 424 U.S. 1, 22 (1976), at the very time when the public's interest in NRLC's issue was at its peak. NRLC could not safely speak unless it was willing to venture forth without protection in the face of two regulations, 11 C.F.R. §§ 100.22(b) and 114.15, that are so vague that the FEC Commissioners, themselves, could not readily or unanimously agree as to the regulations' applicability.

Moreover, the Commission seemed unable, or unwilling, to apply the constitutional mandate that "in a debatable case, the tie is resolved in favor of protecting speech." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2669 n.7 (2007) ("*WRTL II*"). This mandate ought to be applied by the Commission so that where the Commissioners split evenly on whether a communication is prohibited, the communication is recognized as permissible. Similarly, because § 100.22(b) turns on whether "reasonable minds could . . . differ" and § 114.15 turns on whether a "communication is susceptible of no reasonable interpretation other than as an appeal to vote," and because Commissioners nominated by the President and confirmed by the Senate to a federal agency specializing in campaign-finance issues surely must be assumed to be reasonable, where commissioners

"differ" on whether there is an appeal to vote in a communication then that communication should not be deemed express advocacy or an impermissible electioneering communication.

These constitutional problems, coupled with the delay in processing AOs at times when public speech on public issues is most pressing, requires a new approach. While resolving all of these problems is beyond this AOR, the facts of this request offer a good place to begin.

NRLC believes that in a situation where a connected organization is able and chooses to fund communications through a separate segregated fund as a legal precaution while it awaits the outcome of a requested AO near an election, the connected organization should be able to reimburse its separate segregated fund for its disbursements to broadcast the ad if it is recognized in an AO as permissible. The ability of NRLPAC to speak was no substitute for NRLC itself speaking. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2671 n.9 (PAC alternative not adequate substitute). And since federal funds are much more difficult to raise than other funds, connected organizations and SSFs rightly prefer using scarce federal funds only for communications for which the requirement of using federal funds is constitutionally justified.

The FEC could approach this in at least two ways. First, it might interpret the exclusion for administrative expenses, 2 U.S.C. § 441b(b)(2)(C), from the prohibition on "contribution or expenditure"

and "any applicable electioneering communication," 2 U.S.C. § 441b(b)(2), to permit reimbursement for such activity where the activity was undertaken as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election. A legitimate "administration" function, 11 C.F.R. § 114.5(b), is the proper payment of obligations and the allocation of funding to comply with constitutional and legal requirements. This approach provides the advantage of fitting the new reimbursement potential into an existing body of law. For example, 11 C.F.R. § 114.15(b)(3) provides for the reimbursement of administrative expenses by a connected organization to its SSF within 30 days. And AO 1983-22 recognized that the FEC has authority to permit reimbursement beyond that time period where an entity had requested an AO within the 30-day period. This is, of course, analogous to the present situation with NRLC and NRLPAC and the present AOR.

Second, the FEC might simply recognize that 2 U.S.C. § 441b(a) prohibits corporate independent expenditures and "applicable electioneering communication[s]," not expenditures for permissible communications. So, where communications are paid for by an SSF as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election, there is no justification for forbidding the reimbursement. Specifically, in such a situation there is no corporate corruption concern that would justify the government from

forbidding the reimbursement, so that First Amendment liberties should prevail. So the FEC could simply issue the present AO recognizing in this circumstance the permissibility of the reimbursement. The Commission may then wish to engage in a rulemaking on the subject to explore further the constitutionally- and legally-permissible boundaries for allowing such reimbursements.

Question

Under these circumstances, may NRLC reimburse NRLPAC for the costs involved in broadcasting *Apology #1*?

Sincerely,

BOPP, COLESON & BOSTROM

/s/ James Bopp, Jr.

James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen

AUDIOTAPE TRANSCRIPTION

from

FEC OPEN MEETING – OCTOBER 23, 2008

* * * *

Taken for:

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* * * *

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[2] APPEARANCES

SPEAKERS:

Donald F. McGahn, II, Chairman
Steven T. Walther, Vice Chairman
Cynthia L. Bauerly, Commissioner
Caroline C. Hunter, Commissioner
Matthew S. Peterson, Commissioner
Ellen L. Weintraub, Commissioner
Jonathan Levin, General Counsel
Robert Knop, General Counsel
David Adkins, General Counsel
Amy Rothstein, General Counsel

[3] PROCEEDINGS

CHAIRMAN MCGAHN: All right. Next up, Draft Advisory Opinion 2008-15 submitted by National Right to Life Committee, Inc.

Do we have any other late-submitted documents we need to –

UNIDENTIFIED MALE SPEAKER: Yes, Mr. Chairman. We'd move for the sustention of the attorney's – provision for the attorney's submission of documents to consider, Agenda Document Number 08-32 and Agenda Document 08-32A.

CHAIRMAN MCGAHN: Without objection, so ordered.

MR. ADKINS: Good morning, Mr. Chairman, Commissioners. The two draft advisory opinions before you, Agenda Document 08-32 and Agenda Document 08-32A, respond to an Advisory Opinion request submitted on behalf of the National Right to Life Committee, Incorporated. The NRLC is a nonstock, 501c4 nonprofit which has produced two radio advertisements. The NRLC intends to broadcast these advertisements immediately and continuously throughout the United States leading up to the November 2008 general election. The two advertisements involve a dispute between the NRLC [4] and Senator Barack Obama over a vote that Senator Obama cast as a member of the Illinois legislature and specifically whether Senator Obama mischaracterized that vote in subsequent statements. The only

difference between the two advertisements is that the second advertisement features a concluding sentence that reads, "Barack Obama, a candidate whose words you can't believe in." The committee asks whether the NRLC's use of general treasury funds to finance the broadcast of the advertisements would constitute prohibitive corporate expenditures or prohibitive electioneering communications.

The first draft, Agenda Document 08-32, concludes that the first advertisement does not contain express advocacy and would be a permissible corporate-funded electioneering communication. Therefore, the NRLC would be able to fund its broadcast with general treasury funds.

Regarding the second advertisement, the draft concludes that the ad does contain express advocacy, and therefore the NRLC's funding of its broadcast with treasury funds would constitute a prohibitive corporate expenditure.

By contrast, the second draft, which is [5] Agenda Document 08-32A, or revised Draft B, concludes that neither advertisement is an impermissible electioneering communication or contains express advocacy. Therefore, the NRLC would be able to use treasury funds to finance the broadcast of both advertisements.

However, we received two comments on the drafts, specifically the first draft, and one comment on the request. So I'm happy to address any questions you may have. Thanks.

CHAIRMAN MCGAHN: Thank you. First, I'd like to thank Mr. Adkins for his work on this. Whenever we get anywhere near the history of the agency on issues that involve interpreting Supreme Court cases is a very challenging area. And the herding of the cats here has taken up a lot of time, and I appreciate the effort and various drafts and – and helping all the commission with their thinking on this.

Two drafts and on the first ad, my sense is there's some agreement at least as to the conclusion. And then there's a difference on the – whether mentioning – whether putting that extra line in the ad changes the ad. Given that Draft B is from me, it's pretty clear where I [6] stand, but the thing about this is it's an AO request, and it's a rather targeted request, and it certainly is a request designed to put a tough issue in front of the commission. This is not an easy case. These were ads written in a way to probably raise a lot of issues. In a lot of ways this is a law school exam on the meaning of the Wisconsin Right to Life test. And – and, you know, it's tough as an agency to look at test cases because they always raise issues that may not otherwise be raised, but that's the beauty of the AO process. We still have to try to answer the questions as best we can. Any comments, thoughts, motions? Ms. Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I support the other draft. We didn't originally have two drafts, so they're not – one of them doesn't have a letter, and the other one is just

Draft B. I support the unlettered Agenda Document, 08-32. I think that it is most consistent with the Wisconsin Right to Life decision, with our regulation implementing the Wisconsin Right to Life decision, with our – with the arguments that this agency has made in court subsequent to that regulation, and the [7] Wisconsin Right to Life decision, and with the responses that we've gotten back from the court on – from lower courts on that regulation and on interpretations of it. I know a lot of people preferred the magic word test, and, you know, there were a lot of serious, respected people who for many years thought that was the end point of under the constitution of what could be regulated was magic words. But in the McConnell case the Supreme Court said that that test is functionally meaningless and expanded into the area of functional equivalent of express advocacy.

When we got to the Wisconsin Right to Life case, the court said, an ad is a functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.

[8] And I'll just interrupt the quote at this point to point out that the ad in this case – I suppose it

focuses on a legislative issue. It's a past legislative issue. It's a vote that was taken in the state senate in, I think, 2000, but it is – it does generally pertain to the issue of abortion, which clearly is an ongoing public policy concern that, you know, people get very animated about, and it's very important to a lot of people. So I'm, you know, not trying to read this too narrowly. The ad takes a position on – certainly on the vote on that issue. Doesn't really exhort the public to adopt that position or urge the public to contact public officials with respect to the matter. So it's not clear out of the four factors that the court mentioned as being consistent with that of a genuine issue ad. At least two of them are clearly missing from this ad.

Second, going back to the quote, their content lacks indicia of express advocacy: The ads do not mention an election candidacy, political party or challenger, and they do not take a position on the candidate's character, qualifications, or fitness for office.

[9] Now, those factors, those two factors, I think, are clearly evident. The indicia of express advocacy, in the ad – in the second ad which has the tag line – let me find it – "Barack Obama, a candidate whose word you can't believe in."

A candidate, mentions that he's a candidate and says that his word can't be believed in. In the – in a recent case that we litigated, "The Real Truth About Obama," – there were same counsel who has filed the

request today – we had a couple of other ads where the tag line was in one case, "Now you know the real truth about Obama's Position on abortion. Is this the change you can believe in?" The commission took the position that that was not express advocacy.

The second ad had the tag line, "Obama's Callousness," – and I'm going to put in a dot, dot, dot because the rest – there's a part in the middle that doesn't really go to the legal issue – Obama's callousness reveals a lack of character and compassion that should give everyone pause.

Should give everyone pause was enough for this commission to go into court and argue that that's express advocacy.

[10] Now, the really interesting thing to me about, "The Real Truth About Obama" case is that the decision we got back from the Eastern District of Virginia, not normally a place where one finds really liberal interpretations of campaign finance laws, was that both of these ads were express advocacy; that both of them met the no-other-reasonable-interpretation test under Wisconsin Right to Life.

I was stunned and gratified by that because that actually had been my position all along, but, you know, I didn't expect them to agree with me.

But if you look at those two tag lines and say, well, that's express advocacy, I think it's really hard to come back and say a candidate whose word you can't believe in doesn't make the cut. As I said, either

under the direct words of Wisconsin Right to Life or under our regulation, which the court in "Real Truth About Obama" said, you know, was a pretty close matchup to the court's opinion. It pretty much endorsed our regulation as an accurate and precise reflection of the Supreme Court's view.

Now, I recognize that the other draft does attempt to proffer some other explanations for [11] what was going on in that second ad. There are – let's see. Am I on the right draft here? There are, I think, four different proposed – let's see – one, two, three, four – five different proposed interpretations of the ad, none of which go to the tag line, which is, of course, the difference between the two ads. That's why I thought the first draft, the unnumbered – unlettered draft that I support was a good, narrow interpretation of Wisconsin Right to Life and our regulation because even though the ad, I think, does clearly go to Senator Obama's character, without that tag line I think it doesn't quite cross over the line that – the very high bar that the Supreme Court set for us in Wisconsin Right to Life. And as I said, the alternative explanations for even the second ad in the – in Draft B don't address that – that tag line. What the draft does go on to say is that just merely referencing Senator Obama as a candidate doesn't convert the ad into an appeal to vote. Maybe that's true, but in some hypothetical context one could call somebody a candidate without it being an appeal to vote for or against, but there's no other explanation offered as to why that word, candidate, is in there otherwise. What [12]

else does it mean other than here's a candidate; somebody is running for election that you can't trust? What would any normal person do with that information? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in.

The draft goes on to say that the ad, even the second ad doesn't comment on his – Senator Obama's fitness or qualifications for office.

On the contrary, it takes issue with Senator Obama's candor with respect to statements supposedly made by the senator about requester; hence, the ad does not say that Senator Obama is a candidate you can't believe in, but instead remains focused on what he supposedly said; thus stating that he's a candidate whose word you can't believe in with respect to what he said about requester. And I have to say I cannot find the legal difference or even the factual difference between those two statements; that he's a candidate you can't believe in as opposed to a candidate whose word you can't believe in because he's not doing mime out there on the campaign trail. He's using words. If you can't believe his words, what is it that you could believe about [13] this guy?

And it's interesting to me – and I don't know; maybe this is inadvertent – that the draft says – it doesn't comment on his fitness or qualifications for office, but it leaves out the word, character, which is in both the Supreme Court test and in our regulation. And I think character is really the key to this because

when you say somebody's word can't be believed in, that's a very direct attack on character. You know, you say somebody's word can't be believed in? In some parts of the country them is fightin' words.

And certainly, when I try and teach my children about what it takes to be a person of good character, what traits they ought to be adopting, honesty and integrity and trustworthiness and having a word that people can believe in are really high on my list of good character traits. And I'm – I'm willing to bet that the other parents on this panel teach their kids the same thing. This does go directly to character. To say that a candidate is – someone who is a candidate whose word you can't believe in, I just don't think there's any reasonable interpretation of those words other than don't [14] vote for this guy. And it's not clear to me actually whether if the ad said don't vote for him because he's a candidate whose word you can't believe in, if that would be enough for my colleagues to say, that makes the ad express advocacy; or whether they would still say, well, there's all this issue talk in there, and that kind of outweighs the even magic words in the context of this ad. I'm not really sure what the end point is of that analysis. I just – I just don't think it's – it's reasonable. I don't think, again, if – if – again, looking to the more conservative of the two ads in, "The Real Truth About Obama," if Obama's callousness reveals a lack of character and compassion, that should give everyone pause is enough to trip the express advocacy standard, I don't see how saying that he's a candidate whose word you

can't believe in could possibly be anything other than urging somebody – urging anybody who hears this to – to vote against him. And indeed, the fact that he came in here and said, I want a 20-day AO even though I'm not entitled to it, and I really wanted – my colleagues know I really did try to get an answer as quickly as possible on this. I [15] wanted to answer his question quickly because I always assumed that these ads were all about the election. You wouldn't need a 20-day AO if it was just an issue ad, and he wasn't seeking to affect the election. The reason that he needed to – was urging us to get him an answer quickly, I think, is because the election is coming up. And I think, you know, it would be better if we could have answered even quicker and even better if we could agree on the result; although, I'm not – I'm not optimistic.

So for all of those reasons I support the first draft, the unlettered draft, and not Draft B. And I would be happy to move Draft – Draft Unlettered – it's very confusing; sorry – Draft 08-32 at the appropriate time, or we could have further discussion, whatever my colleagues prefer.

CHAIRMAN MCGAHN: The problem I have with the unlettered draft is – well, essentially the flip side of the same coin that Commissioner Weintraub raised, page 8, lines 13 through 19, when we get into referencing Senator Obama as a candidate, significantly alters the tone of the advertisement, focussing it as much on Senator Obama's bid for the Presidency as his actions as a [16] state legislator.

Additionally, the advertisement manipulates senator Obama's campaign slogan, "Change We Can Believe In" to attack his character and call into question his trustworthiness as a candidate whose word you can't believe in. The idea that the tone of the ad is now the standard to me is not a standard at all, and I think this ends up devolving into sort of an ink blot test kind of thing where you either see the vase or the two people talking to each other; and once you see one or the other, you're never going to see the other. To me the issue is whether or not you can read an ad as something other than an appeal to vote, and I think that both ads you can. Merely because you mention that someone is a candidate doesn't convert the ad into something other than – it doesn't convert that into an appeal to vote or preclude reading it as something other than an appeal to vote. Simply because they want an answer before the election that somehow we're going to read some inference into this being therefore the functional equivalent of express advocacy to me is a farfetched argument because folks who want to run issue ads tend to use the [17] campaign cycle as the vehicle to bring their issue to the public attention because, well, that's when the most people are paying attention. You're not necessarily going to run an issue ad on an issue of public in court, you know, the second week of January or something. I mean, you may run it during the Super Bowl; but you run it during election season, and that's when folks have the most opportunity to be heard. So, of course, they're going to use it.

And then as far as the issue being a past legislative issue, the issue that is coming up apparently constantly all across the country in state legislatures, when I first read the ad, I thought, well, okay, these folks are Right-to-Life folks who 365 days a year care about their issue set, and now they've found a vote from a current candidate that illustrates their issue; and they have been called liars, I guess, and they want to essentially defend themselves. They want to make the point that this fellow is a candidate who what he says about is you can't believe in. And that's how I read the ad originally, and that's how I still read the ad.

And it just goes back to what I said [18] initially. This is a tough case because these are essentially a test case. They're very carefully scripted ads. But when we get into those sorts of ads, it does become tough. And, you know, when you get into the tone of the ad and factors and that kind of thing, I just don't see that as – as something that provides a sort of bright-line rule that the Supreme Court thought they were doing in the Wisconsin Right to Life.

Since it was raised – I wasn't going to raise it, but "The Real Truth About Obama" litigation, the end of the opinion, the court says that plaintiff is free to disseminate their message and make any expenditures they wish. And so, you know, it seems – it seems like we may even disagree over what that district court said or didn't say.

With that being said, I mean, this is – I read the Wisconsin Right test as a rather simple bright-line test. And if you can – if you can read the ad as something other than an appeal to vote, that sort of begins and ends the analysis. And in fact, you can't really export the other – the other analyses without the full – the full package goods of the Wisconsin Right to Life; and in close calls the tie goes in favor of the speaker and all that [19] sort of thing. And to me I've tried to offer a variety of other reads of the ad. And whether or not they're reasonable or unreasonable, have that debate, that devolves into an issue of fact, and I don't read this as a fact issue. I read this as an issue of law; and hence, that's why I support Draft B.

Other comments?

COMMISSIONER PETERSEN: I'll just add briefly that I, too, interpret the Chief Justice's test that he set forth in Wisconsin Right to Life as setting a very high bar with regard to which kinds of ads may be subjected to BCRA's prohibition against corporate or labor-funded electioneering communications. I mean, as has been said already, Chief Justice Roberts said in that case, "The Court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than in its appeal to vote for or against a specific candidate. The test contemplates that there may be close calls as we – as -- and I agree with the chairman that this was crafted in a way to be a close call. And – but the tests set forth by the chief justice contemplates those close [20] calls; that you could

have situations where two people who are reasonable, one could interpret it as being the functional equivalent of express advocacy. The other one could think of it as issue advocacy. And he said when that happens, the tie goes to the speaker and not the sensor. So the way I – again, I look at that test as setting a very high standard. And as the draft – Draft B shows, there are a number of reasonable interpretations other than as appeals to vote when you look at those ads that were proposed by the requester in this case. And for that reason I'll be supporting Draft B.

COMMISSIONER HUNTER: Mr. Chairman, thank you. I support the comments of the chairman and Commissioner Petersen. Today a non-for-profit corporation, the National Right to Life Committee, would like to exercise its First Amendment rights by running two radio ads 60 days before a general election regarding an issue that's at the core of its mission. BCRA states that a corporation may not pay for advertisements that mention a candidate within 60 days of the general election. National Right to Life can attempt to ensure that the speech doesn't cross the line by expressly [21] advocating the election or defeat of a specific candidate, by analyzing case law, the statute, and FEC regulations; but if they get it wrong, it's a potential federal crime.

In this case the National Right to Life Committee decided to file an advisory opinion, and we are in the unenviable position of determining whether an ad should be afforded the protection of the First Amendment. In June of '07 the Supreme Court decided the

Wisconsin Right to Life decision, which we have talked about today, and held that the relevant section of BCRA unconstitutional as applied to issue ads that a not-for-profit corporation wanted to air within 30 days of a primary election. So very similar facts to the Wisconsin Right to Life decision are before us today, both non-for-profit corporations. Both would like to air ads within the relevant time period before the relevant electorate.

The Supreme Court found that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

As has been noted today, Draft B notes that [22] there are several other reasonable interpretations other than of an appeal to vote.

In drawing the line between campaign advocacy and issue advocacy, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. I will support Draft B because I believe neither ad before us today is the functional equivalent of express advocacy under an analysis of the Supreme Court precedent or FEC regulations. Thank you.

CHAIRMAN MCGAHN: Ms. Weintraub again.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I don't want to short-circuit

anybody else who wants to talk. I just wanted to respond very briefly to a couple of comments that you made. It's true that the "Real Truth About Obama" decision says that the plaintiff is free to disseminate their message and make any expenditures they wish. The next sentence reads, "Their only limitation is on contributions based on constitutionally permitted restrictions." And that's always the case when we have to decide. Nobody is ever forbidden from speaking. The question is what kind of money can you use, and are there going to be any disclosure [23] ramifications. So I don't –

CHAIRMAN MCGAHN: Well, if I could just –

COMMISSIONER WEINTRAUB: Sure.

CHAIRMAN MCGAHN: So if a corporation – if a corporation would be banned from speaking, and this is a nonprofit entity giving us an Advisory Opinion request – they're a 501c4; they're not an MCFL accepted, so they are prohibited from speaking.

COMMISSIONER WEINTRAUB: Many organizations – I'm not – in fact, I'm pretty sure this one does, too – many 501c4's in that position have a PAC, and they fund these kinds of communications through their PAC. And I believe this one is one of those, so, again, it goes to funding.

CHAIRMAN MCGAHN: We agree that the C-4 is a separate entity from a PAC?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. So the C-4 is banned.

COMMISSIONER WEINTRAUB: The C-4 can't do it out of their C-4 account. They can do it out of their PAC.

The only other point that I wanted to make is that I hear what you're saying about words like [24] "tone" and "factors," and I would be happy to strip all that language out and just go by a straight meeting of the words if that would gain any votes on the other side. I'm not optimistic that it would, but I – I'm happy to make the offer.

CHAIRMAN MCGAHN: I still struggle, though, with this. We have a requester who is a candidate – or who alleges that a candidate for national office called them a liar. And we're not going to get into what the truth or – I mean, the requester included all kinds of backup for the ad; and, you know, for purposes of this, I think you just take everybody at their word for the purposes of the AO. We don't need to get into whether or not who is winning the name-calling contest, but from a pulpit he wouldn't have had if he wasn't running for president. So my view is we shouldn't foreclose a nonprofit from defending itself in the same arena, which is his candidacy. I mean, if they want to comment at a time – and to me they throw out the word, candidate, not only – and I don't think – obviously, when you mention the word, candidacy, it has something to do with

the election, right? But to me, that's not the only reason why they put in the word, candidate. It's [25] another reason not to believe what he's saying because here's a situation where the candidate is saying something about a grass-roots nonprofit group, and they want to say, well, is he a candidate whose words you can't believe in? And the word is that – what he said about this nonprofit is the way I read it. And I'm not so sure stripping out the tone language still changes the end result. If the tag line had said that – said a politician whose words you can't believe in, would that change your view?

COMMISSIONER WEINTRAUB: I'm not sure. That is a much closer call. I'd have to go back and look at the regulation again and see what –

CHAIRMAN MCGAHN: Okay. Well, let's take a look.

COMMISSIONER WEINTRAUB: It says, "Mentioned an election, candidacy, political party, opposing candidate or voting by the general public."

Maybe. I'd want it – I'd want to give it more than 10-seconds thought.

CHAIRMAN MCGAHN: So maybe if they changed that one word, that could –

COMMISSIONER WEINTRAUB: But you still have the – the very direct attack on character. So like [26] I said, I'd want to give it more than 10-seconds thought here at the table.

CHAIRMAN MCGAHN: Okay. So these are not as easy calls as some maybe would think. One word here and there can make a difference in these ads. But in any event, Vice Chair is looking at the regs as well.

VICE CHAIRMAN WALTHER: We all have looked at our regs off and on. I want to say this. I'm probably the most conservative approach on this one because I don't – to me, the added sentence in the second example doesn't make such a difference. In my own mind it makes one express advocacy, and the other one not. Everyone knows Obama is a candidate, so it's not really an issue. And even if it were an issue, I mean, even under Roberts' opinion there are minor things that can be identified and clarified, or interpretation can be developed through discovery. The whole idea, as I understand it, is that we don't want to be able to prevent free speech by engaging in protracted litigation, and then delay is what prevents it. But there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly.

[27] And I think when you look at this, then the next question is whose word you can't believe in. Well, if you read one, you can argue that perhaps Obama could redeem himself if he made an apology. But when you look at what's really the message here is the public would know about his extreme position that he opposed very defining every baby born alive after an abortion as deserving a protection; that what we're talking about is trying to convey that Senator

Obama holds this position. It's unacceptable; and in addition, he's not telling the truth. And I really think at this particular point we find enough in it so that it appears an express advocacy; one is as well.

Because we're in litigation, however, I think my remarks are minor. I'm inclined to just make them as truncated as possible because in getting this interpreted in the next round of our litigation.

CHAIRMAN MCGAHN: Certainly agree. Ms. Bauerly?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman. I share many of Commissioner Weintraub and a certain amount of Commissioner Walther's concerns about this draft as well. I'll [28] support Draft A because I believe its consistent with our regulations and Supreme Court law.

And some of – just some of my concerns about Draft B include that I agree the Supreme Court set a very high bar, and I think that the commission went back and wrote a regulation consistent with that stringent test. And we could, you know, disagree whether that's the right test or the wrong test, but that's, you know, frankly not our role. But the Supreme Court did give us some guidance about how to interpret its tests, and in my view Draft B doesn't fully take account of what I think are important guidants – guiding factors that are directly applicable here. The Supreme Court talks about indicia of express advocacy including mentioning an election or a candidate and an attack on character. And I don't

have children, but I agree with you. My mother taught me that telling the truth was an important thing.

So those are my concerns with Draft B, and so I will be supporting Draft A, or the unlettered draft as we refer to it.

COMMISSIONER WEINTRAUB: Make a motion?

CHAIRMAN MCGAHN: Time for a motion.

COMMISSIONER WEINTRAUB: All right, [29] Mr. Chairman. I move approval of Agenda Document Number 08-32. That's the one without the letter.

CHAIRMAN MCGAHN: That's the unlettered.

COMMISSIONER WEINTRAUB: The unlettered one.

CHAIRMAN MCGAHN: Even though we have a Draft B, we don't have a Draft A, so that would be Pseudo A. On that motion all in favor say aye.

VICE CHAIRMAN WALTHER: May I comment before we vote?

CHAIRMAN MCGAHN: Sure.

VICE CHAIRMAN WALTHER: I would just like to say I would support the portion of the motion

that relates to question number 2, but not with respect to question number 1; so I'll be voting against it.

And I also do have problems with the use of the word, tone. I think that's not the message or really the appropriate one to make this decision on.

CHAIRMAN MCGAHN: Okay. All in favor of the motion say aye.

COMMISSIONER WEINTRAUB: Let me just throw in one more thought, and that is that I appreciate the vice chairman's comments. That's why I think this is the compromised draft because it says one [30] is, and one isn't express advocacy. I'm finished now.

CHAIRMAN MCGAHN: Okay. We can vote now?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: We're all set?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. I'm just looking both ways before I cross the street here. Okay. All in favor say aye.

COMMISSIONER WEINTRAUB: Aye.

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 2 to 4 with Commissioners Weintraub and Bauerly voting in favor, the remainder voting in opposition for apparently different reasons.

Any other motions?

UNIDENTIFIED MALE SPEAKER: Mr. Chairman, I would move that we approve Agenda Document Number 08-32-A, otherwise known as Draft B.

CHAIRMAN MCGAHN: All in favor say aye.

(MEMBERS VOTE AYE)

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 3-3 with [31] myself, Commissioner Petersen and Hunter voting in favor; Vice Chair, Commissioner Bauerly and Commissioner Weintraub voting in opposition. My sense is we have consensus; however, where five of us agree that the first ad – and I don't have the questions in front of me, so I don't want to say. Depending how you frame the question, do we have the okay for the c4 to run, I think, is the best way; and the second, we don't have consensus. So maybe the best thing to do at this point is ask the counsel to prepare a draft that reflects the common areas where we have in five on the first ad and then unable to reach a conclusion on the – with respect to

the second ad. I think that's an accurate representation of the views up here. If it's not – yes.

COMMISSIONER WEINTRAUB: I just want to say to you what I've already said to one or two of your colleagues, and that is that I'm not – I haven't decided yet whether I would vote for that answer. In part, it depends on the legal rationale, but in part I wasn't actually kidding that I thought Draft A was a compromise. And I'm not sure that I'm willing to say, you know, just to give the permission without the complementary [32] restriction on the other ad. So I'm just – I'm continuing to ponder, and it will depend on the wording of the draft.

CHAIRMAN MCGAHN: Do we have any management administrative matters?

UNIDENTIFIED MALE SPEAKER: We do not.

CHAIRMAN MCGAHN: Okay. Anything else for the good of the order?

Okay. With that, we will adjourn our open session. Thank you.

(MEETING ADJOURNED)

[33] STATE OF INDIANA)
) SS:
COUNTY OF VIGO)

I, Renee R. Dobson, a Notary Public in and for said county and state, do hereby certify that I listened to the audiotape recording of a meeting;

That said meeting was taken down in Stenograph notes and afterwards reduced to typewriting under my direction; and that the typewritten transcript is a true and accurate record of said meeting;

I do further certify that I am a disinterested person in this matter; that I am not a relative or attorney of any of the parties, or otherwise interested in the event of this matter, and am not in the employ of the parties.

IN WITNESS WHEREFORE, I have hereunto set my hand and affixed my notarial seal this 13th day of November, 2008.

/s/ Renee R. Dobson, RMR
Renee R. Dobson,
Notary Public,
Residing in Vigo
County, Indiana

My Commission Expires:
September 6, 2015

JOINT APPENDIX

Supreme Court, U.S.
FILED
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No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal
From The United States District Court
For The District Of Columbia

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED AUGUST 15, 2008
PROBABLE JURISDICTION NOTED NOVEMBER 14, 2008

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TABLE OF CONTENTS

Page

Relevant Docket Entries from the United States District Court for the District of Columbia, No. 07-2240 ..... 1a

Amended Verified Complaint for Declaratory and Injunctive Relief (Dec. 21, 2007) 9a

Text of Citizens United's Advertisements (Ex. 1 to Amended Verified Complaint) 26a

Script of *Hillary: The Movie* (Ex. 2 to Amended Verified Complaint) 28a

Preliminary Injunctions Hearing Transcript, United States District Court for the District of Columbia (Jan. 10, 2008) 153a

Memorandum Opinion of the United States District Court for the District of Columbia (Jan. 15, 2008) 195a

Affidavit of David N. Bossie (May 16, 2008) (Ex. 1 to Plaintiff's Summary Judgment Motion) 212a

Attachments and Exhibits to Federal Election Commission's Motion for Summary Judgment (June 6, 2008)

Federal Election Commission's Statement of Material Facts as to Which There Is No Genuine Dispute (June 6, 2008) (Attachment 1) 217a

Federal Election Commission's Statement of Genuine Issues and Objections to Plaintiff's Statement of Material Facts (June 6, 2008) (Attachment 2) 230a

First Supplement to Plaintiff's Responses to FEC's First Interrogatories (Apr. 9, 2008) (Ex. 1).....241a

Spot Cable, Elections '08 On Demand, http://www.spotcable.com/political_sub2.html (May 28, 2008) (Ex. 2) 253a

E-mail from Bob Carlstrom to David N. Bossie (Dec. 20, 2007) (Ex. 8) 255a

Memorandum Opinion of the United States District Court for the District of Columbia (July 18, 2008).....261a

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #:
1:07-cv-02240-RCL-RWR

CITIZENS UNITED v. FEDERAL ELECTION COMMISSION
Assigned to: Chief Judge Royce C. Lamberth
Referred to: Judge Richard W. Roberts
A. Raymond Randolph (Settlement)
Case in other court: Supreme Court of the United States, 07-00953
08-00205
Cause: 28:1331 Federal Question: Other Civil Rights

Date Filed: 12/13/2007
Date Terminated: 07/18/2008
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
12/13/2007	1	COMPLAINT against FEDERAL ELECTION COMMISSION (Filing fee $ 350, receipt number 4616008913) filed by CITIZENS UNITED. (Attachments: #1 Civil Cover Sheet)(jf,) (Entered: 12/14/2007)
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12/13/2007	3	MOTION for Three-Judge Court by CITIZENS UNITED. (Attachments: #1 Text of Proposed Order)(jf,) (Entered 12/14/2007)
12/13/2007	4	MOTION to Expedite by CITIZENS UNITED (Attachments: #1 Text of Proposed Order)(jf,) (Entered: 12/14/2007)
12/13/2007	5	MOTION for Preliminary Injunction by CITIZENS UNITED (Attachments: #1 Text of Proposed Order)(jf,) (Entered: 12/14/2007)
* * *		
12/14/2007	14	ORDER granting 3 Motion for Three-Judge Court. Signed by Judge Royce C. Lamberth on 12/14/07. (rje) (Entered: 12/14/2007)
* * *		
12/20/2007	18	Memorandum in opposition to re 5 MOTION for Preliminary Injunction filed by FEDERAL ELECTION COMMISSION. (Attachments: #1 Text of Proposed Order)(Noti, Adav) (Entered: 12/20/2007)
* * *		

12/20/2007	20	Memorandum in opposition to re 4 MOTION to Expedite filed by FEDERAL ELECTION COMMISSION. (Attachments: #1 Text of Proposed Order) (Hajjar, Steve) (Entered: 12/20/2007)
* * *		
12/21/2007	22	AMENDED COMPLAINT against FEDERAL ELECTION COMMISSION filed by CITIZENS UNITED.(tg,) (Entered: 12/21/2007)
12/21/2007	23	MOTION for Preliminary Injunction by CITIZENS UNITED (Attachments: #1 Text of Proposed Order)(Bopp, James) (Entered: 12/21/2007)
* * *		
01/04/2008	29	ORDER denying 4 Motion to Expedite; * * *
* * *		
01/08/2008	33	Memorandum in opposition to re 23 MOTION for Preliminary Injunction filed by FEDERAL ELECTION COMMISSION. (Attachments: #1 Text of Proposed Order)(Noti, Adav) (Entered: 01/08/2008)

01/08/2008	34	ORDER filed in USCA dated December 20, 2007, designating Circuit Judge A. Raymond Rudolph and District Judge Richard W. Roberts to serve with District Judge Royce C. Lamberth to hear and determine this case; directing that Circuit Judge Randolph will preside. Signed by Douglas H. Ginsburg on 12/20/07. (gt,) (Entered: 01/08/2008)
		* * *
01/15/2008	38	ORDER denying 5 Motion for Preliminary Injunction; denying 23 Motion for Preliminary Injunction. Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 15, 2008. (lcrcll,) (Entered: 01/15/2008)
01/15/2008	39	MEMORANDUM AND OPINION. Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on January 15, 2008.(lcrcll,) (Entered: 01/15/2008)

	* * *	
01/16/2008	41	NOTICE OF APPEAL to the U.S. Supreme Court as to 38 Order on Motion for Preliminary Injunction, 39 Memorandum & Opinion by CITIZENS UNITED. Filing fee $ 455, receipt number 4616009634. Fee Status: Fee Paid. Parties have been notified. (tg,) (Entered: 01/17/2008)
01/24/2008	42	Supreme Court of the United States Case Number 07-953 for 41 Notice of Appeal, filed by CITIZENS UNITED. (tg,) (Entered: 01/25/2008)
02/11/2008	43	MOTION to Dismiss *Counts 3 and 4 of the Amended Complaint* by FEDERAL ELECTION COMMISSION (Attachments: #1 Text of Proposed Order)(Noti, Adav) (Entered: 02/11/2008)
	* * *	
03/24/2008	46	Memorandum in opposition to re 43 MOTION to Dismiss *Counts 3 and 4 of the Amended Complaint* filed by CITIZENS UNITED. (Attachments: #1 Text of Proposed Order)(Bopp, James) (Entered: 03/24/2008)
	* * *	

04/28/2008	63	US SUPREME COURT JUDGMENT as to 41 Notice of Appeal, filed by CITIZENS UNITED, it is ordered and adjudged by this Court that the appeal is dismissed for want of jurisdiction. (USSC No. 07-953)(kb) (Entered: 07/11/2008)
05/16/2008	52	MOTION for Summary Judgment by CITIZENS UNITED (Attachments: #1 Affidavit of David N. Bossie, #2 Text of Proposed Order)(Bopp, James) (Entered: 05/16/2008)
05/22/2008	53	STIPULATION *Regarding Count 5 of the Amended Complaint* by CITIZENS UNITED, FEDERAL ELECTION COMMISSION. (Attachments: #1 Text of Proposed Order)(Noti, Adav) (Entered: 05/22/2008)
05/23/2008	54	ORDER dismissing Count 5 of the Amended Complaint pursuant to the stipulation of the parties. Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on May 23, 2008.(lcrcll,) (Entered: 05/23/2008)

06/06/2008	55	MOTION for Summary Judgment by FEDERAL ELECTION COMMISSION (Attachments: #1 Text of Proposed Order, #2 Exhibit Exhibits 1-7)(Noti, Adav) (Entered: 06/06/2008)
06/06/2008	56	Memorandum in opposition to re 52 MOTION for Summary Judgment filed by FEDERAL ELECTION COMMISSION. (Attachments: #1 Text of Proposed Order, #2 Exhibit Exhibits 1-7)(Noti, Adav) (Entered: 06/06/2008)
		* * *
06/27/2008	61	Memorandum in opposition to re 55 MOTION for Summary Judgment *and reply* filed by CITIZENS UNITED. (Attachments: #1 Text of Proposed Order)(Bopp, James) (Entered: 06/27/2008)
		* * *
07/18/2008	65	MEMORANDUM OPINION. Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on July 18, 2008. (lcrcll,) (Entered: 07/18/2008)

07/18/2008	66	ORDER granting in part and denying in part 43 Motion to Dismiss; denying 52 Motion for Summary Judgment; granting 55 Motion for Summary Judgment. Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on July 18, 2008. (lcrcll,) (Entered: 07/18/2008)
07/24/2008	67	NOTICE OF APPEAL to the U.S. Supreme Court as to 66 Order on Motion to Dismiss, Order on Motion for Summary Judgment, 65 Memorandum & Opinion by CITIZENS UNITED. Filing fee $5, receipt number 4616013881. Fee Status: Fee Paid. Parties have been notified (tg,) (Entered: 07/25/2008)
		* * *
12/05/2008	68	NOTICE from the U.S. Supreme Court dated 11/14/08 noting probable jurisdiction in this case. (jeb,) (Entered: 12/05/2008)

United States District Court
District of Columbia

Citizens United, 1006 Pennsylvania Ave., SE Washington, DC 20003, ***Plaintiff,***	
v.	**Case No. 07-2240-RCL**
Federal Election Commission, 999 E Street, NW Washington, DC 20463, ***Defendant.***	THREE-JUDGE COURT

Amended Verified Complaint for Declaratory and Injunctive Relief

Citizens United complains as follows:

Introduction

1. This is an as-applied challenge to the constitutionality of **(a) § 201** of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 88-89, entitled "Disclosure of Electioneering Communications," which added a new subsection "(f)" to § 304 of the Federal Election Campaign Act ("FECA") that requires reporting of electioneering communications and **(b)** BCRA **§ 311**, 116 Stat. 105, requiring that electioneering communications contain "disclaimers." *See* 11 C.F.R. § 110.11. BCRA § 201 is called herein the **"Reporting Requirement,"** BCRA § 311 is called the **"Disclaimer Requirement,"** and the requirements together are called the **"Disclosure**

Requirements" for ease of identification. The Reporting Requirement is codified at 2 U.S.C. § 434(f). The Disclaimer Requirement is codified at 2 U.S.C. § 441d(a). It is also an as-applied and facial challenge to BCRA § **203**, the **"Prohibition,"** which is codified at 2 U.S.C. § 441b.

2. Citizens United intends to publish advertisements and broadcast a movie that will meet the statutory definition of electioneering communications, 2 U.S.C. § 434(f)(3), but are not properly considered electioneering communications for any purpose, including disclosure, because they "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, . . . are not the functional equivalent of express advocacy, and therefore fall outside the scope of *McConnell*'s holding." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2670 (2007) ("*WRTL II*"). The Disclosure Requirements are unconstitutional as applied to such ads and movie, and the Prohibition is unconstitutional as applied to the movie and the "Questions" ad (*see Exhibit 1*), and it should also be declared unconstitutional on its face.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this case, brought under 42 U.S.C. § 1983, pursuant to 28 U.S.C. §§ 1331 and 2201 and BCRA § 403, 116 Stat. at 113-14, because Plaintiff "elects such provisions to apply to this action." BCRA § 403(d)(2), 116 Stat. at 114.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) and BCRA § 403, 116 Stat. at 113-14.

PARTIES

5. Plaintiff Citizens United is a nonstock, nonprofit (under 26 U.S.C. § 501(c)(4)), membership, Virginia corporation with its principal office in Washington, District of Columbia.

6. Defendant Federal Election Commission ("FEC") is the government agency with enforcement authority over FECA.

FACTS

7. Citizens United was founded in 1988. Its purpose is to promote the social welfare through informing and educating the public on conservative ideas and positions on issues, including national defense, the free enterprise system, belief in God, and the family as the basic unit of society. Its current annual budget is about $12 million. Citizens United has a related § 501(c)(3) entity called Citizens United Foundation ("CUF").

8. Citizens United is not a "qualified nonprofit corporation" because it receives corporate donations and engages in business activities. *See* 11 C.F.R. § 114.10 (exempting certain ideological, nonstock, nonprofit corporations from the electioneering communication prohibition),

9. One of the principal means by which Citizens United fulfills its purposes is through the production and distribution of documentary films. Its first major documentary film, in 2004, was entitled *Celsius 41.11: The Temperature at Which the Brain Begins to Die*. The film was a conservative response to Michael Moore's documentary *Fahrenheit 9/11* and was shown in over 100 theaters in 2004. It continues to be sold in DVD format.

10. In 2005, Citizens United and CUF co-produced *Broken Promises: The United Nations at 60*, which was an exposé on the United Nations narrated by noted actor Ron Silver. This film was released in DVD format.

11. In 2006, Citizens United and CUF co-produced two films: *Border War: The Battle Over Illegal Immigration* and *ACLU: At War With America*. *Border War* had a limited theatrical release and was sold on DVD. *ACLU* was released only in DVD format.

12. *Broken Promises* and *Border War* have competed for and won a number of awards from the motion picture industry. *Broken Promises* won a Special Jury Remi Award at the 2006 Houston International Film Festival. *Border War* won best feature documentary at the 2006 Liberty Film Festival, a Silver Remi Award at the 2007 Houston International Film Festival, and best feature documentary film honors from the American Film Renaissance in February 2007. *Border War* also qualified for consideration under the Academy of Motion Picture Arts and Sciences demanding criteria for nomination to the 79th Academy Awards in February 2007.

13. In 2007, CUF produced *Rediscovering God in America*, which is narrated by Newt and Calista Gingrich. This film premiered in Washington, D.C., and New York City and is now available in DVD format only. As of December 11, 2007, the film was the top selling historical documentary on Amazon.com.

14. Citizens United is in the final stages of production on a feature length documentary film on Senator Hillary Clinton entitled *Hillary: The Movie*.

This issue-advocacy film will be released somewhere in the December 2007 to February 2008 time-frame and is slated for theaters, cable on-demand broadcast, and DVD sales. It includes interviews with numerous individuals and many scenes of Senator Clinton at public appearances. It is about 90 minutes in length. It does not expressly advocate Senator Clinton's election or defeat, but it discusses her Senate record, her White House record during President Bill Clinton's presidency, and her presidential bid. Some interviewees also express opinions on whether she would make a good president. A compendium book is being published by Thomas Nelson Publishers, which has purchased the book rights to the film and is paying Citizens United an advance royalty on sales. Neither of the Disclosure Requirements applies to the documentary itself (unless it is broadcast, *see infra*).

15. When Citizens United produced *Celsius 41.11* in 2004, it ran national broadcast ads promoting the film. The original version of the ads had images and sound bites of President George Bush and Senator John Kerry, but those images and sound bites had to be deleted from the ads due to the electioneering communication prohibition. Prior to running the ads, Citizens United received FEC Advisory Opinion 2004-30, stating that its film and film ads would qualify as electioneering communications and would not be exempt under the Press Exemption.

16. Citizens United intends to fund television ads ("Ads") to promote *Hillary: The Movie* that will meet the electioneering communication definition at 2 U.S.C. § 434(f)(3), *see* ¶ 17 *infra*, but will not properly be an electioneering communication for any

purpose, including disclosure, because the Ads "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate, . . . [is] not the functional equivalent of express advocacy, and therefore fall[s] outside the scope of *McConnell*'s holding." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2670 (2007) ("*WRTL II*"). A true and correct transcript of the Ads is attached. *See Exhibit 1.* Citizens United has not, and will not, coordinate the production and broadcast of the Ads with any candidate, campaign committee, political committee, or political party.

17. The Ads that Citizens United intends to broadcast will meet the electioneering communications definition at 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29 because they **(a)** will be broadcast on Fox News cable and major network stations so that they **(b)** will be receivable by more than 50,000 persons, *see* http://gullfoss2.fcc.gov/ecd (Federal Communications Commission's Electioneering Communications Database), in states where caucuses, conventions, or primary elections will be selecting a Democratic party nominee, **(c)** will clearly reference Senator Clinton, a presidential candidate, and **(d)** will be made within 30 days before the following caucuses, conventions, or primaries in the identified states (with electioneering communication periods indicated) where she will be on the ballot: **Iowa** Presidential Caucus (12/04/07 - 01/03/08); **New Hampshire** Presidential Primary (12/09/07 - 01/08/08); **Michigan** Presidential Primary (12/16/07 - 01/15/08); **Nevada** Presidential Caucus (12/20/07 - 01/19/08); **South Carolina** Presidential Primary (D) (12/27/07 - 01/26/08); **Florida** Presidential Primary (12/30/07 - 01/29/08). *See* http://www.fec.gov/info/

charts_ec_dates_prez.shtml (electioneering communication periods).

18. Citizens United will broadcast the 30-second, issue-advocacy ad entitled "Questions" on Fox News cable, and may broadcast it on major television network stations, too. Citizens United will broadcast the 10-second ads "Wait" and "Pants" on major television network stations, but not on Fox News. The disclaimer language mandated by FEC rule, *see* 11 C.F.R. § 110.11, takes about 4 seconds to narrate, making 10-second ads virtually impossible and 30-second ads extremely difficult to do and have any significant time left for substantive communication.

19. Citizens United's Ads will promote showings of *Hillary: The Movie* in theaters and sales of *Hillary* in DVD format, which may be pre-ordered while the movie is in theaters, and refer viewers to www.hillarythemovie.com for more information about the documentary and how to see or purchase it. When publicly released, the DVD form of *Hillary* will be available from major national retailers, such as Amazon.com.

20. Citizens United would like to begin broadcasting its Ads on Monday, December 17, 2007, and run them through the middle of January for its initial media buy. However, because it will not run the Ads absent the requested relief from this Court, Citizens United intends to begin broadcasting its ads when it gets the relief requested herein and run them through the middle of January for its initial media buy. If Senator Clinton becomes the presidential nominee of her party, Citizens United will again plan to run the Ads (and possibly materially-similar ads) on Fox News cable (and possibly other broadcast outlets) within 30 days

before the Democratic National Committee Convention (electioneering communication period is 07/29/08 - 08/28/08) and within 60 days of the November general election (electioneering communication period is 09/05/08 - 11/04/08). *See* http://www.fec.gov/info/charts_ec_datesprez.shtml. At these times, the Ads will also meet the electioneering communication definition. Citizens United believes that these are the times when the public's interest in Senator Clinton will be at its peak, which is the key to maximizing box office, cable on-demand, and DVD sales for *Hillary*.

21. In addition to being protected issue advocacy, the 10-second ads meet the requirements of the recently-enacted FEC rule recognizing a commercial-transaction safe-harbor exception to the electioneering communication prohibition because each **(a)** "[p]roposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event," 11 C.F.R. § 114.15(b)(3)(ii); **(b)** "[d]oes not mention any election, candidacy, political party, opposing candidate, or voting by the general public," *id.* at § 114.15(b)(1); and **(c)** "[d]oes not take a position on any candidate's or officeholder's character, qualifications, or fitness for office." *Id.* at § 114.15(b)(2). Citizens United is uncertain as to whether the 30-second "Questions" ad fits this safe-harbor because the FEC has expressed doubt on that question. *See infra*.

22. The Ads are subject to the Disclosure Requirements because the FEC recently refused requests to exclude from the Disclosure Requirements "electioneering communications" that

meet the Supreme Court's issue-advocacy safe harbor, *WRTL II*, 127 S. Ct. at 2667 (no-other-reasonable-interpretation test), or the FEC's own commercial-transaction safe harbor. *See* http://www.fec.govilaw/law_rulemakings.shtml#ec07 (rulemaking documents, including requests to eliminate disclosure for ads not subject to electioneering communication prohibition).

23. One of the chief concerns with the Reporting Requirement is the disclosure of donors who may then be subject to various forms of retaliation by political opponents. On information and belief, the Clinton White House had in its possession over 1,000 FBI files on political opponents. *See, e.g.*, Neil A. Lewis, *White House Got More Files Than Disclosed*, N.Y. Times, June 12, 2007 (available by query at google.com).

24. Citizens United will have donors that it will be required to disclose (as to name and address), absent the judicial relief requested here, because it will pay for the Ads "exclusively from a segregated bank established to pay for electioneering communications permissible under 11 C.F.R. § 114.15" (rule implementing *WRTL II* by permitting corporate electioneering communications), to which donors will have "donated an amount aggregating $1,000 or more . . . since the first day of the preceding calendar year." 11 C.F.R. § 104.20.

25. Citizens United intends to broadcast materially-similar ads mentioning public figures who are candidates in materially-similar situations during future electioneering communication periods when public interest is at a peak. There is a strong likelihood that such similar situations will recur, given the facts that Plaintiff has engaged in similar

activity in the past and that such activity is common and regularly recurring for it—as are conflicting electioneering communication periods.

26. Citizens United intends to broadcast its Ads without complying with the Disclosure Requirements, but it will not broadcast its Ads if it does not obtain the judicial relief presently requested. It also will not broadcast the "Questions" ad unless it obtains the judicial relief requested as to the Prohibition.

27. If Citizens United does not obtain the judicial relief presently requested, it will not proceed with its activities as planned. Instead, it will be forced to include the compelled speech of a disclaimer, which **(a)** requires it to mislead the public by identifying its speech as electioneering speech when it is not because the U.S. Supreme Court has held that such speech is not sufficiently related to elections to be regulated as electioneering and **(b)** deprives Citizens United of valuable time in its short and expensive broadcast Ads, which deprivation and burden is not justified by any constitutional or congressional authority. Adding the disclaimer will preclude Citizens United from running its 10-second ads and will require it to revise its 30-second ad so as to be much less effective—both as the issue advocacy that it is and as a vehicle for promoting *Hillary: The Movie*. And Citizens United will be compelled to file reports of its activity, which **(1)** requires it to mislead the public by reporting its speech as electioneering speech when it is not because the U.S. Supreme Court has held that such speech is not sufficiently related to elections to be regulated; **(2)** deprives Citizens United of valuable time and resources in complying with reporting requirements,

which deprivation and burden is not justified by any constitutional or congressional authority; and **(3)** will, in Citizens United's belief based on long experience, substantially reduce the number of donors and amount of donations to Citizens United because many potential donors do not wish to be publicly so identified for a variety of legitimate reasons. However, Citizens will not even broadcast the "Questions" ad unless it obtains the judicial relief requested as to the Prohibition. If the foregoing events occur, Citizens United will be deprived of its constitutional rights under the First Amendment to the United State Constitution by these substantial burdens on its highly-protected, core "political speech," *WRTL II*, 127 S. Ct. at 2659 (twice), 2660, 2664, 2665 (thrice), 2666 (twice), 2669, 2671-74, and will suffer irreparable harm.

28. On December 20, 2007, a company that markets nationwide Video on Demand ("VOD") broadcasting of programs on cable television made an offer to Citizens United to broadcast *Hillary: The Movie*, for a fee to be paid by Citizens United, to cable viewers nationwide (or to such markets as remain appropriate when the judicial relief requested herein is provided). *Hillary* would be broadcast under a "Political Movies" component of "Elections '08, a new channel sponsored by the cable industry. The contract offered would be for 4 weeks. A true and correct copy of the current (not finalized) script of *Hillary* is filed separately under seal. *See Exhibit 2* (under seal). Citizens United expects further opportunities to put *Hillary* on television in the near future by other means.

29. This broadcasting would bring *Hillary* within the electioneering communication definition because

the movie **(a)** will be broadcast on cable stations so that it **(b)** will be receivable by more than 50,000 persons, in states where caucuses, conventions, or primary elections will be selecting a Democratic party nominee, **(c)** will clearly reference Senator Clinton, a presidential candidate, and **(d)** will be made within 30 days before the caucuses, conventions, or primaries in the states identified in ¶ 17 where she will be on the ballot.

30. Citizens United intends to accept this offer to broadcast its documentary, but will not do so unless it receives the judicial relief requested herein because **(a)** it will have donors who would have to be disclosed and it does not wish to comply with the Disclosure Requirements as to the movie for the reasons stated in ¶¶ 23 & 27 and **(b)** the communication would be a prohibited "electioneering communication" under BCRA because it is not exempt from the "electioneering communication" prohibition under the FEC's regulation at 11 C.F.R. § 114.15 (creating an exception to the electioneering communication prohibition).

31. If Citizens United does not obtain the judicial relief presently requested as to *Hillary*, it will not proceed with its activities as planned. In such an event, Citizens United will be deprived of its constitutional rights and will suffer irreparable harm.

32. On the evening of December 20, 2007, the FEC filed its memorandum opposing preliminary injunction (Doc. #18), in which it stated that "the Commission has not had a sufficient opportunity to consider whether plaintiff's third ad (titled 'Questions') qualifies as a *WRTL* ad under the Commission's new regulations. Although plaintiff's

first two proposed ads appear to come within the *WRTL* exemption — thus placing Citizens's United's constitutional claim squarely before the Court as applied to those two ads — 'Questions' poses a closer question that the Commission has not had an adequate opportunity to address." Doc. #18 at 8-9. If the FEC can't tell by looking at an ad whether it meets the FEC's own exception to the Prohibition, then Citizens United can't know whether it may even broadcast the ad without being subject to FEC investigation, enforcement, and penalties. Therefore, CU will not broadcast this ad unless it receives the judicial relief sought herein and will be irreparably harmed by violation of its constitutional rights to free speech and association.

33. There is no adequate remedy at law.

Count 1

34. Citizens United realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

35. As applied to **(a)** communications that may not be prohibited as electioneering communications under *WRTL II*, 127 S. Ct. 2652, and **(b)** Citizens United's Ads, the Disclosure Requirements, i.e., BCRA §§ 201 and 311, are unconstitutional because the activity is not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Disclosure Requirements do not come within congressional authority to regulate elections and are overbroad for sweeping in First Amendment activity without authority.

36. As applied to **(a)** communications that may not be prohibited as electioneering communications

under *WRTL II*, 127 S. Ct. 2652, and **(b)** Citizens United's Ads, the Disclosure Requirements are unconstitutional under the First Amendment guarantees of free expression and association.

Count 2

37. Citizens United realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

38. As applied to the broadcasting of *Hillary*, the Disclosure Requirements, i.e., BCRA §§ 201 and 311, are unconstitutional because the activity is not "unambiguously related to the campaign of a particular federal candidate." *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Disclosure Requirements do not come within congressional authority to regulate elections and are overbroad for sweeping in First Amendment activity without authority.

39. As applied to *Hillary*, the Disclosure Requirements are unconstitutional under the First Amendment guarantees of free expression and association.

Count 3

40. Citizens United realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

41. As applied to the broadcasting of *Hillary*, the Prohibition is unconstitutional because the documentary is not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80, and because the movie "may reasonably be interpreted as something other than as an appeal to vote for or against a specific

candidate." *WRTL II*, 127 S. Ct. at 2670. Failing this threshold requirement, the Prohibition does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without authority.

42. As applied to *Hillary*, the Prohibition is unconstitutional under the First Amendment guarantees of free expression and association.

Count 4

43. Citizens United realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

44. As applied to the broadcasting of the ad entitled "Questions," the Prohibition is unconstitutional because the ad is not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80, and because the ad "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2670. Failing this threshold requirement, the Prohibition does not come within congressional authority to regulate elections and is overbroad for sweeping in First Amendment activity without authority.

45. As applied to the ad entitled "Questions," the Prohibition is unconstitutional under the First Amendment guarantees of free expression and association.

Count 5

46. Citizens United realleges and incorporates by reference all of the allegations contained in all of the preceding paragraphs.

47. The Prohibition should be declared unconstitutional on its face because it has not proven workable in application, as required by *Wisconsin Right to Life v. FEC*, 126 S. Ct. 1016 (2006).

48. The Prohibition is unconstitutional under the First Amendment guarantees of free expression and association.

PRAYER FOR RELIEF

Wherefore, Citizens United prays for the following relief:

1. a declaratory judgment declaring BCRA §§ 201, 203, and 311 unconstitutional as applied to **(a)** communications that may not be prohibited as electioneering communications under *WRTL II*, 127 S. Ct. 2652, **(b)** Citizens United's Ads, and **(c)** *Hillary: The Movie*.

2. a preliminary and permanent injunction enjoining the FEC from enforcing the challenged provisions as applied to **(a)** communications that may not be prohibited as electioneering communications under *WRTL II*, 127 S. Ct. 2652, **(b)** Citizens United's Ads, and **(c)** *Hillary: The Movie*.

3. a declaratory judgment that BCRA § 203 is unconstitutional on its face, and preliminary and permanent injunction enjoining the FEC from enforcing it.

4. costs and attorneys fees pursuant to any applicable statute or authority; and

5. any other relief this Court in its discretion deems just and appropriate.

* * *

Respectfully submitted

/s/ James Bopp, Jr.
James Bopp, Jr.

/s/ Richard E. Coleson
Richard E. Colson*

/s/ Jeffrey P. Gallant
Jeffrey P. Gallant*

/s/ Clayton J. Callen
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*pro hac vice motion pending
Counsel for Plaintiff

Exhibit 1—Citizens United's Ads

"Wait"

:10

[Image(s) of HRC on screen]

If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.

[Film Title Card]

[Visual Only] Hillary: The Movie.

[Visual Only] www.hillarythemovie.com

"Pants"

:10

[Image(s) of HRC on Screen]

First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit.

Now, a movie about everything else.

[Film Title Card]

[Visual Only] Hillary: The Movie

[Visual Only] www.hillarythemovie.com

"Questions"

:30

[Image(s) of HRC on Screen] Who is Hillary Clinton?

[JEFF GERTH Speaking & Visual] [S]he's continually trying to redefine herself and figure out who she is . . .

[ANN COULTER Speaking & Visual] [A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . .

[DICK MORRIS Speaking & Visual] Hillary is the closest thing we have in America to a European socialist . . .

If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.

[Film Title Card]

[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.

[Visual Only] www.hillarythemovie.com

HRC – Draft 12/21/07

VIDEO	AUDIO
CU LOGO LISTEN TO LIZ OPTION Can license Magpie for $500	Music — The Thieving Magpie
Title Card FADE ON MORE SLOWLY OTHER TEXT OPTIONS	"The problem with nostalgia is what we tend to do is only remember what you like and you forget the parts you didn't like."
ADD TO TEXT Democratic Presidential Candidate	(WAIT A BEAT BEFORE DISSOLVING IN JOHN EDWARDS)
Hillary Headlines Montage	
Headlines continue	MUSIC
Hillary stills 1st STILL HOLD ON 2 MORE SECONDS	
	BAY BUCHANAN She's driven by the power. She's driven to get the power. That is the driving force in her life.
	ROBERT NOVAK She does not answer

questions straight out

ANN COULTER
5128 she is the expert at not saying what she believes - //she will run on attacking republicans, and being the first woman president – oh isn't that amazing, she's a woman she can walk and talk

LARRY KUDLOW
The thought here is it's all politics. Parcel out favors to individual groups, whether it's unions here or the farm block there

MARK LEVIN
520 she is steeped in controversy, steeped in sleaze, that's why they don't want us to look at her record//

KATE O'BEIRNE
I would recommend that Hillary Clinton appreciate that she will not be by any means the candidate of American women. American women have diverse views on politics, just like men.

JOHN MICA
At the core of almost everyone of the investigations we did for eight years where there were problems and I mean major problems in the Clinton administration she was at the core of them

TONY BLANKLEY
It's part of the Clinton method, which is say what you need to say at any given moment, and rely on the lack of memory of the American public, (10:00) and support of the mainstream media to support that lack of memory.

(or alternate
TONY BLANKLEY 10935
she makes herself sound like she has diplomatic experience, like she has managerial experience, as if she has policy development experience. She doesn't have any of those things, and the media has largely bought-in to her campaign claim that she's Miss

Experience, and she's not.)

MUSIC

MARK LEVIN
the 20-year plan really is that the Clintons share power; one would be president eight years; and one would be president another eight years over a span of 20 years with a little Republican in between perhaps.

USE STILL OF BILL AND HILLARY "SHH-SHHING" ELSEWHERE

JEFF GERTH
So in essence what happened is that Bill and Hilary in their mid-20's before they ever took their martial vows, they took their political vows

DICK MORRIS (APPROX 200 IN)
You know a lot of people ask me do we have to go through all these old Clinton scandals again. Well I've good news for you. You don't. Because you can look at the new ones. Because Hillary Clinton scandals are a gift that keeps on giving.

Hillary b roll or stills to big finish	Music
CHECK AND SMOOTH OUT TIMING OF DICK AND ANN INTERCUT	DICK MORRIS Ruthless, vindictive, ANN COULTER Mendacious, venal, sneaky DICK MORRIS Ideological, intolerant ANN COULTER Liar's a good one. MARK LEVIN Scares the hell out of me ANN COULTER Looks good in a pant suit.
Movie title BRING TITLE IN MORE SLOWLY, LEAVE ON SCREEN ANOTHER 2 SECONDS	Music buttons
REVERB OR ECHO ON HRC VOICE. MAKE IT SOUND DISTANT, FROM THE PAST.	HILLARY clip voice over only I announced today that I am forming a presidential exploratory committee. I'm not just starting a campaign though, I'm

beginning a conversation, with you, with America.//

Continue with Washington images — treated, filtered, dark, ominous

MUSIC QUICK UP

HILLARY
So let's talk. Let's chat. Let's start a dialogue about your ideas and mine.//

MUSIC QUICK UP

HILLARY
and while I can't visit everyone's living room. I can try.//
add a bit more breath here
(So) let the conversation begin. I have a feeling it's going to be very interesting.

Cover most of her w/Hillary

KATE O'BEIRNE
The challenge for Hillary Clinton on a campaign trail is she has to pretend to be something that she is not. She is far more liberal than she is going to want to be led on. That means, you have to be very controlled. You cannot be too spontaneous. You are pretending to be something and I think that is going to

be a potential problem for her on a couple of grounds. It is inauthentic and people spot that.

HRC (screaming)
...we have a right to debate and disagree with any administration!!

1850?

JEFF GERTH
she's a person who's struggling herself with figuring out who she is or more importantly how she wants to present herself to the American public, because her own advisors told us that her sort of authenticity, who she is, is issue one, issue two and issue three for her.

HRC
I don't feel no ways tired. I come to far from where I started from

GERTH – 4020
she's continually trying to redefine herself and figure out who she is and, and project an authenticity to voters who are, are of course wondering who is

	the real Hillary.
	VO #1 HILLARY RODHAM CLINTON. COULD SHE BECOME THE FIRST FEMALE PRESIDENT IN THE HISTORY OF THE UNITED STATES? HER NAME IS KNOWN BY NEARLY EVERY AMERICAN, BUT WHO SHE REALLY IS REMAINS LARGELY A MYSTERY.
NEW	VO#2 HILLARY CLINTON POINTS TO HER TIME IN THE WHITE HOUSE AS A LARGE PART OF HER QUALIFICATION FOR THE JOB AS PRESIDENT. BUT MOST OF THE NEWS MEDIA HAS CONVENIENTLY FORGOTTEN THAT HER TIME AS FIRST LADY WAS MIRED IN CONTROVERSY.
USE HEADLINE GRAPHICS TO SEPARATE VO 1, 2, and 3	

CHANGE BACK TO ORIGINAL	VO #3 SHE WAS THE 'FIRST FIRST LADY' TO COME UNDER CRIMINAL INVESTIGATION. IN BOTH LITTLE ROCK AND WASHINGTON, D.C., SHE WAS PLAGUED BY NUMEROUS SCANDALS
SCANDAL MONTAGE	Quick News clip – scandal
5706 RAW TRANSCRIPT NUMBER NOVAK'S IN IS CLIPPED	BOB NOVAK: Senator Clinton has an extraordinary ability to obfuscate, to refuse to answer questions; to avoid confrontations, and up until now has been giving a pass on it.
HAVE INSERTED YOUTUBE CLIP. IT IS SHORTER THAN THIS ONE. WE HAVE REQUESTED THE NH, October 14 CLIP	JOHN EDWARDS "Instead of moving from primary mode to general election mode, why don't we have tell-the-truth mode, all the time, and not say something different one time than we say another time? We need to be able to trust both a presidential candidate and a president of the United States." (NH, October 14, 2007)

BOB TYRELL
We know Hillary's an insecure person, secure people don't lie. They don't lie inveterately they way she does.

BAY BUCHANAN
What drives Hillary now is power. She very much is interested in gaining power, she considers herself to be a special person. She has a lot of arrogance, a spirit of superiority about her. And this is the driving force in her life, is to gain and acquire and maintain power. And her husband got to the top and since she saw it, she felt it, and she wants there herself.

VO #4A
OVER THE PAST 16 YEARS
HILLARY CLINTON HAS UNDOUBTEDLY
BECOME ONE OF THE MOST DIVISIVE
FIGURES IN AMERICA.
HOW THIS MAKES HER SUITED TO UNITE THE COUNTRY AS THE NEXT PRESIDENT IS

TROUBLING TO MANY.

ANN COULTER
1855 and recall Hillary speaking at a black church on Martin Luther King what a coincidence

Hillary CLINTON
U.S. house run like a plantation, and you know what I'm talking about (audience rumble)

ANN COULTER
and you know what I'm talking about girlfriend. What? That's how she's going to get the power? By accusing the republicans of running a plantation at a black chuch on martin luther king day. That's it? Okay 1917

FADE OUT – END TEASE
ADD CHAPTER HEADLINE GRAPHICS

AUDIO FADE or button

SLOW PUSH ON OPRAH

INCLUDED TEXT FROM MAUREEN DOWD'S COLUMN

VO#5
AFTER ANNOUNCING HER BID FOR THE PRESIDENCY, FELLOW DEMOCRATS INCLUDING FORMER

CLINTON CONFIDANT AND HOLLYWOOD MOGUL DAVID GEFFEN PUBLICLY QUESTIONED HILLARY'S INTEGRITY AND TRUTHFULNESS. SUCH BREAKS WITHIN THE CLINTON INNER CIRCLE BEG THE QUESTION: WHAT *IS* THE TRUTH ABOUT HILLARY RODHAM CLINTON?

BOB TYRELL
It's a recklessness that is born of arrogance that does back to her 1960's roots in their narcissism. They believe they are a rule unto themselves. Every time Hillary's been caught in scandal, she really did it. No one made it up.

DICK MORRIS
She's deceitful. She'll make up any story; lie about anything, as long as it serves her purpose of the moment. And the American people are going to catch on to it.
VO #7
SO, WHO IS THE REAL

HILLARY CLINTON? IS SHE A-BRILLIANT TRAILBLAZER, POISED TO MAKE HISTORY AS THE FIRST FEMALE PRESIDENT, OR IS SHE RUTHLESS, CUNNING, DISHONEST - WILLING TO DO ANYTHING FOR POWER?

FADE OUT

FADE OUT

MUSIC

PRETTY IN PINK BITES FROM "PINKpulls 11dec07"

PRETTY IN PINK Q&A

DICK MORRIS
When you look at all the scandals in the Clinton administration, all roads lead to Hillary.

ANN COULTER:
It also tells us something about the character of the American media. I mean they - they carry these people. Republicans with those numbers of character flaws, with that sort of behavioral problem and psychopathic psychology could not run or be elected to dog catcher if it were a

Republican.

AS PER DAVE, BETTER. MORE AGGERSSIVE HRC PHOTO FROM 90'S

VO#6
THE 'POLITICS OF PERSONAL DESTRUCTION' WAS A PHRASE POPULARIZED BY THE CLINTONS IN THE 90s TO DESCRIBE THE ATTACKS BY WHAT HILLARY CALLED THE 'VAST RIGHT WING CONSPIRACY. BUT, IS SHE ACTUALLY MORE FAMILIAR WITH PRACTICING THAT FINE ART THAN BEING ITS VICTIM?

MR. BLANKLEY:
They have been the masters of the politics of personal destruction. And then they use the well-known trick of accusing your opponents of your own malfeasance. So they accuse Conservatives of speaking honestly about the ethical shortcomings of the Clintons, while they, in fact, speak dishonestly about the integrity of their opponents. And that has been a bellwether, and it has done destruction to

people who they've encountered.

JOHN FUND
I think that even people in the Democratic Party will acknowledge the Clintons are particularly ruthless and particularly aggressive when it comes to campaigns. They war room. This is a military metaphor for the campaign the Clintons invented. The war room regarding instant responses that no matter what the validity of the charge you don't explain the charge, you don't apologize for the charge, you don't admit any error, you automatically attack the integrity or the motivations of the other side.

NEED WORK ON TRANSITION NEW CHAPTER

TONY BLANKLEY 14015
There are any number of things in the Clinton's political history worth recalling before you go in to potentially vote for a Clinton, in this case a Hillary Clinton//it's a small example but I think a telling one, when they

turned on, when they were in the White House, the travel ~~office~~, where you had career civil servants doing a great job providing the travel services for the President and his staff. And they wanted to get a lackey friend in, and they could have fired the guy in charge, but they accused him of a crime, they tried to ruin his life in order to get him out and get their lackey s in. 14054 (hard out)

Clinton inaugural b roll?

MUSIC-

VO #8
WHEN THE CLINTON'S MOVED TO 1600 PENNSYLVANIA AVENUE IN 1993, WHITE HOUSE VETERAN BILLY DALE WAS THE DIRECTOR OF THE TRAVEL OFFICE. DALE HAD FAITHFULLY SERVED 7 PREVIOUS PRESIDENTS STARTING WITH JOHN F. KENNEDY IN 1961. BUT DALE, WHO HAD ACTUALLY VOTED FOR CLINTON FOR

PRESIDENT, WOULD SOON DISCOVER THAT BUSINESS UNDER THE CLINTONS WOULD NOT BE BUSINESS AS USUAL.

BILLY DALE
we knew that we were in for a rougher transition because we had heard stories from secret service agents who had gone to Little Rock for a two week stay down there... and the stories that some of the agents would come back and tell us, that we just knew that it was going to be different. We didn't realize how different it was going to be.

MUSIC QUICK

BILLY DALE 10149 -
The new administration is free to fire anybody that they want to but uh, traditionally that does not happen

VO#9 (bd2)
ON THE DAY OF CLINTON'S INAUGURATION,

WEDNESDAY, JANUARY 20, 1993, BILLY DALE GOT A CALL FROM AN UNKNOWN WOMAN, INDICATING THAT KATHERINE CORNELIUS, THE 24 YEAR OLD 3RD COUSIN OF PRESIDENT CLINTON, WOULD SOON BE WORKING IN THE TRAVEL OFFICE.

BILLY DALE 10223
I got to know who Katherine Cornelius was, she went to work in David Watkins office, uh answering phones, but she never let up in her demands . . . to take over the travel office.

BILLY DALE 10352
in the meantime I get a telephone call from a gentleman in Ohio

BILLY DALE10355
And he wants to know how he can get in on some of the White House charter business,

BILLY DALE

BILLY DALE 10403

VIDEO CU male mouth talking into phone

And I said "That's what I do. I arrange the charters." And he says "I know. But-" he says, "We could make some money here."

MUSIC QUICK

BILLY DALE

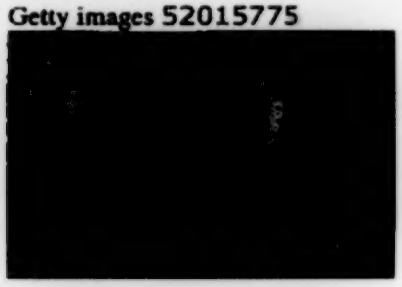
BILLY DALE 10427
If I had made arrangements with that gentleman I speculate that things would have been very different then as they turned out.

TRANSITION NEEDS WORK

FIX VO

Getty images 52015775

VO #11
THAT CALL WAS FROM DARNELL MARTENS, A PARTNER OF CLINTON'S CLOSE FRIENDS AND HOLLYWOOD PRODUCERS, HARRY AND LINDA BLOODWORTH-THOMASON, IN A TRAVEL AGENCY CALLED T-R-M. WHEN CONGRESS INVESTIGATED, THEY LEARNED HARRY THOMASON HAD MULTIPLE CONVERSATIONS WITH



FIRST LADY HILLARY CLINTON ABOUT TAKING OVER THE WHITE HOUSE CHARTERS.

BILLY DALE
[01:49:20] approx
at that time I didn't even know who Harry Thomason was, but we have since learned that Katherine was reporting to him and he was reporting to the First Lady, Hillary Clinton

VO #12
AS DALE SAYS, EVERY NEW PRESIDENT HAS THE RIGHT TO HIRE NEW TRAVEL OFFICE STAFF – EVEN THOUGH NO PRESIDENT HAD DONE SO FOR OVER 30 YEARS. BUT NOT ONLY WAS BILLY DALE FIRED, ALONG WITH 6 OTHER TRAVEL OFFICE STAFF MEMBERS, HE WAS ALSO LOCKED OUT OF HIS OFFICE. BUT THAT WAS ONLY THE BEGINNING.

BILLY DALE 10636

I got accused of embezzling $14,000 . . . that I couldn't account for because the logs were missing

BILL DALE: 10723 at the same time//

BILL DALE 10740
Didi Meyers is in, in the press room briefing the White House Press Corps, telling them that we were being fired for criminal misconduct and the FBI was being called in to conduct a criminal investigation.

Music quick

CONGRESSMAN BURTON

BURTON 10754
I think that they wanted to make it look like they were doing it because it was corruption over there so nobody would criticize them, because the media liked Billy Dale and the people there.

VO #13 (bd4)
GARY ALDRICH WAS AN FBI AGENT FOR 26 YEARS – THE LAST FIVE

AS AN AGENT RESPONSIBLE FOR BACKGROUND CHECKS ON WHITE HOUSE STAFF.

GARY ALDRICH (raw bite at 13535 from Gary Aldridge stringout)

GARY ALDRICH:
. . . the FBI had conducted investigations of all of these men and had determined uh, that they were qualified to work in the White House, and that they were honest individuals. I conducted some of those investigations . . .

GARY ALDRICH (raw bite at 13653 from Gary Aldridge stringout)

GARY ALDRICH:
Billy Dale, was humiliated and was accused of serious wrongdoing, to the degree that they conducted a Federal Grand Jury investigation and an indictment of him.

Music quick

BILL DALE: 10910
I had dedicated 32 years of my life to his job and served faithfully to democrats or republicans alike

GARY ALDRICH (raw bite at 13727 from Gary Aldridge stringout)

GARY ALDRICH:
the experience uh, was, was a major event in my career because it taught me that powerful politicians can misuse uh,

Alt angels?

law enforcement authority, almost whimsically. #And because it was the First Lady ordering the investigation, well then, charges have to be found. That scared me. That was different from my experience in the FBI of twenty-six years. I thought, if we've reached the level where a politician can get irritated with somebody, and cause them, to maybe end up in federal p, prison, we've got a serious problem.

Music – moody

VO #14
THE WHITE HOUSE TRAVEL OFFICE AFFAIR BECAME KNOWN AS TRAVELGATE. WHEN DALE'S LEGAL BILLS TO DEFEND HIMSELF WERE ESTIMATED TO RUN AS MUCH AS 750,000

DOLLARS, HE CONSIDERED A PLEA DEAL – A FINE OF 69 THOUSAND DOLLARS AND A BRIEF JAIL SENTENCE.

B-ROLL Blanch and Billy on dock

BILLY DALE: 11018 Blanch and I had been married for 38 years at that time . . . and I decided that I would have to sell my home, could I ask her to give up everything that we had worked for?

MUSIC QUICK

VO #15
THE PLEA BARGAIN SEEMED JUST THAT, "A BARGAIN," IN ORDER TO SAVE HIMSELF AND HIS FAMILY FROM THE UNENDING ORDEAL. BUT, WHEN DALE WAS INFORMED HE WOULD NOT BE ABLE TO PROCLAIM HIS INNOCENCE, HE REALIZED HE COULDN'T BARGAIN WITH THE TRUTH.

MUSIC QUICK

STILL IRS BUILDING

BILLY DALE 11045
in the meantime, during this year I got a uh, a notice from the IRS that I was being audited

VO #16 (bd6)
FOR THE NEXT 30 MONTHS DALE WAS INVESTIGATED. HIS SON AND DAUGHTER WERE ALSO SUBPOENAED.

BILLY DALE

BILLY DALE: 11330
I remember during my trial Vicky, my oldest daughter, telling her mother that if I was found guilty (cut down on crying a bit — goes on too long) // 11451 that if I was found guilty and I had to go to jail for something that I did not do, that she didn't know if she could live in this country any longer. When the, the government would be responsible for doing something like that to her father.

VO #17 (bd7)
WHEN THE CASE WENT TO TRIAL IN THE FALL OF 1995, A PROCESSION

OF WHITE HOUSE JOURNALISTS VOLUNTEERED TO SERVE AS CHARACTER WITNESSES FOR DALE, INCLUDING BRIT HUME AND SAM DONALDSON. THE JURY NEEDED LESS THAN TWO HOURS TO REACH A VERDICT.

BILLY DALE
11558 and the jury came in and they found me not guilty on all counts. 11616 And I laid my head down on the desk in front of me and cried.

music

VO #17A
ULTIMATELY, THE OFFICE OF THE INDEPENDENT COUNSEL'S FINAL REPORT ON THE TRAVEL OFFICE FIRINGS FOUND THAT MRS. CLINTON'S SWORN TESTIMONY WAS FACTUALLY INACCURATE.

BILL DALE: 102Hillary

Clinton was uh, I guess more powerful as a First Lady than any First Lady that had been in the White House that I knew of.

BILL DALE: 1011 have learned that she was involved with it more than Bill was, that Bill just wiped his hands of it and just would let her handle it.

TONY BLANKLEY 14058 (Blankley varicam timeline) that's an example of the cynicism and ruthlessness of the Clintons -and at the time I think a lot of people thought that Hillary had as much to do with that as Bill did.

~~APnote~~
~~BURTON 11750~~
~~Billy Dale ... and his family suffered immeasurably...at the hands of the Clinton Administration.~~

ANN COULTER
3842 what she did to the travel office I mean in a way that is the most illustrative scandal because

it was such an evita peron act of maliciousness toward these ordinary people this guy running the travel office all these years, I'm getting them out and my rich Hollywood friends in – it's not even the most illegal thing they did but its the most contemptible thing they did 3909*

Billy Dale last shot - alone

MUSIC – LONG FADE

VO #18
BILLY DALE WASN'T THE ONLY VICTIM OF WHAT SOME WOULD ALLEGE TO BE HILLARY CLINTON'S BRUTAL, AND CORRUPT, POLITICAL MACHINE.

NOVAK

NOVAK
I would say the most important thing that I would study is her conduct as first lady, not as Senator. Her lack of sensitivity to civil liberties, of privacy, of using the Internal Revenue Service, of her hostility to opponents, of her hardness, her meanness

NOVAK
The Clinton administration almost from its first day started using the IRS as a threat

COULTER

COULTER
I know a lot of tax lawyers and the odds of someone like Paula Jones with her income being audited by the IRS is like being struck by lightning twice.

VO #18a
OTHERS WOULD CLAIM THAT USING THE IRS TO HARASS POLITICAL ENEMIES WAS A CLINTON WHITE HOUSE SPECIALTY — ONE REMINISCENT OF THE STRONG ARM OF RICHARD NIXON.

TONY BLANKLEY
18:00
they're both very smart, very politically ruthless, very hardworking, great work habits, some of them not complimentary, very cynical, willing to do things that are beyond the pale of proper conduct.

VO #20
'PROPER CONDUCT' WOULD NOT INCLUDE USING PRIVATE INVESTIGATORS TO INTIMIDATE. THOSE ALLEGATIONS COME FROM SEVERAL WOMEN INVOLVED WITH BILL CLINTON — INCLUDING GENNIFER FLOWERS, ELIZABETH WARD GRACEN, PAULA JONES, AND . . . KATHLEEN WILLEY.

Former Clinton white house volunteer

KATHLEEN WILLEY(30006 willey timeline)
The scare tactics, being followed, and being audited by the IRS, their homes broken into, I mean, where does it end?

VO #21
CLINTON SUPPORTER AND CAMPAIGN WORKER, KATHLEEN WILLEY WAS A WHITE HOUSE VOLUNTEER WHO ALLEGES THAT PRESIDENT CLINTON SEXUALLY ASSAULTED

HER DURING A
MEETING IN THE
PRIVATE STUDY OFF
THE OVAL OFFICE IN
NOVEMBER OF 1993.

KATHLEEN WILLEY
20553 from willey
stringout)
I kept thinking to myself,
what in the hell is he doing?
That was what I kept
thinking and it sounds silly
at the time but I was
getting embarrassed for
him. This is just not proper

Brief beat/music

KATHLEEN WILLEY
You have to remember this
was at the time when there
was a lot of speculation
about his womanizing and I
was the loyal democrat and
I would not allow myself to
believe that was true, I just,
I just thought it was all just
rumor.

VO #22
WILLEY BELIEVES THAT
HILLARY CLINTON WAS
WELL AWARE OF THE
TACTICS USED BY THE

CLINTON WHITEHOUSE TO INTIMIDATE PERCEIVED ENEMIES. WILLEY SAYS TWO DAYS BEFORE SHE WAS TO TESTIFY AGAINST PRESIDENT CLINTON IN THE PAULA JONES SEXUAL HARASSMENT CASE, A STRANGER CONFRONTED HER.

KATHLEEN WILLEY:
13056 and he stopped and he said "Hey Kathleen, did you ever find your cat?" // // and then he said rather ominously "yeah, that bulls eye was a really nice cat" //that's when I thought, the hair standing up in the back of my neck and that is when I thought that something else was going on here

KATHLEEN WILLEY:
13244
and he kind of stepped back// he stood back and he said "you're just not getting the message are you?"

Retrack and for however

VO #22A
THE CLINTON ATTACK

MACHINE
IMMEDIATELY
TARGETED
WILLEY. ~~HOWEVER~~ AND
THERE ARE
CORROBORATING
WITNESSES.

VO #23
JARED STERN, A
FORMER MARINE,
LATER TOLD
CONGRESSIONAL
INVESTIGATORS HE
WAS HIRED TO
INVESTIGATE
KATHLEEN WILLEY
DURING A
CLANDESTINE
NIGHTTIME MEETING.

JARED STERN:
It was late at night. He called me, asked me to meet him here in this parking garage. I met him. He said he had something very important to discuss. Talked to him about it, discussed the tasking. And then I left to carry it out.

VO#24
STERN DECLINES TO
DISCUSS WHAT HE WAS

HIRED TO DO. BUT STERN HAS ADMITTED HE WAS SO UNEASY ABOUT IT THAT HE CALLED WILLEY, USING AN ALIAS. ~~AND TOLD HER SHE WAS IN DANGER~~.

JARED STERN (20758 big pic 006)
I made a telephone call to Miss Willey. I left a message on her answering service indicating I would try again the next day.

KATHLEEN WILLEY 23018
#and he'd he left a message for me saying that, telling me to...be careful that were people out to get me.

KATHLEEN WILLEY 20814 (big pic 006)
Jared Stern is a first hand witness to what the Clintons have done and are doing to these women.

JARED STERN 12834
The Clintons are a unit. They share a zeal for power and a willingness to engage

in any and all threat neutralizing strategies, legality be damned.

JARED STERN 20913 big pic 006
No one will ever say that what happened to Kathleen Willy was an anomaly. That M.O. can be seen throughout Clinton's political lives. It is consistent.

VO #25
WILLEY SAYS HER CAR WAS VANDALIZED, HER HOUSE BROKEN INTO, AND A CAT'S SKULL WAS LEFT ON HER PORCH. TODAY, SHE STILLS LIVES IN FEAR.

KATHLEEN WILLEY 32714
I don't understand how any woman in this country who could vote for a woman who does that to other people, who sets out to destroy and ruin these women who have crossed paths with Bill Clinton.

KATHLEEN WILLEY
32104 They're power hungry. They stop at nothing, they stop at nothing

WILLEY FINAL B ROLL
FADE OUT/

FADE UP

DICK MORRIS (BIG TIMELINE 20618)
I finally parted company with Hillary Clinton when I saw how she was using private detectives to investigate the women who were linked to her husband. Not to change him, not to reform him, not to make him a better person. But to cow the women into silence so that he could get elected president. I do not want that woman controlling the IRS or the DEA or the NSA or the FBI or the CIA. Not in a democracy, I don't.

ANN COULTER
42 I mean think of what it says about Hillary Clinton that she was willing to put up with his open philandering, with anything in a skirt who wanders

before his eyesight – all for the power - at least with Bill Clinton he was just good time Charlie. Hillary's got an agenda and she's willing to put up with that to be president of the united states, she's got a to do list when she gets to the white house 108

VO #26
HILLARY CLINTON'S MACHIAVELLIAN BEHAVIOR —HER TENDENCY TO MANIPULATE, DECEIVE AND DESTROY FOR PERSONAL GAIN IS NOTHING NEW. THIS WOMAN, NOW A HERO TO FEMINISTS, GAINED MUCH OF HER POWER DURING THE CLINTON PRESIDENCY FROM HER ABILITY TO DEAL WITH HER HUSBAND'S ~~SO CALLED 'BIMBO ERUPTIONS.'~~ INFIDELITIES.

DICK MORRIS
Bill was always heavily involved in the policies of his administration. But he

left chasing down his women and silencing them, pursuing the scandals and lying about them, escaping culpability for any of things in their passed to Hilary. She was his Nixon. She was his evil equivalence. She was the one who made sure that nothing got to him uh, because she was so good at it. And she was.

Chapter 2

VO #27
HILLARY'S MASTERY OF THE BLACK ARTS OF ATTACK POLITICS IS OFTEN SKILLFULLY CLOAKED IN LAYERS OF DENIABILITY. BUT WHEN SHE NEEDS MONEY, AS ALL CANDIDATES DO, HER ~~RECKLESSNESS~~ IMPRUDENCE BEWILDERS EVEN HER MOST LOYAL SUPPORTERS.

VO #28 (OLD pl a)
THE PATTERN IS A FAMILIAR ONE. HUGE AMOUNTS OF MONEY

ARE RAISED FROM POLITICAL INSIDERS, LOBBYISTS, AND SPECIAL INTEREST GROUPS. AND QUESTIONS FOLLOW. IN THE SUMMER OF 2007, HILLARY WAS FORCED TO RETURN NEARLY 900,000 DOLLARS FROM FUNDRAISER NORMAN HSU, WHO IS NOW UNDER INDICTMENT FOR RUNNING A PONZI SCHEME. DURING THE WHITE HOUSE YEARS, IT WAS THE DIRTY MONEY OF A CAST OF CHARACTERS THAT INCLUDED JOHNNY CHUNG AND CHARLIE TRIE — BOTH CONVICTED OF ILLEGAL CAMPAIGN FUNDRAISING.

DAN BURTON
. . . it was Johnny Chung . . . that said, uh, "The White House was like a subway turnstile, you put the money in and you got in."

JOHN FUND
And his tokens were very large of course. There's evidence that he collected money from a Chinese intelligence officer . . . trying to influence our elections to gain access to decision making powers in the United States so they would bend U.S. policy toward China . . . The campaign finance scandals were so extensive 120 people either fled the country to avoid being interrogated by investigators, plead the Fifth Amendment or otherwise avoided questions. Fourteen guilty pleas came out of that.

MARK LEVIN
740 This is really stunning, and it's stunning to me how the media will give her a pass, the media pretends none of these things happened — and they accept the Hillary operatives line, that's old new, everyone knows about it, let's move on. Let's move on? Now they're laundering

money thru Chinese dishwashers in Chinatown in New York

MICHAEL BARONE
I'm a little surprised that someone in the campaign didn't flag that down and say, ah 'dishwashers?' — maximum contributions or 1000 dollars? Let's look into that a little bit. The Los Angeles times looked into that and found they couldn't find something like third of these contributors and they found others who said they had no idea that they had made these contributions. It looks like a clear case that somebody committed campaign — (ah ah — clean this up) fundraising law violations and that the Clinton campaign did not do due diligence to track that down

VO #29 (p2)
ONE CASE IN PARTICULAR HIGHLIGHTS HILLARY'S HYPOCRISY AND STARTLING RECKLESSNESS WHEN

IT COMES TO RAISING ILLEGAL CAMPAIGN CONTRIBUTIONS. THOUGH MOST OF THE NEWS MEDIA HAS IGNORED IT, HILLARY WAS DIRECTLY INVOLVED IN WHAT HAS BEEN CALLED THE BIGGEST ~~ELECTION LAW~~ CAMPAIGN FINANCE FRAUD IN THE HISTORY OF THE UNITED STATES.

VO 29A
IT IS A STORY WITH ALL THE ELEMENTS OF A BESTSELLER: CASH, CONS, AND HOLLYWOOD STARS. AND IT WAS ALL CAUGHT ON TAPE

MUSIC QUICK

VO #30 (p3)
FEW BUSINESSMEN HAVE SEEN THE CAREER HEIGHTS, AND DEPTHS OF PETER F. PAUL.

PETER PAUL
I've been fortunate to spend time with some of the

Need Dali

world's most celebrated figures of the twentieth century. And one my idols was Salvador Dali. He was an extraordinary human being who lived life on his terms, he had a creativity that was unmatched. And he had a big influence on the way that I directed my life.

VO #31 (p4)
IN THE EARLY 1980'S PAUL, A MIAMI LAWYER PAUL WITH A PAST CRIMINAL RECORD INCLUDING CONVICTIONS FOR COCAINE POSSESSION AND FRAUD, HEADED TO HOLLYWOOD FOR A FRESH START AS A PROMOTER AND PRODUCER.

PETER PAUL
After doing various projects in Hollywood I decided after meeting a fellow who is an out of work model that that there was an opportunity for me to prove that I could cultivate a media icon, #
And within eighteen

months I had him on the cover of People Magazine. And ultimately it led to my first meeting with the Clintons, with Hillary Clinton actually.

Tonken b roll – HC-079

VO #33 (p6)
IN FEBRUARY OF 2000, PETER PAUL MET WITH HOLLYWOOD CHARITY FUNDRAISER AARON TONKEN. TONKEN WAS A CELEBRITY OBSESSED CON MAN WHO, IN JUST A FEW YEARS, WENT FROM BEING HOMELESS TO ONE THE CLINTON'S TOP MONEY CONTACTS IN HOLLYWOOD. LIKE MORE THAN A FEW CLINTON ASSOCIATES FROM THE PAST, TONKEN ENDED UP IN FEDERAL PRISON FOR UNRELATED FUNDRAISING SCAMS.

AARON TONKEN
(APPROX 910 IN) it was, in reality, it was a growing, new relationship. And if I hadn't gotten in trouble, it would have gotten stronger and stronger. I don't know

CLEAN UP AUDIO

where it ultimately would lead, but I suppose not in a good place, because all the people that I met around them, that I dealt with at different events, have all gone to prison. (10:00) And these are very close people, mainly to the President.

VO #33A
THROUGH TONKIN'S CONNECTIONS TO THE CLINTONS CAME AN INTERESTING OFFER: IN EXCHANGE FOR DONATIONS TO HILLARY'S 2000 SENATE CAMPAIGN, PAUL WOULD GAIN ACCESS TO BILL CLINTON FOR BUSINESS OPPORTUNITIES ONCE CLINTON LEFT THE WHITE HOUSE.

PETER PAUL
I had become a very close friend of the creator of Spiderman, Stan Lee. And we had started a company together in late 1998 . . . I embarked on this effort to try to hire Bill Clinton when he left the White

ADD NATS/MUSIC

House as a rainmaker for the company, Stan Lee Media. we had a luncheon at Spagos for twelve people that who were influential in the community . . . And we also raised some money for Hillary.

~~HRC: Don't tell everything.~~

PAUL: I indicated that my plans were to hire Bill when he left the White House. She responded by saying that she would help if I became a major supporter of her campaign.

VO #34 (p7)
IN JUNE OF 2000, PAUL AGREED TO FINANCE WHAT WOULD BE THE LARGEST AND MOST LAVISH POLITICAL FUNDRAISER EVER STAGED IN HOLLYWOOD.

PETER PAUL
I came up with a name for the event as the Hollywood Gala Salute to President Clinton. And it consisted of a concert, a dinner and a

reception.

PETER PAUL
in my office on July 17th, I got a phone call from Hillary Clinton

VO #35 (p8)
PAUL, WHO HAD A HABIT OF VIDEOTAPING MANY OF HIS ENCOUNTERS WITH HOLLYWOOD OR DC POWER PLAYERS – SAYS THIS TAPE IS EVIDENCE OF TWO CRIMINAL OFFENSES COMMITTED BY SEN. HILLARY CLINTON. THE TAPE SEEMS TO INDICATE CLINTON'S PARTICIPATION IN THE PLANNING OF THE EVENT -VIOLATING FEDERAL ELECTION STATUTES.

HRC CALL

(PHONE CALL FROM HRC . . .
I think that, Whatever it is your doing – is it ok that I thank you?

SUBTITLE HRC? IN MOTION

PAUL
I think it's tremendous.

We're having a good time trying to help out
HRC
Well I'm very appreciative. it sounds fabulous. I got a full report from Kelly (today)

VO#35A
WHEN HILLARY SAYS SHE'S NOT SURE ABOUT WHAT SHE CAN SAY OR NOT SAY, IS SHE ADMITTING THAT HER INPUT ON THE EVENT COULD BE ILLEGAL?

AS PER DAVE REPLAY HRC LINE FROM ABOVE

HRC
I think that, Whatever it is your doing - is it ok that I thank you?

PETER PAUL
Hillary Clinton refers to Kelly. Kelly is Kelly Craighead, Hillary's senior staff assistant at the White House
Hillary's confirmation that she had been fully briefed on my progress
And that she would be involved on a personal basis whenever needed . . .
committing a ~~felony~~

violation of the Federal Election Law.

(HRC PHONE CALL continues.)
you know I talked with Cher and she was just great. And I hadn't talked to her so you really did a great job selling it to her.

PAUL
And her reference to Cher being induced to contribute her singing services...all of them colluded to hide this from every investigation

CHECK WITH JT FOR LARGER AMOUNTS ON CHECKS

PETER PAUL
All of the expenses that I paid for entertainment and costs of various fundraisers for Hillary were never legally reported under the federal law if a candidate or her agent is involved in soliciting or coordinating a contribution from a donor that contribution must be considered to be made to that candidate's campaign.

I wasn't aware of those laws. But what I discovered was because Hillary was

involved directly personally and indirectly through her agent, Kelly Craighead in conceiving the event, in soliciting the money to pay for the event and then coordinating the expenditures for the event clearly the two of them . . . were violating federal law

Nat sound
Ladies and gentlemen, the chairman of Stan Lee media, Stan Lee – I just want to welcome you all to the Hollywood salute of WJC

PETER PAUL
It was the biggest event ever produced in Hollywood for a president. Mohammad Ali, John Travolta, Brad Pitt, Shirley MacLaine, the Steenburgens, Gregory Peck, -Cher, Diana Ross, Patty LaBelle, Toni Braxton, Melissa Ethridge, Sugar Ray, Michael Bolton, Paul Anka over a hundred stars and . . . the entire leadership of the democratic party was there, . . . a magical evening.

CHECK RE MUSIC CLEARANCE

Music -

CHANGE BACK TO ORIGINAL VO

VO #37 (p10)
BUT JUST TWO DAYS LATER - THE MAGIC WAS GONE.
Music – then echo out –

PETER PAUL
The Monday after the event. . . . I got a phone call from Ed Rendell telling me that the Washington Post was asking questions. . . and that the position that Hillary Clinton would take was that she hardly knew me and that I didn't give any money and that if I was smart in order to maintain my deal that I would go along with that.

LOSE THE THUMBPRINT IN PHOTOSHOP OR CHOOSE A NEW STILL

VO #38 (p11)
THE WASHINGTON POST'S BOMBSHELL QUESTIONED HILLARY'S DECISION TO ASSOCIATE WITH PAUL, GIVEN HIS CRIMINAL PAST. THE CLINTON CAMP IMPLIED THEY

WEREN'T AWARE IT.

PETER PAUL
I had been vetted six times, my house had been prepared for a presidential sleepover the president allowed me to put my name on 25,000 invitations . . . It's impossible to think that . . . they didn't know that I had federal convictions which anybody that uses the internet can find within four clicks.

SUBTITLE THIS

AARON TONKEN
Peter Paul was basically paying for the entire event, and he was held at arm's length. He wasn't invited to the White House.// And they did not really want to interact with him. And it never really dawned on me, because I really didn't understand those part of politics, how it works, that they do a vetting process.

NEW VO

VO #39 (v12)
~~MORE~~ AMAZINGLY ~~STILL~~, THE CLINTON'S CONTINUED TO SOLICIT MONEY FROM PAUL,

EVEN AFTER PUBLICLY DISTANCING THEMSELVES FROM THEIR NEWFOUND FRIEND.

FOOTAGE TIGHT on FAX coming out of fax machine
DATE August 24, 2000
featured HC for Senate LOGO featured

SFX FAX MACHINE connection tones.

REDEACT THE NUMBERS

PETER PAUL
On August 24th a fax was sent to my office, on Hillary's letterhead, the Hillary Clinton for Senate letterhead, by her finance director, David Rosen, asking me to transfer 100,000 dollars in stock

And here you have a smoking gun document, which is on her letterhead faxed to my comptroller, with the wiring instructions to send 100,000 dollars worth of stock

. . .that's illegal

Add some music or a breath here

PETER PAUL
when I became Hillary's biggest donor, no one made any reference to concerns about my credibility, my truthfulness or my ability to honestly do business.

Hillary has no problems with me as long as I'm writing checks.

VO #40 (v13)
FROM THERE - THE PAUL CASE TAKES TWISTS AND TURNS NO SCREENWRITER COULD IMAGINE. STAN LEE MEDIA COLLAPSES. PAUL IS INDICTED ON TWO FELONIES IN CONNECTION WITH TRADING OF STAN LEE MEDIA STOCK. HE'S ARRESTED IN BRAZIL BY INTERPOL, AND LANGUISHES 2 AND A HALF YEARS IN A BRAZILIAN HELLHOLE OF A PRISON AWAITING EXTRADITION.

PETER PAUL
she's never called me liar and she's never said that

my allegations are false.

What she has sworn to is that she can't remember some conversations that we had in detail.

PETER PAUL
I'm not asking anybody to like me or to trust me or even to believe me. I'm asking people to look at the record that is undisputed and to come to their own conclusions regarding the suitability of Hillary Clinton to acquire the highest office in this county

INTERCUT RAY on computer AND Peter COMPUTER reacting

POLYGRAPHER: June 9, 2000, did you discuss with Hillary Clinton supporting her campaign in exchange for President Clinton helping you in your business concerns?

PETER COMPUTER reacting

PAUL: Yes

POLYGRAPHER: Did Hillary Clinton pledge President Clinton's support for your business interest?

PAUL: Yes.

POLYGRAPHER: August 13, 2000 at Barbara Streisand's home, did you talk with Hillary Clinton about supporting her campaign provided President Clinton help you with your business interest?

PAUL: Yes.

POLYGRAPHER: I've been analyzing polygraphs since 1995. I attended the Department of Defense Polygraph Institute. . . . I would say Mr. Paul has been truthful in his answering the questions concerning the issues administered in the polygraph.

EVENT RECAP CLIPS

MUSIC QUICK

DICK MORRIS
It was the most lavish affair of all. But her campaign said that it cost four hundred thousand, not 1.1 million, so that they could use the other seven-hundred-thousand for the campaign, and use it to buy

Need to see Hillary

advertisements. //

Now the question is: did Hilary know it was a mistake? Of course she did. //Number one, she was there, and she knew it couldn't have only cost four hundred. Number two, she frequently urged Peter Paul to hold down the expenditures for it. //Number three, after the forms were filed with the FAC Peter Paul told her they were inaccurate and Hilary continued to file inaccurate forms.//

And finally the FAC investigated it and concluded it did cost 1.1 million

ADD HILLARY UP SOUND, "I WANT TO THANK STAN LEE, PETER PAUL . . . AND AARON TANKEN FOR THEIR LEADERSHIP ON THIS

VO #41 (v14)
THE CLINTON CAMPAIGN ULTIMATELY

PAID $35,000 IN FINES FOR HAVING UNDERREPORTED THE COST OF THE GALA. AARON TONKEN SAYS BOTH SENATOR CLINTON AND HER FINANCE DIRECTOR DAVID ROSEN KNEW OF HIS ILLEGAL FINANCING SCHEMES - INCLUDING HOW HE REIMBURSED CELEBRITIES WHO DONATED TO HILLARY'S SENATE CAMPAIGN.

PAGE 56 OF TRANSCRIPT
CLEAN UP AUDIO
ADD SUBTITLES

MR. TONKEN:
they wrote a check where I told them to write it, The Senate 2000 and the invitation they received, and then I reimbursed them either $1,000 or $2,000, depending if one or two people came.
//
AARON TONKEN:
I told David Rosen. He just didn't want to know (62:00). //and he just said, "Don't tell me anything like that." (weak) And I told the FBI.

VO #41-1

IS IT POSSIBLE THAT THE SENATOR FROM NEW YORK AND FORMER FIRST LADY; THE MOST EXPERIENCED ~~AND QUALIFIED~~ OF ALL THE CANDIDATES, WAS COMPLETELY UNAWARE OF HER FINANCE DIRECTOR'S DEALINGS?

VO #41A
PETER PAUL AWAITS SENTENCING FOR SECURITIES FRAUD. HE VOWS TO SPEND THE REST OF HIS LIFE TRYING TO EXPOSE WHAT HE CHARACTERIZES AS HILLARY'S CHRONIC PATTERN OF CORRUPTION.

FIND BLIZZARD HEADLINE

PETER PAUL
Well, I think that, like, William Safire said in the New York Times, Hillary is a congenital liar. //even David Geffen who was a supporter of hers commented on her facility with lying

PETER PAUL
if she can do this as publicly and in such a gross and unvarnished way, then imagine if she got additional power in the White House and what she would do with that

PETER PAUL
I can't think of any other politician in history who has shown such a disrespect and a contempt for the Constitution and the rule of law as Hillary. And I represented Richard Nixon's best friend and I knew Richard Nixon. And I'll tell you something. She's no Richard Nixon. She's worse.
Music fade

VIGNETTE FLATS BEHIND TYRRELL

BOB TYRELL
One of her great claims, throughout the 90's and in her career as a senator — is she'll say 'oh this is old news'.' //Well it's old news because the Clinton's are repeat offenders. They've been doing these things going right back to the 1980's

MOVE THIS

~~BARACK O'BAMA CLIP "Sen. Clinton is claiming basically the entire eight years of the Clinton presidency as her own, except for the stuff that didn't work out, in which case she says she has nothing to do with it,"~~

MARK LEVIN
As a senator Hillary Clinton has basically done nothing of note. She's not been a leader in national security. She has not been a leader on economic issues. She's not been a leader on anything.

VO #44
IS HILLARY REALLY THE MOST QUALIFIED TO HIT THE GROUND RUNNING IF ELECTED PRESIDENT? AFTER ALL, SHE WAS FIRST LADY FOR 8 YEARS AND NOW A SENATOR FROM NEW YORK. REFERRING TO HER OPPONENTS SHE'S SAID, QUOTE, "THERE IS ONE JOB WE CAN'T AFFORD ON-THE-

JOB TRAINING FOR: THAT IS THE JOB OF OUR NEXT PRESIDENT."

DICK MORRIS
Hillary says we should elect her president because of her tremendous accomplishments in the United States Senate. Well, she's passed roughly twenty bills. Let me tell you what some of them were. To commemorate the 225th anniversary of the American Revolution. To express our appreciation to Alexander Hamilton. To name the Thurgood Marshall courthouse in lower Manhattan. To honor the men's and the women's lacrosse high school team from Syracuse High School. To express the sense of Congress that Harriet Tubman, who died over a hundred years ago, should have received a federal pension.

DICK MORRIS
But is that the legislative gravitas and qualifications

enough to elect her president of the united states? Is she kidding?

VO #45
DURING HER SENATE CAMPAIGN HILLARY PROMISED TO CREATE 200,000 JOBS — LARGELY TO BENEFIT ECONOMICALLY DEPRESSED UPSTATE NEW YORK.

Nat sound or music—
Marshall walks down stalls to cam in slo mo, or milking cows or working

B roll part of this

MARSHALL BROWN: 12208
(I'm) Marshall Brown, I own G&B Farms. I've been in business for twenty years on my own. I grew up here on the farm with my father and then we sold out in 1985 and I started it back up in 1987. I work alone here; I have fifty holstein cows that I milk plus heifers. //

MR. BROWN: I've milked cows every day of my life for

twenty years!

Nat sound — marshall working

MARSHALL BROWN:
12501
Agriculture is New York State's largest industry. I don't know if Hillary was told that when she got off the plane or not. Dairy farming is the largest segment of that.

Nat sound — marshall working montage Milk machines, milk into containers etc

MARSHALL BROWN:
Three years ago, Hillary Clinton came to Oswego County. She said she had a plan for the dairy industry. Like all her plans, she never gives any specifics but it's going to make everything all wonderful for us. Two years after she gave her I got a plan speech the price of milk dropped to the same level it was in 1979 and I'm losing my ass.

Nats quick marshall working

GEORGE MARLIN
Senator Clinton's promise of 200,000 jobs for Upstate New York was one of the most irresponsible statements she ever made because (a) it proved to me that she had no clue of what was wrong with Upstate New York and (b) there's no way the federal government can deliver that.

LARRY KUDLOW
should she have made the promise, oh sure, that's what politicians do. That's what God put them on the earth to do, is make promises they can't keep.

LARRY KUDLOW
I don't fault her for making the promise [04:00]. I fault her for making bad votes in the senate against the very tax cuts that would have helped the State of New York.

Vignette this

NEWT GINGRICH
the Bush tax cuts were the

only hope Upstate New York had of competing and if New York State wasn't so burdened by heavy taxes, heavy unionism, heavy regulatory red tape, Upstate New York would be doing dramatically better.

HRC CLIP
I do have a plan . . . I have an economic plan for upstate new york etc

NEW VO

VO #46
BETWEEN 2000 AND 2006 OVER ONE MILLION NEW YORKERS MOVED OUT OF THE STATE FOR ECONOMIC OR FINANCIAL REASONS. TODAY, IN THE UPSTATE TOWN OF CLINTON, NEW YORK, MANY OF HILLARY'S CONSTITUENTS AREN'T PLEASED WITH THEIR SENATOR.

MS. DELVENA ROGERS: Well, we certainly would like more support from her in this area. I think every business would like to see more economic support.

MR. PARKER:
I think that she's just a typical politician; whatever the survey shows she should be doing, she's doing.

MR. LUBERGER: 10942
She tends to spend most of her time down state. That's where the votes are primarily. And sometimes we feel forgotten up here.

NATS QUICK FARMER BROWN B ROLL

MARSHALL BROWN
She cares more about her consumers, her food stamps, her welfare programs than she does the American farmer that's producing the food. When the American farmer is eligible for food stamps, there's a problem. Which I am.

VO #47
AS A PRESIDENTIAL CANDIDATE, HILLARY HAS MADE OTHER PROMISES THAT MAY

ALSO PROVE DIFFICULT TO KEEP.

Clip? NEED A NEWS CLIP HERE — HILLARY MAKING A HEALTH CARE PROMISE
HRC "will not create one new government department, etc. etc."

VO #48
HER SWEEPING HEALTH CARE REFORM PROPOSAL COMES WITH A PRICE TAG OF NEARLY $110 BILLION PER YEAR.

ANN COULTER
2823 ann is going to pay more, you ae going to pay more, people with jobs are going to pay more, that's why she's so popular with women with needs — but not so much so women with jobs

VO #48A
HILLARY'S FIRST EFFORT TO SOCIALIZE HEALTH CARE CAME IN 1993 DURING HER HUSBAND'S FIRST TERM. WIDELY

PERCEIVED AS A DISASTER, MANY SAY IT PROVOKED THE REPUBLICAN REVOLUTION.

Move this here and add to top
HEALTH CARE CUT NEEDS CONFORMING

NEWT GINGRICH
I mean, certainly you have to ask whether or not she's learned a lot from that experience. It was a failure. She knows it was a failure. It was a very embarrassing failure for her.

DICK ARMEY
ARMEY - Where have you seen the government make anything more efficient and less costly . . . and more effective by its presence? Where have you seen that, in what area?

Need to transcribe

HRC
You know, as we remember, back in '93 and '94 we tried to come forward with a plan. We weren't successful . . . I still have the scars to show from that

HRC
I have the scars to show for that experience.

LARRY KUDLOW
The effort to kill Hillary-Care was really good, common American sense. Americans know a bad fish when they smelled one.

DICK ARMEY
Everything Hillary wants for America is what Canada does for all of it's people, any one of whom that has five extra bucks in their pocket, comes across the border to the United States for health care services.

TONY BLANKELY 10441
I think I think it's worth remembering, after her health care fiasco, the Clinton team put her to the side. They gave her ceremonial duties thereafter. She was more like a Pat Nixon than she was like an Eleanor Roosevelt from mid-'94 onward, because Bill Clinton's professionals recognized she made a hash

of the one big policy she had been given.

DICK MORRIS OPTION
She was essentially out of the White House in '95, '96 ~~and '97~~. I know, 'cause I was there most of that time. //She was visiting China, she went to seventy foreign countries, she wrote a best-selling book, did book signings. Then when the Lewinsky scandal broke, she came back to Washington and in '98 and '99 led the effort to keep her husband in office and in '99 and 2000 spent her time running for the Senate in New York.

New music

HRC B ROLL – walking, with constituents etc

VO#49
MANY AMERICANS BELIEVE OUR HEALTH CARE SYSTEM NEEDS IMPROVEMENT. BUT WHAT IS HILLARY'S ~~BELIEVES THE ONLY~~ SOLUTION? ~~IS BIGGER GOVERNMENT . . . MUCH BIGGER~~.

DICK MORRIS 15736
Hillary is the closest thing we have in America to a European socialist. She favors a vast expansion of the role of government in areas of health care and education//15730 And she wants to increase taxes to do it.// 15733 from thirty-three percent, as it is now, up into the mid-forties and high forties, as it is in France and Germany.

ALSO HAVE SIMILAR SOUND BITE FROM JZ'S CD

TRY TO GET OCT 30 DEBATE –HILLARY PLEDGES TO TAKE 10 BILLION FROM OIL COMPANIES 30 Oct CNN DEBATE
HRC
I'm going to take $10 billion away from a lot of these industries, starting with money from the HMOs that are getting too much out of Medicare, starting with the no-bid contracts for Halliburton, starting with the defense industry that needs to be pared down and reined in. I've been very clear about that,

BAY BUCHANAN
(add – earlier incue) And as she talks on the campaign trail, her purpose of government as she sees it is to remold society for the common good.

redigitize

LARRY KUDLOW
the common good in this case means government. It means Washington. She wants government to be in control. She was government to direct the economy.

HRC
Need new transcript – profits

CREATE GRAPHIC WITH TEXT TO GO UNDER ANY AUDIO WE USE

BAY BUCHANAN
She expects to use the government to become extremely involved with the lives of the people in this country because government knows best.

MARK LEVIN
So when she talks about

	nationalizing health care, she's not kidding. She's been at this now for 10 years. She wants to take over the health care system.
Need YUMA B ROLL – SET THE SCENE-trains, the church, city detail, etc.	MUSIC OR TRAIN SFX – make it a sequence
(50:24)	VO #50 WHAT MIGHT HILLARY'S HEALTH CARE PLAN LOOK LIKE? WELCOME TO YUMA, ARIZONA.
YUMA b roll setup	MUSIC
Hospital set up shot	
	Nat sound – any medical b roll/patients nats?
HIEB TITLES: Lee Hieb, MD Yuma, AZ	DR. LEE HIEB in my practice about 70 percent of the care is paid for by Medicare, federal government, and another 20 percent is paid for by the state// So essentially we're a very socialized medical community here . . . .

B roll LEE CONT

nats

VO #51
BUT WITH SO MUCH FREE HEALTH CARE AVAILABLE FROM THE STATE AND FEDERAL GOVERNMENT, ABUSES ARE INEVITABLE.

NEED NAT SOUND ON LEE B ROLL

Music quick

DR. LEE HIEB
One of my favorites is a patient of mine who was actually a drug runner //His books didn't tally, and to teach him a lesson, they blew a hole in his foot with a shotgun down in Mexico.

Well, he went to the closest medical hospital in Mexico where medical care was free, but even he recognized that free medical care is not always good medical care, and they were going to amputate his foot.

So he hopped up to the border, literally, and at that point demanded an ambulance which by law we have to supply . . . . We brought him to our

emergency room . . . I said, "Let me guess. This guy is insured, right?" And my friend said, "Actually he has Medicare." //

This guy has been wanted for years on four federal warrants . . . we're giving him his Social Security check every two weeks." . . .

music

NEW VO

VO #52
CRITICS SAY HILLARY'S HEALTH CARE OVERHAUL IS NOT UNLIKE WHAT CITIZENS OF CANADA OR THE U-K NOW EXPERIENCE. YES, MUCH OF IT IS FREE – BUT, IS THERE A CATCH?

Nats – waiting room

DR. LEE HIEB
The waiting lists get longer and longer.

You can wait six months to see a specialist. That's socialism. When you're standing in a line waiting

and waiting, that's socialism.

HRC Clip:
"Well, I'm thrilled that universal health care is back on the national agenda.

DR. LEE HIEB 14326
medicine should be between one physician and the patient, not between an army of bureaucrats and the patient,

Nats yuma health care center quick

DR. LEE HIEB
If people give their health to the government, what does the government not control?

Med b roll

Music quick

redigitize

DR. LEE HIEB
The federal government from 3,000 miles away is not your doctor...

CHAPTER 4
FADE IN

VO #53
HILLARY HEALTH CARE IS ONE OF THE FEW

	CLINTON CAMPAIGN PLATFORMS THAT CONTAINS SPECIFICS. BUT ON OTHER ISSUES IMPORTANT TO AMERICANS, WHAT DOES SHE BELIEVE?
recreate the Edwards ad — no music — all from Oct 30 debate	HRC — debate 10/30 split screen 1 But on specific issue I've come out with very specific plans. With respect to social security I do have a plan./
TAKE FROM MATTHEW'S RECORDING	HRC – split screen 2
	But personally I am not going to be advocating a specific fix until I am seriously approaching fiscal responsibility.
New spot OR USE EDWARDS SPOT	TIM RUSSERT
USE TEXT (We've been told not to use anchors)	Do you, the New York Sen. Hillary Clinton, support the New York governor's plan to give illegal immigrants a driver's license?
New	HRC split screen 1
TAKE FROM YOUTUBE	"I just want to add, I did not say that it should be done, but I certainly recognize

why Gov. Spitzer is trying to do it.

HRC split screen 2
CHRIS DODD
"Wait a minute," "No, no, no. You said yes, you thought it made sense to do it.
HRC
"No, I didn't, Chris," Clinton said. "But the point is, what are we going to do with all these illegal immigrants who are driving?"

HRC SPLIT SCREEN 3
"You know, Tim, this is where everybody plays gotcha," she said. "It makes a lot of sense. What is the governor supposed to do?

HRC split screen 4
Do I think this the best thing for any governor to do, no.

TAKE FROM YOUTUBE

EDWARDS
"Unless I missed something, Sen. Clinton said two different things in the course of about two minutes just a few minutes

ago, and I think this is a real issue for the country.

OBAMA
" Well, I was confused on Sen. Clinton's answer. "I can't tell whether she was for it or against it, and I do think that is important.

TRANSITION

BOB TYRELL
obviously she hadn't been coached on, and if she's not coached, despite the fact that she's intelligent, she is so insecure and so loathes the give and take of real politics that she just seizes up, and she sure seized up when those questions were asked her

ANN COULTER
804 finally Hillary said they were so mean to her, all that happened in that debate, I think it was time russert engaged in the old journalistic practice of the followup question. That's all it took, and all hell breaks loose, cause Hillary's asked to actually tells us what her position is,

MICHAEL BARONE
You know it raised the question can you withstand the criticism the way any president has to because there's going to be a lot of it for any president, even during the most propitious times, and if your're gonna whine about people complaining about you, that doesn't suggest presidential stature or character

NEED TO CONFORM SCRIPT

HILLARY CLINTON MONTAGE
If I had been president in 2003 I would Iraq flip flop sedction

MICHAEL MEDVED
There's one Hillary who says, "I'm gonna bring the troops home right away when I'm elected President" and another Hillary who says, "I'm gonna keep troops in Iraq indefinitely." One of these two women is lying.

TONY BLANKLEY
I think she did that as long as she thought that it was

still politically advantageous to support the war effort. once 2006 kicked in and the war became quite unpopular, at least for a while, then she started moving to the anti-war position. //reversing the position she'd held only months before . . .

CLEAN UP

ROBERT NOVAK
not because her heart is full of pacifistic tendencies but because she thought it was the politically expedient way to go.

~~O'BEIRNE~~

~~CLIP Iraq War footage / Soldiers~~

~~KATE O'BEIRNE~~
~~. . . when politicians like Hillary Clinton tell our troops in the field that their mission is hopeless and encourages the enemy by talking about timetables for our surrender . . . they betray our selfless troops.~~

RETRACK TO TIME – NEED PICTURES

VO #53a
FLIP-FLOPPING ON A DRIVERS LICENSE IS ONE THING. BUT WORDS DO MATTER PARTICULARLY WHEN THEY IMPACT THE

LIVES OF OUR SOLDIERS AND THEIR FAMILIES.

Wroblewski section need. transcribing here

VO #53b

ROBERT "BUZZ" PATTERSON SERVED AS THE PRESIDENT'S SENIOR MILITARY AID IN THE CLINTON WHITEHOUSE. DISTINGUISHED SERVICE IN THE AIR FORCE, INCLUDING COMBAT MISSIONS, AND HIS REGULAR INTERACTION WITH THE FIRST LADY, GAVE HIM UNIQUE INSIGHT ABOUT THE POTENTIAL FUTURE COMMANDER-IN-CHIEF.

PATTERSON BITE NEEDS TO BE TRANSCRIBED

HRC CLIP
Hardest decision I had to make etc

Wroblewski's

Hrc clip

Wroblewskis – need transcript

MICHAEL LEDEEN
If, a legislator does not like the war and decides, "Enough already with this war", then, cut off the money. They're entitled to do that. But above all, its not up to a legislator to try to outguess the uh, military strategists-that's not their job.

~~GERTH~~
~~so in essence she was now trying to portray herself as, well, yeah, I was sort of only half for the war, really maybe against the war, before I actually voted for it~~

EXPAND THIS BITE

BAY BUCHANAN
so you say again, "okay. well she's flipping, she's flopping." no. she's not flipping and flopping. she's lying. she will not take responsibility for calling and asking our good and

brave soldiers to put their lives on the, the line. she will not take responsibility.

MICHAEL LEDEEN
. . . every Democratic candidate-they all want to just get out of Iraq, just whatever it takes. When the fact of the matter is, that you can't have good security in Iraq until you've dealt with, at a minimum, Syria and Iran, because they're the ones who are arming, training and running a lot of these terrorists.

Change coverage

VO #54
THE WAR ON TERROR ISN'T THE ONLY ISSUE WHERE HILLARY IS TRYING TO HAVE IT BOTH WAYS. WHEN IT IS POLITICALLY EXPEDIENT, HILLARY CAMPAIGNS ON HER HUSBAND'S PRESIDENCY, BUT WHEN THE POLLS SAY OTHERWISE, SHE ABANDONS THEIR RECORD.

Needs script conform

BARACK O BAMA CLIP
"Sen. Clinton is claiming basically the entire eight years of the Clinton presidency as her own, except for the stuff that didn't work out, in which case she says she has nothing to do with it,"

ADD FROM SCREENERS RECEIVED 10DEC07

BILL CLINTON: Clinton said he had a new campaign slogan: "Buy One, Get One Free."

MARK LEVIN
This is as much about Bill Clinton as it is Hillary Clinton. I mean for purposes of this election it's one and the same.

~~MOVE~~
~~ADD "EVIL MAN" LINE FROM JZ'S HRC GREATEST HITS CD~~

~~HRC~~
~~The question is we face a lot of dangers in the world and, in the gentleman's words, we face a lot of evil men and what in my background equips me to deal with evil and bad men?~~

ADD FILTERS

VO #55
"BUZZ" PATTERSON, CARRIED THE 'NUCLEAR FOOTBALL' FOR

PRESIDENT BILL CLINTON, WHILE SERVING IN THE CLINTON WHITE HOUSE, HE LEARNED FIRST HAND ABOUT THE FORMER FIRST LADY'S QUALIFICATIONS.

BUZZ PATTERSON
When she was moving around the White House hallways and corridors the, the edict was for us to avoid eye contact with her so as to preclude her from making exchanges like "Good morning, good afternoon." . . . those us that worked in and round herself and her husband would often times dive into open office uh, office ways, doorways to avoid her stare.

Music quick

BUZZ PATTERSON
I saw her vent on her husband many, many times.

[00:24:27]
BUZZ PATERSON:
As we entered the elevator

to go the top floor of this hotel for the fundraiser Misses Clinton lit into her husband with every profane four-letter word you've ever heard in your life, and as, as a military guy I've heard them all. //-how vicious it was, and how profane it was, and then of course we got to the top floor of the elevator uh, of the hotel, and the elevator opened, they were holding hands and smiling and waving like uh, they could turn it on and off in a heart beat.

VO #55A
BOTH CLINTONS ARE WELL AWARE THE WAR ON TERROR COULD BE KEY ISSUE IN HILLARY'S RUN FOR THE PRESIDENCY. BOTH HAVE BEEN QUICK TO FAULT THE BUSH ADMINISTRATION FOR FAILING TO PREVENT THE 9/11 ATTACKS – WHILE ABSOLVING THE CLINTON WHITE HOUSE OF ANY MISSED OPPORTUNITIES.

Need this

PATTERSON
there were many times, eight to ten that I'm aware of uh, in the 1990s that we had had a chance as a country to, to capture Bin Laden or to kill him . . . Clinton chose not to pull the trigger

FRANCELLE – NEED STOCK FOOTAGE HRC at 26 Sept 06 news conference in DC

HRC
I'm certain that if my husband and his national security team had been shown a classified report entitled 'Bin Laden Determined to Attack Inside United States,' he would have taken it more seriously than history suggests it was taken by our current president and his national security team,'

VO #55B
PATTERSON SAYS THAT'S LAUGHABLE
HE SAYS PRESIDENT CLINTON WAS BRIEFED BY MULTIPLE U-S INTELLIGENCE AGENCIES OF AL QAIDA PLANS TO ATTACK THE UNITED STATES.

PATTERSON
We knew about the potential and they specifically pointed to the possibility of using ~~flying he hijack-~~ hijacked airlines into the Pentagon, the CIA quarters, and it also talked about New York City.

CLIP? OR B ROLL CYRUS

B-ROLL FROM JOHN ZIEGLER?

VO #56
CYRUS NOWRASTEH IS THE AWARD WINNING WRITER/PRODUCER OF THE ABC MINISERIES "THE PATH TO 9/11". THOUGH HIS MOVIE TAKES AIM AT BOTH THE CLINTON *AND* BUSH ADMINISTRATIONS IN THE DAYS AND YEARS PRIOR TO 9/11, NOWRASTEH SAYS HE AND HIS FILM WERE TARGETED BY THE CLINTON MACHINE.

CYRUS NOWRASTEH
there was a huge coordinated campaign to discredit the movie and me, and get Disney ABC to pull

or re-cut the movie. It was unprecedented. There's never been an attack on a movie so broad and vicious.

VO #57
IN THE WEEKS JUST PRIOR TO AIR, NOWRASTEH'S HOME ADDRESS AND EMAIL WERE POSTED ON VARIOUS PRO CLINTON WEB SITES.

CYRUS NOWRASTEH
I got death threats at my house. I got hate mail, and they set about, basically, trying to destroy us, and stop this thing from airing. (14:00) The intimidation included five senators led by Harry Reid sending a letter to Disney ABC threatening to revoke their station licenses if they didn't pull or re-cut the movie.

Now one thing you've got to understand, // these phone calls, the threats on the internet, the bloggers, none of them had seen the movie.

music

Replace with angry bill still

CYRUS NOWRASTEH
This was all political spin. It was hysterical, it was out of control, and it was generated by ex-President Clinton from his offices in Harlem, where he met with (36:00) all of these bloggers to specifically discuss counter-measures against the ABC broadcast, "The Path to 9/11", and how they could get it pulled from the air.

CYRUS NOWRASTEH
Now Disney ended up cutting about three minutes from the over five hours of the broadcast.

Add this 10310
So I'm going to show that to you now.

CYRUS NOWRASTEH
Now they have the compound surrounded, they know where Bin Laden is, and what they need to do is coordinate with Washington, so they're on satellite phone

Currently there is way too much up sound

communication with Sandy Berger, Richard Clarke, George Tenet, et al from Washington to basically get the final green light to go ahead with this operation.

CLIP – (USE 30-45 secs maybe)

ANN COULTER

4431 its shocking that abc would bow down to bill Clinton on the path to 9/11 – it's shocking that bill Clinton would ask. ~~(I'm not a big fan of democrats)~~ you can't imagine Walter Mondale doing that, I don't even think you could imagine Jimmy Carter doing that

VO #58
PRESIDENT CLINTON HAS SAID HE NEVER GOT THAT CLOSE TO GETTING OSAMA BIN LADEN. BUT NATIONAL SECURITY EXPERTS HAVE SAID ON THE RECORD THAT THE PATH TO 9/11 WAS ACCURATE.

Clean it up

CYRUS NOWRASTEH
So the path to 9'11 got it right. That's why they were upset. We exposed the hot button truth that they'd been trying to bury for years.

VO #59
THE $40 MILLION PROJECT WAS A RATINGS SMASH - WITH NEARLY 28 MILLION VIEWERS. IT LATER RECEIVED 7 EMMY NOMINATIONS. BUT IF YOU WANT TO CATCH THE PATH TO 9/11 ON DVD – YOU CAN'T. ABC/DISNEY WON"T RELEASE IT. WHY WOULD THEY PASS UP MILLIONS OF DOLLARS IN DVD REVENUE?

CYRUS NOWRASTEH
12718 I think the initial attacks #were really about Bill Clinton's legacy. However now a year later with the dvd being suppressed I think it's about Hillary's run for the

White House

CYRUS NOWRASTEH:
All I can say is what the exec at ABC told me, which is, "If Hillary wasn't running, this wouldn't be a problem"

HAVE SIMILAR FROM CNN SCREENERS (came in 13Dec07)

BERGER -
"Last year when I was at the Archives I made an honest mistake.

VO #61
FORMER CLINTON NATIONAL SECURITY ADVISOR SANDY BERGER PLED GUILTY TO STEALING AND DESTROYING HIGHLY CLASSIFIED DOCUMENTS FROM THE NATIONAL ARCHIVES AND LYING TO INVESTIGATORS.

MICHAEL BARONE
I was surprised and astonished when I learned he had taken documents out of the National Archives, stuffed them in his socks, I have written ~~in my blog at US News.com~~

that the only reason Berger might have done this was at the behest of Bill Clinton or someone of similar stature who wanted information, or single copies, unique copies removed from the Archives

VO #61a
THE PAPERS REPORTEDLY REVEALED CLINTON'S RESPONSE REGARDING THE MILLENNIUM BOMB PLOT AND SUDAN'S OFFER TO TURN OVER BIN LADEN IN 1996. BUT BECAUSE SANDY BERGER DESTROYED THESE CRITICAL, SECRET DOCUMENTS, THE AMERICAN PEOPLE MAY NEVER KNOW THE TRUTH ABOUT THESE EVENTS OR THE CLINTON ADMINISTRATION AND 911.

CYRUS NOWRASTEH:
The documents that he stole pertain specifically to the sequence in the mini-series that they were upset

about. I believe they are criminally guilty of distorting history

PATTERSON

PATTERSON
there was a smoking gun in there in terms of what the Clinton Administration knew about Bin Laden

STOCK STILL Berger in front of 911 Commission

Music quick

JOHN MICA 12750
Sandy Berger had a mission, and that mission was to go in and clean up history, clean up mistakes, destroy any evidence of error or culpability to actions that led to 9/11. He accomplished that. He basically paved the way for her to move forward and give Bill a free pass. I mean, it is that simple.

VO #62
SANDY BERGER WAS FINED, LOST HIS SECURITY CLEARANCE FOR 3 YEARS, AND DISGRACED, ESPECIALLY IN WASHINGTON. BUT HE HAS RESURFACED.

~~INCREDIBLY,~~
REPORTEDLY, BERGER IS NOW AN ADVISER TO THE PRESIDENTIAL ~~CANDIDATE~~ CAMPAIGN OF . . . HILLARY RODHAM CLINTON.

ANN COULTER
2134 its either that he's really good at foreign policy, which I doubt or he knows something, or they owe him, and I think that's what it is

MARK LEVIN
3143 do I think he should be advising hillary Clinton? I think he's a perfect person to advise hillary Clinton he's sleazy he broke the law, he'll do her bidding, he should be her chief of staff as a matter of fact

VO #63
HILLARY IS TOUGH ON TERROR AS LONG AS IT'S POPULAR. BUT ONCE AGAIN THE REAL HILLARY CLINTON REMAINS A MYSTERY.

GERTH

STILLS or footage OF HRC WEBSITE

GERTH
we went through all the speeches that were posted on her website, some 200 of them . . . and there's no speech that's about counter terrorism or talks about the threat to the homeland,

GAFFNEY

STOCK STILLS HRC in NYC Sep 01

GAFFNEY
whatever Mrs. Clinton took away from the 9/11 experience is now slipping away or perhaps she never meant it in the first place

GAFFNEY At 1510
as far as I know, Senator Clinton simply has not wanted to discuss with clarity and certainly with the kind of authority would expect from a now senior member of the Senate Armed Services Committee that we are at war with a totalitarian ideology

TONY BLANKLEY 15730
I'd like to see a President in either party who is going to be honest about the nature of the danger, and willing to stand up and say this is what needs to be done, even

if it's not popular at the moment. She doesn't seem to have any instinct to be able to do that, whatever her high intelligence might be.

MUSIC QUICK

New music

VO #6
WHO *IS* THE REAL HILLARY CLINTON? CLINTON SCHOLARS AND WRITERS HOPING FOR AN ANSWER WERE SHOCKED TO LEARN THAT, DESPITE FREEDOM OF INFORMATION ACT STIPULATIONS, AFTER THREE YEARS THE CLINTON LIBRARY HAS ONLY RELEASED ONE HALF OF ONE PERCENT OF ITS RECORDS.

LEVIN

MARK LEVIN
This is the mentality of a tyranny, and yet the media treats this as if it's no big deal. It is a very very big deal. We paid for those documents at that library,

much of our money goes into that library. It's a federally run operation.

VO #67
THE CLINTON LIBRARY IS KNOWN LOCALLY AS 'LITTLE ROCK'S FORT KNOX'. NEARLY 2 MILLION PAGES OF RECORDS COVERING HILLARY'S YEARS IN THE WHITE HOUSE ARE LOCKED AWAY, CLOUDING HER ROLE IN POLICY MAKING. OVER 300 FREEDOM OF INFORMATION ACT REQUESTS ARE PENDING.

POSSIBLE ADD FROM 30 OCT CNN DEBATE

SEN. CLINTON: Well, that's not my decision to make. And I don't believe that any president or first lady has. But certainly we'll move as quickly as our circumstances and the processes of the National Archives permits.

~~SEN. OBAMA~~
~~We have just gone through one of the most secretive administrations in our~~

~~history, and not releasing, I think, these records at the same time, Hillary, as you're making the claim that this is the basis for your experience, I think, is a problem.~~

ANN COULTER
2335 This idea they're claiming now, 'we're trying to release them , we're trying to release them as fast as we can but the library just won't let us release them //

2355 you want the papers released order the papers released. They're your papers

MR. FUND:
I think the American people have a right to as much of a public record as possible about Hillary Clinton. Those records should be released before the 2008 elections so we can learn a lot more about exactly how much influence she had in the White House, what her positions were in the White House, and how she acted

in the White House.

TRANSITION NEW CHAPTER

music

VO #67A
CHARACTER IS DEFINED AS WHAT WE DO WHEN WE THINK NO ONE IS LOOKING. BY THAT STANDARD MANY CRITICS SAY THE CLINTONS ARE SORELY LACKING.

Stills – pardons

Add a beat here for music

VO #68
ON JANUARY 20, 2001, PRESIDENT CLINTON ISSUED 140 PARDONS ON HIS LAST DAY IN OFFICE. THOSE PARDONED OR RECEIVING COMMUTED SENTENCES INCLUDED COCAINE TRAFFICKER CARLOS VIGNALI AND THE BIGGEST TAX FUGITIVE IN U-S HISTORY MARC RICH.

Need marc rich still

MUSIC

VO #69
AS MUCH AS THOSE

PARDONS REVEAL ABOUT BILL, AN EARLIER PARDON MAY HAVE REVEALED EVEN MORE ABOUT HILLARY'S CHARACTER – AND HER WILLINGNESS TO DO *ANYTHING* TO GET ELECTED.

B ROLL – QUICK MONTAGE

Nat sound sfx

JOE CONNOR 21151
I remember the first Mets game (my dad) he took me to, and we were sitting at the very top at Shea Stadium, this is probably 1971 , . . .

//21221 it was just a beautiful day out with my dad. He loved the Mets, he loved his sports, and that's one day that I'll never forget, it's sort of being in the care with him and being at the game with him, and just enjoying his presence.

JOE CONNOR 10433
It was an idyllic childhood to be honest with you, I couldn't have asked for a better childhood up until I

was nine.

JOE CONNOR 10126
My dad was a very decent, honest family man. As a matter of fact on that day, January 24th, he was looking forward to coming home that Friday and having celebrating my brother's 11th and my 9th birthdays. It was going to be a big family event for us.

MUSIC

JOE CONNOR 21341
Fraunces Tavern has an extraordinary place in American history. It's where The Sons of Liberty met, it's where George Washington bid farewell to his officers at the end of the Revolutionary War, and it's also the place where Frank Connor, my father was murdered in 1975.

B ROLL

MUSIC (scratch Moby Live Forever)

SFX – NEWS FOOTAGE – REENACTMENTS (pull up pauses)

RICK: 34422
On January 24th 1975, I was working as surveillance

on the west side of Manhattan and the sirens started to go off, just an endless stream of fire trucks, police vehicles going down to the southern end of Manhattan and short time later turning on radio it was easy to find out that there have been a bombing in Fraunces Tavern,

STOCK FOOTAGE crowded NYC street circa 1975

RICK 22938
Nobody dreamt that this was a day time bombing of a restaurant in New York City in the United Sates of America, because it simply was not the sort of thing that happened in America.

NEW VO

VO #72 (connor 3)
THE SENSELESS BOMBING HAD BEEN PERPETRATED BY WHAT WAS ~~TO BECOME~~ ARGUABLY THE MOST ACTIVE TERRORIST ORGANIZATION IN US HISTORY, THE FALN. BUT IN 1975, THE FALN WAS A NEWLY FORMED, PREVIOUSLY UNHEARD OF ORGANIZATION THAT THROUGH

DEADLY VIOLENCE ADVOCATED COMPLETE INDEPENDENCE FOR PUERTO RICO.

JOE CONNOR 10700
I kept hoping and thinking that maybe he is under rubble and trying to get through and there is a mistake, it really didn't happen, that he was okay.

10633 My mom says, now that all she wanted to do was run. She wanted to run out of the door and keep running, I remember I was a little tiny nine-year-old, and I was – one of the guys had picked me up and I was sort of punching him in the back. Not knowing how to react to something like that.

JOE walks into Tavern – both angles ext and int 30156 goes in 30223 comes in

MUSIC (new – make this a big moment)

B roll dining room

JOE AND RICK ENTER BISSELL

RICK 22138
Joe this is The Bissell dining room at Fraunces

Tavern, and this is the room that suffered most of the damage in the bombing on January 24, 1975. The bomb was placed actually just on the opposite side of these doors.//

JOE AND RICK CROSS CUT

RICK 22348
waiters and some of the other witnesses remember seeing somebody come through this door carrying a large duffel bag. He looked around the room, one of the waiters was about to approach him and tell him that he had to leave. When he stepped back out, he apparently left the bomb outside,

RICK: 22455
This was a typical FALN type of device, it was a quantity of dynamite, included propane tanks which was one of their trademarks in building their bombs in the early days and a simple timer, a wrist watch altered to serve as a timer to set off the device.

JOE AND RICK CROSS CUT	JOE CONNOR: 22412 So, it was a timed bomb, so he new when he placed it that essentially the people that he was, that he had seen were going to feel the impact on them. RICK: Absolutely, he knew that he was committing mass murder, no question about it. The bomb was estimated as approximately 12 pounds of dynamite, 24 sticks of dynamite.
JOE AND RICK CROSS CUT	JOE CONNOR: 22648 Where would my dad have been sitting in relation to this table?
JOE AND RICK CROSS CUT	RICK: I believe your dad was sitting at the end of the table here Joe, and would have been one of the first people hit by the blast of the bomb.
CLOSE ON JOE, THEN EFFECT – BOMB GOES OFF	SFX – BOMB BLAST
GFX Diagram of Bissell dining room and blast pattern	RICK 22548 Joe, the bomb being just

outside this door here, when it functioned, much of the blast came of course through into this room knocking down this door, and that shock wave would have taken everything in the room and just made missiles out it. So, you have victims that have pieces of glassware, pieces of silverware pushed into their bodies as a result of the blast. //

HOLD ON JOE

RICK: 23752
three of the six people that were seated at a table, approximately here, were killed.

PRE-LAB JOE'S VO OVER ABOVE REACTION

JOE CONNOR: 23907
Do you know why they chose the time, the place, the day?

GFX FALN statement highlight "capitalist-imperialist-pigs"

RICK: 23921
The communiqué that they left said that they were trying to kill capitalist-imperialist-pigs in Fraunces Tavern and specifically sites Fraunces has been target.

Music quick

VO #73 (connor4)
FOUR DIED AND MORE THAN 50 WERE INJURED. IT WAS A TYPICAL FALN OPERATION – ONE OF OVER 130 BOMBINGS BETWEEN 1974 AND 1983.

VO #74 (connor 5)
BUT ON THAT CRISP WINTER DAY, AT FRAUNCE'S TAVERN, NO ONE COULD IMAGINE WHAT THE FUTURE HELD FOR THE MURDEROUS MEMBERS OF THE FALN.

DICK

DICK MORRIS Pg 47 line 17
Hillary's biggest problem running for the Senate was that she wasn't a New Yorker. And how is she going to appeal to the specific ethnic groups that make up the New York State electorate? And the biggest ones are people from Puerto Rican extraction. So in

SEE NEW CNN FOOTAGE OF HRC WITH PUERTO RICO POSTER IN B.G.

STOCK FOOTAGE HRC on campaign trail in NYC

September, 1999, right in the middle of her Senate campaign, she was approached by city councilman Jose Rivera, who really is a spokesman for the Hispanic community in New York. Who gave her a packet urging the pardoning of the FALN terrorists.

DICK MORRIS Pg 45 line 17 MR.
MORRIS: And included in the packet was a letter to Hillary asking her to use her influence on her husband to get these pardons granted. And two days later they were.

SEE HEADLINES OR JOE OR BOTH

MUSIC
And/or CLIP HC-054@5253

News anchor announces faln clemency

VO #75
IT MADE NO SENSE. NOT ONE OF THE INCARCERATED FALN TERRORISTS HAD REQUESTED CLEMENCY, OR HAD

EXPRESSED ANY REMORSE. IN FACT, PRIOR TO THAT ACTION, THE CLINTON ADMINISTRATION HAD GRANTED CLEMENCY IN JUST 3 CASES OUT OF OVER 3000 APPLICATIONS, ACCORDING TO THE OFFICE OF THE PARDON ATTORNEY AT THE JUSTICE DEPARTMENT.

ADD A BREATH

JOE CONNOR 11036
It was putting a political agenda of the Clinton's above my father's life

Music quick

ALTERNATE CAMERA ANGLES

RICK: 11052
Sandy Berger appeared on television a day or two after the pardons were granted or after clemency was granted and stated that these people were not personally involved in violence. That's simply not the fact

RICK 11245

in this case, these people were convicted of planting 36 bombs in Chicago. If that's non-violence, then Mr. Berger's dictionary is a little bit different than mine is.

ALTERNATE CAMERA ANGLES

RICK HAHN 11030
the Department of Justice received a memo from the FBI saying that under no circumstances should these people be released

FIND NEW STILL WITH HRC WHISPERING IN WJC'S EAR

RICK 11312
the President of the United States who had access to all this information//11314 ignored the facts of the matter.

Music quick

RICK 11254
You have to ask yourself who benefited from this besides terrorists themselves? it's my view //~~that you have concluded~~ the only other person that could have benefited from this was Hillary Clinton.

CUT

Music quick

VO #76
THE SENATE, ON A 95 TO 2 VOTE, LATER DENOUNCED PRESIDENT CLINTON'S FALN CLEMENCY.

NEW VO

CANDIDATE CLINTON CLAIMS SHE IS THE MOST EXPERIENCED. HER HUSBAND CLAIMS SHE WAS INTIMATELY INVOLVED IN HIS ADMINISTRATION. AND YET . . .

HILLARY SAID PUBLICLY SHE HAD, QUOTE, "NO INVOLVEMENT IN OR PRIOR KNOWLEDGE OF THE DECISION."

DICK MORRIS
Obviously she knew about it. Obviously she asked Bill to do the pardons. And obviously when she says she knows nothing about it she's not telling the truth.

Home movie footage

Music -

ADD MONTAGE THAT

JOE CONNOR 12027

REFLECTS NOSTALGIC OPENING CONNOR MONTAGE

How dare they – my father was a decent, honest, family man and he was being forgotten or used as a political pawn by those people who didn't have his decency, didn't have his family values and wasn't the kind of man, that my father was.

Ending b roll

Music – long fade

WRAP
Need a breather here – HRC montage

Music – fade up

Need an upsound clip here of Hillary

VO#77
WE'VE HAD ONLY TWO FATHER-SON PRESIDENCIES IN THE ~~230 YEAR~~ HISTORY OF OUR NATION. WE MAY BE ON THE VERGE OF THE FIRST HUSBAND AND WIFE COMMANDER IN CHIEFS. HISTORICALLY, AMERICANS HAVE NEVER BEEN KEEN ON DYNASTIES. SO IT'S WORTH REMEMBERING THAT A VOTE FOR

HILLARY IS A VOTE TO CONTINUE 20 YEARS OF A BUSH OR A CLINTON IN THE WHITE HOUSE.

John Edwards bite needs transcription

JOHN FUND
So what John Edwards is saying about outmoded thinking and nostalgia is really I think expressing a reluctance to turn American democracy which is very – I think mariducratic (ph.) over the two families. And Hillary Clinton would represent the past in that in a continuation of I think [22:00] a dangerous trend to electing people because of how much recognition they have rather their intrinsic qualities.

HRC STILLS AND B ROLL
Retrack president

VO #78
FINALLY, BEFORE AMERICA DECIDES ON OUR NEXT PRESIDENT, VOTERS SHOULD NEED NO REMINDERS OF THE WHAT'S AT STAKE — THE WELL BEING AND PROSPERITY OF OUR

NATION.

NEW

GERTH
we uncovered, uh, a radio show that Eleanor Roosevelt, her heroine, did in 1934, and Eleanor Roosevelt was asked during this show, when will a woman become president?

[00:39:09]

GEOFF GERTH: her answer// when a majority of the American people have trust and confidence in the integrity of her. And that's the challenge that Hilary faces,

BOB NOVAK
Its been said and I agree with it that this is the most personal political choice that Americans make. //They want, they – their personality traits, their – will they consider a person that they could trust, that they would like, that they were comfortable with, and that's were I think Hillary Clinton as a candidate has great defects.

PETER PAUL
She's not accountable. She'll never be accountable personally for anything that she does and her personality is such that she believes that the ends justifies the means no matter what those means are.

MICHAEL MEDVED
if she weren't married to Bill Clinton, what is there that she has accomplished in her life-that would lead you to believe that she should become the most powerful person in the country?

TONY BLANKELY 15604
which candidate is most likely to be able to be successful in protecting us from a threat from radical Islam? That is the central crisis of our time

FRANK GAFFNEY 13627
If she reverts to form, Hillary Clinton will likely be in the future what she has been in the past, which

is a person, a woman, a politician of the left, and I don't think that's going to good for the security of the United States.

NEWT GINGRICH
She can't favor English as the official language of government, has said she can't favor it. Eighty-five percent of the American people favor English as the official language of government. I think there are a number of big issues where you'd have a very clear contrast. She favors liberal judges. Ninety-one percent of the American people favor the right to say "one nation under God." The bigger this campaign is, the better the choices, the more trouble she's in.

MUSIC

NEW

LARRY KUDLOW
What will be important though, and this is some baggage she has to deal with, ~~Mrs. Clinton - Senator Clinton~~, is the idea of a co-presidency. The idea that

Bill Clinton will be back in the White House. Because I think when he left the White House people had enough.

NEW
HEADLINE GRAPHICS

COULTER
I can't imagine that Americans want to go back to the '90s and the country being dragged into this ugly, dysfunctional family drama.

JOHN FUND
I certainly don't see Hillary Clinton as someone who can unify the country. President Bush didn't, I don't think she would either.

~~MR. FUND: Hillary Clinton as president would probably run an administration that would very much look back to the eight years that she spent as first lady under Bill Clinton~~

BUZZ PATTERSON 14420
I think we are at a very critical time in this country I can tell you beyond a shadow of a doubt that uh,

	the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief.
	MARK LEVIN this vote comes down to one thing: liberty. Do you believe in liberty or don't you? Economic liberty, free speech, protecting our borders, protecting our country from terrorism – the issue is liberty.
HRC IN LIMO	music
TRAVELING LIMO DC SHOT	HRC You know . . . on January 20th, 2009 . . . some one will stand on the steps of the capitol . . . and raise his or her hand to take the oath of office as the 44th president of the United States of America.
	applause
TRAVELING LIMO DC SHOTS	DICK MORRIS we must not ever underestimate this woman. We must not ever
END ON NATIONAL ARCHIVES STATUE BASE	understate her chances of winning. We mustn't be

"PAST IS PROLOGUE"
RAPID CUTS MONTAGE
"BLIP-VERT STYLE"

END ON MATTHEW'S STILL OF HRC FROM WEB-SITE

lolled into a state of security and complacency by the new found moderation that she likes to talk about. And we must never forget the fundamental danger that this woman possess to every value that we hold dear.

You see, I know her.

MUSIC: Hail to the Chief

HRC EXITS LIMO

ANNOUNCER
Ladies and gentlemen, the President of the United States . . . .

WHITE OUT

END

END CREDITS

ADD THESE TO THE QUESTIONS TO CAMERA FOR CREDIT SEQUENCE

BOB NOVAK: The problem with that formulation is that as a practical person I know she wouldn't answer it. She doesn't answer questions so it's hard to think of them. If I were using some kind of a drug that'll force her to tell the truth, I'd like to know – I'd

really like to know what her model for America is? She's – it takes a village, does it take a government that she see - I would really like to know would she put kind of a tax system, what kind of an economic system, what kind of a regulatory system she has – not that she's going to propose but what she really wants for America. But she wouldn't tell the truth so it wouldn't be worth asking.

MR. FUND:
My question for Senator Clinton would be very simple you have a record of eight years serving in the Clinton administration as first lady, a very unusual first lady with a great deal of power and influence. The American people have a right to know as much as possible about your record during those years.

GERTH
I guess the, the question I would ask her is why at so many points in her career over the last 15 years has

she found it necessary to when she's made a mistake or made a misjudgment or made a misstatement, why she found it necessary to dig down deeper into the hole instead of just addressing the mistake, either admitting the mistake, explaining the mistake, uh. and moving o, why, why is she – has this proclivity to cover up and compound what sometimes starts out with small mistakes. Other times they're not small mistakes, but in either event, you know, make the matter worse.

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

CITIZENS UNITED	CIVIL ACTION NO. 07-2240
	WASHINGTON, D.C.
VERSUS	THURSDAY, JANUARY 10, 2008
FEDERAL ELECTION COMMISSION	10:00 A.M.

PRELIMINARY INJUNCTIONS HEARING

BEFORE THE HONORABLE A. RAYMOND RANDOLPH, CIRCUIT JUDGE,
AND THE HONORABLE ROYCE C. LAMBERTH AND RICHARD W. ROBERTS,
UNITED STATES DISTRICT COURT JUDGES

APPEARANCES:

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FOR THE DEFENDANT, FEDERAL ELECTION COMMISSION	KEVIN DEELEY, ESQ. DAVID KOLKER, ESQ. ADAV NOTI, ESQ. 999 E Street, NW Washington, D.C. 20463 (202) 694-1556
REPORTED BY:	WENDY C. RICARD, CCR, RPR

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Proceedings recorded by mechanical stenography.

Transcript produced by computer-aided transcription.

WENDY C. RICARD,CCR, RPR
OFFICIAL COURT REPORTER

P-R-O-C-E-E-D-I-N-G-S

JUDGE RANDOLPH: We'll hear from the plaintiff. we have to set time limits --

JUDGE LAMBERTH: We need to call the case, first.

THE DEPUTY CLERK: Civil Action 07-2240, Citizens United versus Federal Election Commission. Counsel, will you please introduce yourself to the Court.

MR. BOPP: I'm Jim Bopp. I'm representing the plaintiff.

JUDGE RANDOLPH: Good morning. We haven't set time limits. How much time do you think you'll need?

MR. BOPP: A total of 30 minutes with 10 minutes for rebuttal.

JUDGE RANDOLPH: That'll be fine. And the other side will have 30 minutes -- 40 minutes, as well. Okay. Proceed.

MR. BOPP: That would be 30 total and then 20 minutes for opening. Thank you. Thank you, Your

Honor. Like Michael Moore, Al Gore, and many others, both inside and outside of Hollywood, Citizens United has produced a political documentary that it wishes to advertise, sell, and broadcast on television. However, federal campaign finance laws impose unconstitutional burdens on this activity or prohibit it outright. This is an as applied challenge to these burdens and prohibitions.

Let's start with, first, principles as announced in Buckley in 1976. Congress has no authority, and the first amendment prohibits any attempt by Congress to regulate non-campaign-related speech through campaign finance --

JUDGE ROBERTS: Can I ask you a quick question? I think I heard you say this is an as applied challenge to those burdens. You have not abandoned the facial challenge that you had put in your papers to the funding prohibition of the movie, have you?

MR. BOPP: No, we have not.

JUDGE ROBERTS: Okay. Go ahead. I'm sorry.

MR. BOPP: All right. The first principle announced in Buckley on Page 80 was that Congress can only regulate communications that are, quote, unambiguously related to the campaign of a particular federal candidate, end of quote, by calling for a vote for/or against the candidate. Thus, the, quote, discussion of issues and candidates, end of quote, is constitutionally protected.

Now, Buckley applied this principle not only to a prohibition, which is the prohibition on independent expenditures over a thousand dollars, but also to disclosures. They applied that principle, the unambiguously campaign- related principle to, first,

the definition of political committee, and, of course, if you are a political committee, you have to file periodic reports and put a disclaimer on your publications; and, secondly, to the one time independent expenditure report which requires a one-page report for an independent expenditure and a disclaimer on the publication.

Congress had sought to regulate the -- both PAC activities and independent expenditures in a very broad way, defining expenditures as any communication for the purpose of influencing a federal election. However, the Court in order to insure that these campaign finance rules apply only to campaign related speech provide a narrow gloss to those requirements and to the definition of expenditure by requiring that the communication in explicit words expressly advocate the election or defeat of a candidate; thus, they then upheld the disclosure requirements on Page 81 --

JUDGE RANDOLPH: The law back then was that the -- it wasn't exactly as you described it. It said in relation to, and the Court was construing those words in relation to a campaign for office or something.

MR. BOPP: Well, in the PAC definition, it uses the word "expenditure". In other words, if you do a thousand dollars worth of contributions or a thousand dollars worth of expenditures, it triggers the requirement of being a PAC. Secondly, the independent expenditure report, independent expenditure, and expenditure was defined as for the purpose of influencing an election. So in each case, they were construing the word "expenditure", which applies to -- would apply to any communication for the purpose of influencing an election --

JUDGE RANDOLPH: This history is very interesting. I take it at some point, you're going to get to McConnell.

MR. BOPP: I'm sorry, sir?

JUDGE RANDOLPH: I said the history is very interesting, but I take it at some point, you're going to have to get to McConnell.

MR. BOPP: Certainly. McConnell applied. This same principle by deciding the case under Buckley -- under Buckley's rules that you have to be sufficiently campaign related in order to be regulated and then decided that the electioneering communication provision was the, quote, functional equivalent of express advocacy. In other words, they weren't creating a new rule, they were operating under Buckley's framework of the of the fact that you can only regulate activity that is campaign related because it calls for a vote for/or against a candidate.

Now, the Court in McConnell recognized that there were genuine issue ads and so when they went to the as-applied challenge in Wisconsin Right To Life, II, we find the Court giving us a test for, quote, Functional Equivalent of Express Advocacy as applied in McConnell, and that test announced by Chief Justice Roberts is that the communication must be susceptible to no reasonable interpretation other than as an appeal to vote for/or against a specific candidate.

And so and they held -- and that case involved a prohibition, and they held that the corporate corruption interest did not, quote, extend beyond campaign speech. So we have a straight line from Buckley through Mass Citizens for Life that applied the express advocacy test to corporate prohibition to

McConnell's Functional Equivalent of Express Advocacy and then Wisconsin's Right to Life's test by Chief Justice Roberts that there be no reasonable interpretation of the communication other than an appeal to vote for/or against. And in each -- and throughout this strain, of course, beginning with Buckley, was the application of this principle to disclosure.

In other words, there isn't some like -- you can regulate with campaign finance laws campaign related speech, but you can also apply disclosure to non-campaign related speech, and, in each case, the Court, beginning with Buckley, was distinguishing circumstances in which you urge a vote for/ or against a candidate with a discussion of, quote, issues and candidates, end of quote.

JUDGE ROBERTS: You're not saying that Wisconsin Right to Life holding extended to disclosure agreements, though, are you?

MR. BOPP. No. Well, the holding does, the analysis does. Well, let me say -- let me correct that. The holding --

JUDGE ROBERTS: I asked about the holding.

MR. BOPP: It was only challenged as to the prohibition. The reasoning is consistent with and is applying the principles of Buckley which applied the principle to disclosure, as well.

Now, the problem with disclosure is that there is an inherent harm -- and that was explained in Buckley -- and that is, quote, compelled disclosure in itself can seriously infringe on the privacy of association and belief guaranteed by the First Amendment. That is why --

JUDGE RANDOLPH: What is it that distinguishes your case from any other case involving an electioneering communication during the 30-day period prior to a primary?

MR. BOPP: Because it does not -- it does not pass Roberts' test. That is, Roberts' test is that the only ad that can be prohibited -- that's the holding -- is an ad in which there was no other reasonable interpretation than a vote for/or against a candidate. That reasoning is directly applicable to disclosure requirements as Buckley held. In other words, Buckley held that limiting campaign finance laws to only campaign-related speech is a principle that applies whether it is prohibition as in Buckley and Mass Citizens or disclaimer and disclosure requirements in Buckley, and so there is a continuity here. There is a principle that is applicable and because it was not challenged in Wisconsin doesn't mean that the principle is not equally applicable to other requirements imposed upon electioneering communications.

Now, I was mentioning that disclosure has inherent harms, and Buckley explained that. They explained that inherent indisclosure(Phonetic) includes, quote, deterring some individuals who might otherwise contribute, end of quote, to the organization; that is, disclosing their identity. It is because of that that the Court imposed what they called exacting scrutiny on Page 64 or if you look on Page 75 where they are considering a disclaimer -- excuse me -- a disclosure requirement, they said, quote, this strict standard of scrutiny must be applied, end of quote.

And if there is any doubt, McIntyre on Page 347 explained that exacting scrutiny requires narrow

tailoring and service of a compelling governmental interest.

JUDGE ROBERTS: May I ask you then if you're arguing about the effect on donors is one that you are advancing now, are you advancing that in connection with whether the exacting scrutiny test has been met here or are you advancing that to further your own argument about irreparable harm or both? I don't mean to --

MR. BOPP: There are certainly -- it has both of those ramifications; that is, the first ramification is that it triggers strict scrutiny, and so we are not in some area where -- which I suppose is their argument -- that you can have more disclosure than you can have prohibition.

JUDGE ROBERTS: Well, let me understand. Are you arguing that the proper test to apply for the as applied challenge to the disclosure requirements is strict scrutiny and not the exacting or intermediate scrutiny the FEC advances?

MR. BOPP: It is strict scrutiny, but, as I just mentioned, exacting scrutiny is strict scrutiny. On page --

JUDGE RANDOLPH: Even though your ads by your own argument -- do your ads consist of commercial speech.

MR. BOPP: Well, it's commercial. It's a mix. Well, the confusion for this arises --

JUDGE RANDOLPH: You're saying -- we're not engaging in political speech involving a campaign, what we're doing is we're trying to sell these DVD's, so that's commercial speech.

MR. BOPP: Well, you get the message --

JUDGE RANDOLPH: And does the Supreme Court say that commercial speech is subject to the regulation of commercial speech like cigarette advertising and all the rest of --

MR. BOPP: No. This is not commercial speech in that sense.

JUDGE RANDOLPH: In what sense is it, then?

MR. BOPP: Only under the regulation of the FEC, the creator of the safe harbor, where a communication had certain aspects of a commercial transaction. I think that's where the confusion comes. The constitutional analysis, this is political speech. We have in a 30-second ad, which they concede meets Roberts' test and is not campaign related.

JUDGE RANDOLPH: Your papers say this is not political speech. We're proposing a commercial transaction. That's what commercial speech is.

MR. BOPP: We do say it is issue-oriented political speech. We do say that. And it is -- the 30-second ad says --

JUDGE RANDOLPH: What's the issue?

MR. BOPP: The 30-second ad --

JUDGE RANDOLPH: What's the issue?

MR. BOPP: That Hillary Clinton is a European socialist. That is said in the 30-second ad. That is an issue about politics. They say it straight up in the 30-second ad.

JUDGE RANDOLPH: Which has nothing to do with her campaign for the presidency.

MR. BOPP: Not specifically, no. It doesn't mention the campaign. It is no doubt an issue

pertinent to the campaign, if you will, or would be -- that type of thing is what people discuss and talk about in the context of a campaign.

JUDGE LAMBERTH: But aren't issues normally dealing without personalities? In other words, once you say Hillary Clinton is a European socialist, aren't you saying vote against her?

MR. BOPP: No.

JUDGE LAMBERTH: What's the difference? Isn't that the functional equivalent?

MR. BOPP: No.

JUDGE LAMBERTH: Why not?

MR. BOPP: Because the functional equivalent as Justice -- Chief Justice Roberts said a few months ago, it requires that there's no other reasonable interpretation called for/or against a candidate and says specifically --

JUDGE LAMBERTH: What's the reasonable interpretation of what you just said?

MR. BOPP: It is a discussion of issues about --

JUDGE LAMBERTH: With her name in it.

MR. BOPP: Excuse me, sir?

JUDGE LAMBERTH: With her name in it it's a discussion of issues.

MR. BOPP: Yes. Related to her.

JUDGE LAMBERTH: And it doesn't suggest that you vote against her.

MR. BOPP: That's right.

JUDGE ROBERTS: You're just talking about the questioned ad at the moment or the three --

MR. BOPP: I think that's what we're talking about and which they already conceded meets the Roberts' test.

JUDGE LAMBERTH: Right.

MR. BOPP: And argues that it is not to be prohibited under the Roberts' test, and then they say that that is moot because they concede that it can be run. Now, as to the mootness, we say it is not moot; number one, it took them 24 days to figure out what whether the 30-second ad was prohibited or not, and so it leaves us very uncertain as to what can happen in the future.

And, secondly, the commission itself only has two people -- requires four commissioners. So the commission itself hasn't even taken a position on this. And, finally, under DC Circuit decision Chamber of Commerce versus Federal Election Commission -- even if they had taken an official position, it does not moot a challenge to a statute or a regulation. So there is no mootness (phonetic) here.

The issue of whether the 30-second ad is prohibited, which they concede meets the Roberts' test is a question for this Court to decide. Now, as –

JUDGE ROBERTS: Now, how do you answer the FEC's argument that cases in the past that have stricken funding restrictions have nevertheless upheld the related disclosure restrictions?

MR. BOPP: And what would that relate to?

JUDGE ROBERTS: I take it that you are making an argument that if it is protected speech that no one can ban funding in a certain way; that means that any kind of speech should be regulated in any way.

MR. BOPP: If it's not campaign related, it can't be regulated in any way.

JUDGE ROBERTS: Well, my question was how do you answer FEC's argument that they had made that -- is faulty because there have been cases in the past where there has been a ban, and they have struck down a ban on funding restrictions, but the related disclosure restriction was upheld.

MR. BOPP: I am not familiar with such a case. Maybe they can enlighten us on what case they are talking about, but I'm not familiar with such a case; that is, simultaneously struck down a prohibition that upheld a disclaimer. I mean we have four Supreme Court cases -- the four leading cases on campaign finance law in America which do the exact opposite; that is, Buckley strikes down both prohibitions and disclaimers on the basis that it's too broad and encompasses speech that is not campaign related. So I just don't know what case they're referring to.

And the principle just creates a bright line. In other words because the principle separates what Congress can regulate under campaign finance laws and what Congress cannot regulate under campaign finance laws because it is only unambiguously campaign related activity that gives rise to any of the interests that would justify congressional regulation, including the disclosure interest.

Now, moving to the prohibition and the movie, we've alleged and they do not contest that there is no express advocacy in this movie. There is considerable issue advocacy --

JUDGE LAMBERTH: Do you have to use the magic words "vote" for it to be express advocacy; is

that your position? As long as you don't say "vote", then you can say anything. You can say she's a terrible person.

MR. BOPP: Yes.

JUDGE LAMBERTH: She's -- well, I'll give you a couple of direct votes.

JUDGE ROBERTS: -- got to do it on the record.

JUDGE LAMBERTH: Well, I guess -- tell me why this is all sealed. why is the transcript sealed?

MR. BOPP: Well, at the time the transcript was sealed --

JUDGE LAMBERTH: So you can sell it; that's why we have it sealed?

MR. BOPP: Yes. Because it was not completed. The movie was not completed.

JUDGE LAMBERTH: Is there a reason it is sealed today?

MR. BOPP: There would be no need to have it sealed today. When we filed it, yes; but now --

JUDGE LAMBERTH: We can unseal it today.

MR. BOPP: we could do that, yes. And, in fact, we have filed with the Court an unsealed version of the final movie and the final ads.

JUDGE LAMBERTH: Okay.

MR. BOPP: So that you can see them in DVD in addition to the fact that you have the transcript.

JUDGE LAMBERTH: I have not received that.

MR. BOPP: That was filed on Monday. I had the -- I was notified electronically that it was filed.

JUDGE ROBERTS: In any event, there's no problem with it --

JUDGE LAMBERTH: -- file it. It didn't get to me. But in any event --

JUDGE ROBERTS: There's no problem with us citing passages from the --

JUDGE LAMBERTH: -- what you just said we can unseal -- I can tell you beyond a shadow of doubt that Hillary Clinton that I know is not equipped, not qualified to be our commander-in-chief. That doesn't say vote against her?

MR. BOPP: That does not say vote against her.

JUDGE LAMBERTH: Because it did not use the magic words.

MR. BOPP: Exactly right.

JUDGE LAMBERTH: And unless you use the magic words --

MR. BOPP: It said explicit words of advocacy.

JUDGE LAMBERTH: What could be more explicit advocacy than to say she's not equipped to be commander-in-chief?

MR. BOPP: Explicit words of advocacy to vote for or against?

JUDGE ROBERTS: How is that different from Billy Yellowtail(Phonetic), then?

MR. BOPP: How it is it?

JUDGE ROBERTS: Yeah.

MR. BOPP: Well, the movie involves numerous issues that are related to either conduct in office, when she was in the White House, or her policy

positions. Not what she is doing with her husband behind closed doors -- Yellowtail, remember, he hit his wife and said he didn't hit her hard. That has nothing to do with public policy or conduct in office, issues that are legitimate about discussing in the public square about politicians.

She was in the White House for eight years as First Lady. It talks about the travel -- office firing of White House personnel. It talks about the White House giving pardons to which President Clinton did, but she had a -- arguably hand in. It talked about responsibility of the Clinton administration for 911. It talked about her policy positions on health care, immigration, the war on terror and Iraq.

JUDGE ROBERTS: And over and over, it returns to a refrain such as the one on Page 32: I'm not asking anybody to believe me, I'm asking people to look at that record, it's undisputed, and to come to their on conclusions regarding the suitability of Hillary Clinton to acquire the highest office in this country.

MR. BOPP: It doesn't advocate the election of a -- they haven't claimed it.

JUDGE LAMBERTH: Oh, that's really --

MR. BOPP: They haven't even claimed it. These are the experts over here.

JUDGE ROBERTS: And you really think that's different from the conclusion the Supreme Court reached with respect to the Billy Yellowtail ad?

MR. BOPP: Yes, I think it is different.

JUDGE ROBERTS: All right.

MR. BOPP: You can talk about -- and this kind of gets down to the critical distinction in position. They are claiming that they have authority to prohibit communications because it discusses the character of the individual. That's their position.

Now, there's no question that this movie discusses the character in certain places of Hillary Clinton.

JUDGE ROBERTS: Many places; you would concede that?

MR. BOPP: I haven't counted many. You could say many; many places. It's a 90-minute documentary. It discusses a wide range of issues, and it does discuss her character as it relates to her conduct in office and her policy position. It does do that, no question.

Well, Buckley said that there is a distinction between urging somebody to vote for/or against a candidate on the one hand and discussing issues and candidates -- and, look, what people do in office, what it demonstrates in terms of their character, is a legitimate issue.

JUDGE ROBERTS: And issue ads often exert listeners to do something at the end of those ads. What does this ad or movie exert listeners to end up doing?

MR. BOPP: Nothing. Nothing. Because it doesn't urge them to vote for/or against a candidate. It urges them to do nothing. It's just like what you see on Frontline.

JUDGE ROBERTS: On what?

MR. BOPP: Frontline; on the PBS documentary series called Frontline or Nova or 48 Hours or 60 Minutes. They talk about issues, and you --

JUDGE LAMBERTH: You can't compare this to 60 Minutes.

MR. BOPP: Huh?

JUDGE LAMBERTH: You can't compare this to 60 Minutes. If you read those transcripts --

MR. BOPP: Well, I beg to differ. I feel that it is comparable. I mean it's a political documentary, no question. It's about politics. It's about issues and character, but it does not call for a vote for/or against a candidate as other documentaries such as -- how about Farenheit 9/11, Michael Moore's documentary; a hard-hitting, political documentary that called into question every aspect of the incumbent president who was up for re-election?

I mean this used to be the American way. This is the American way. You can talk about politicians. You can talk about candidates, of what they're doing to us and for us in office. And the FEC in order to -- because they --

JUDGE LAMBERTH: You still can here, the only thing is you have to disclose who it is that's talking.

MR. BOPP: Well, absolutely, you're prohibited.

JUDGE LAMBERTH: Right.

MR. BOPP: Okay.

JUDGE RANDOLPH: I want to make sure it's clear on your position here. What I hear you saying is, number one, that if advertisement or whatever, a statement that's broadcast within 30 days of

elections does not expressly advocate the election or defeat of a candidate --

MR. BOPP: Uh-huh.

JUDGE RANDOLPH: -- then it can't be regulated in any way, shape, or form.

MR. BOPP: Either expressly advocate or Roberts' test, also. I mean Roberts' test is the applicable test under the electioneering communication provision.

JUDGE RANDOLPH: So that means, under your proposal, the PAC's and 527's also would not have to make any disclosures and would have to make no disclaimers.

MR. BOPP: No. PAC's would. PAC's would. They are registered with the Federal Election Commission. Their major purpose is to engage in campaign-related activity under the proper constitutional --

JUDGE RANDOLPH: What if they promulgate an ad or put out an ad that is the same as the kind of ads that you're putting out? Why would they have to --

MR. BOPP: In PAC? Because the federal campaign finance laws requires all expenditures and all contributions of PAC's to be reported. That's why.

JUDGE RANDOLPH: But I think I heard you say not five minutes ago that you can -- under the First Amendment, those kinds of ads can't be regulated in any way. Now, you're saying they can be if your a PAC.

MR. BOPP: If you're a PAC, they can. Yes. If you're a PAC, they can be.

JUDGE RANDOLPH: So the First Amendment right depends on not the speech, but on who the speaker is; is that your --

MR. BOPP: In that case, that's what the Court in Buckley decided. They said that if an organization's major purpose is the nomination or election of candidates, then all of its expenditures and contributions can be required to be reported because of the major purpose test. Well, they don't pass the major purpose test.

JUDGE RANDOLPH: What about 527's?

MR. BOPP: Well, the 527's, if they are not PAC's

JUDGE RANDOLPH: Right.

MR. BOPP: -- they would say that their major purpose is not the election or defeat of candidates under federal election laws.

JUDGE RANDOLPH: So if they don't expressly advocate vote for/or against, then their ads also -- they would not have to make any disclosure in their disclaimer.

MR. BOPP: That's correct. That's correct. Okay. Now, again, the reason for this case is if they fall under the electioneering and communication provision, then, currently, they have to meet the Roberts' test not to be prohibited, and we are saying -- the purpose of this challenge, one purpose, is also to say that the disclosure requirements cannot be applied to ads that do not meet Roberts' test as they concede the ads do not meet Roberts' test.

Now, understand, the FEC's position goes beyond what our discussion has been. The FEC's position is that they have the power to require disclaimers of, quote, attempts to sway public opinion on issues just

as the plaintiff claims to want to do here, end of quote. In other words, for them to win, their position is, well, we have the authority that goes way beyond campaign finance speech. Forget Buckley. Forget Mass Citizens. Forget McConnell. Forget Wisconsin Right to Life. We can just go right out and take on issues by requiring disclosures and disclaimers on them, and, of course, the quintessential example of that type of an ad in which that would be unwarranted is the Wisconsin Right to Life ad which is a grassroots lobbying ad, a classic example of genuine issue ad, which was the subject of the Wisconsin Right to Life suit.

Now, the --

JUDGE ROBERTS: By the way, when you come back up, perhaps, for rebuttal or unless you remember now the question I had asked --

MR. BOPP: Is 20 up?

JUDGE ROBERTS: No. The question I had asked you about before which you may be returning to right now.

MR. BOPP: Okay.

JUDGE ROBERTS: About the FEC's position about the cases that have struck down the funding prohibition but left in place the disclosure restrictions appears on Page 14 of the FEC's opposition to your first preliminary motion. You can take a look at that, perhaps, on rebuttal, address that.

MR. BOPP: Does that refer to a case?

JUDGE ROBERTS: It does.

JUDGE RANDOLPH: You've used up your 30 minutes.

MR. BOPP: Oh, well, I'm sorry. Then I'll --

JUDGE ROBERTS: Page 14.

MR. BOPP: Page 14. Thank you.

JUDGE RANDOLPH: Let me hear from the FEC.

MR. DEELEY: May it please the Court, Kevin Deeley on behalf of the Federal Election Commission. This is indeed a case about the First Amendment. There are competing interests at play, and the First Amendment supports disclosure here as McConnell put it because of the First Amendment interests of individual citizens seeking to make informed choices in the political marketplace. People want information about who is airing and funding political broadcasts in order to evaluate the messages they are receiving and detect corruption in government.

JUDGE RANDOLPH: Isn't that flatly against the First Amendment, that proposition, the one that you just expounded? And the cases there are -- and, particularly, in the lower courts and some of the commentators have noticed that the Supreme Court failed to even mention a whole line of cases going way back where they had held that the right to speak anonymously is a right under the First Amendment.

And the entire purpose of the federal election -- or this new amendment to the federal election law is to take away that right to speak anonymously. The framers of the federalist papers didn't sign their names; didn't sign Hamilton, and Madison and -- they signed publius.

Do you -- how strong do you think that holding of the Supreme Court is, the McIntyre case goes against it; the City of Straton case goes against it; Judge Easterbrook in the Seventh Circuit has refused to vote on a disclosure provision saying in a separate opinion that he can't -- the whole area is totally unprincipled as a result of the Supreme Court's McConnell decision.

MR. DEELEY: Well, the McIntyre case has been -- has not been extended in any further Supreme Court jurisprudence, and it's very different from the case we have here. Partially, what we're talking about is speaking versus contributing money. We're talking here about disclosure of people who are giving money to plaintiff so that plaintiff may speak, and so what -- partially what we're getting disclosure of is the contributions that are made to plaintiff.

So that -- in a contribution context, the Supreme Courts held that is more marginal restriction -- that's a more marginal version of speech. Also, McIntyre involved an individual as opposed to an organization, a corporation in this case. It was a loaned pamphleteer, and it had no reference to candidates at all.

So all the Supreme Court jurisprudence after McIntyre in the context of the Federal Election Campaign Act have held that it is important that the individual citizens know who is airing and funding the ads, and there's not really a dispute as to the anonymous speech here. Plaintiff has its name in the movie already.

JUDGE RANDOLPH: I understand that, but the donors' names are not there.

MR. DEELEY: That's correct. And McIntyre did not involve any issue of donors. It was an individual handing out pamphlets --

JUDGE RANDOLPH: The only reason I'm bringing that up is that the compelling interest or the interest of the government here is the one that you identified and rightly so because you get it from McConnell, but it seems odd that we're going to hold that this regulation as applied in this case survives because the compelling governmental interest is one the Supreme Court has said violates the First Amendment.

MR. DEELEY: Well, and McIntyre was a very limited context, and the Supreme Court in the context with which we are confronted here has held very clearly that there is a compelling governmental interest. The Court noted specifically Congress' finding that groups had been running ads under misleading names and that people were unable to evaluate the messages that they were being bombarded with when they turned on their TV's and radios, and Congress found that that was an important governmental interest, and the Supreme Court agreed.

JUDGE ROBERTS: Is that important the same as compelling just for purposes of the proper test to impose?

MR. DEELEY: No.

JUDGE ROBERTS: In terms of important and compelling, are they interchangeable?

MR. DEELEY: No, they're not. Important governmental interest applies here, and that's clear from Buckley and McConnell cases, but the Buckley court, the actual test was whether the important

governmental interests bears substantial relation to the interest that Congress had specified.

And the Court in both Buckley and McConnell upheld the governmental interests of shedding light on publicity -- the publicity of campaign financing and detecting, gathering data to protect potential violations.

JUDGE RANDOLPH: But if it's a pure issue ad that mentions a candidate, what exactly is the government's interest in requiring disclosure?

MR. DEELEY: Well, this case is not a pure issue.

JUDGE RANDOLPH: Well, I know. I understand that. I understand that. But I'm asking you the question if it's a pure issue ad that happens to mention a candidate, what's the government's interest in requiring disclosure?

MR. DEELEY: It's the interest that I've already referred to. Well, if you're talk about ones that mentions candidates, there are several. There are so that citizens can evaluate the messages that they are being confronted with, just general issue speech, and Judge Roberts' question was a good one. The cases, Citizens against Rent Control, Berkeley, and Massachusetts Citizens for Life, the Supreme Court was confronted with situations that were pure issue speech. They were ballot initiatives.

And the Court upheld disclosure as to both struck down in MCFL in expenditure restriction and Citizens against Rent Control contribution limits for ballot initiative questions and yet upheld disclosure so that people can -- when they receive messages find out who is paying for that message and find out who is actually airing them.

And as Chief Justice Renquist put it on the question of --

JUDGE RANDOLPH: These ads -- you say because of your regulation -- they're exempt from the prohibition of putting on an ad within 30 days?

MR. DEELEY: Yes. Under Chief Justice Roberts' test in Wisconsin Right to Life --

JUDGE RANDOLPH: I'm talking just about your regulations.

MR. DEELEY: Our regulations, yes. Our regulations which implement Wisconsin Right to Life decision --

JUDGE RANDOLPH: What do you do with what is now 434 -- I guess sub-section F(3)(b)(4); do you have that? My reading of it -- you know which -- I think it's -- three or 202 in the --

MR. DEELEY: Okay.

JUDGE RANDOLPH: You have 434. Here's my question.

MR. DEELEY: Yes.

JUDGE RANDOLPH: First of all, I take it your position is that even though these ads are -- fit within the definition of electioneering communication, they nevertheless can be broadcast because of the Wisconsin case.

MR. DEELEY: Because of the Wisconsin case, the electioneering communication financing restrictions cannot be constitutionally applied.

JUDGE RANDOLPH: All right. But without getting into the constitutional issue, you have promulgated regulations that take them out of the

category of a prohibited electioneering communication?

MR. DEELEY: The regulations made clear that the financing restrictions forcing corporations and labor organizations to pay for that type of communication with PAC money. The regulations made clear that that is no longer required. The regulations do not say that these are not electioneering communications --

JUDGE RANDOLPH: If these are not electioneering communications, there's no disclosure required, right?

MR. DEELEY: If -- so totally separate case --

JUDGE RANDOLPH: If these are not -- it's a simple question -- if these are not electioneering communications, there's no disclosure required.

MR. DEELEY: But these are electioneering communications.

JUDGE RANDOLPH: Do you understand -- I'm asking you a question -- forget about --

MR. DEELEY: If the ads were not run within 30 days of an election --

JUDGE RANDOLPH: If the ads are not electioneering communications, there's no disclosure requirement, true?

MR. DEELEY: If they don't meet the statutory test --

JUDGE RANDOLPH: Right.

MR. DEELEY: That's correct.

JUDGE RANDOLPH: Okay. Now, we get to the statute. The statute says -- the way I read it is -- if

the commission exempts through regulations any electioneering communication, then it's not considered electioneering communication anymore, and one way of reading your regulations -- forget about Wisconsin. You say these communications come within your regulations. Why aren't they therefore no longer under the commissions own regulations, no longer electioneering communications, and, therefore, no disclosure?

MR. DEELEY: I'm sorry, Your Honor. It's just impossible to read our regulation that way. Our regulation -- our explanation and justification explicitly makes clear that the regulation deals with whether the financing restriction applies, the disclosure portion of the electioneering communication provisions still apply. That was something that was before the commission when it issued -- when it did this rulemaking and explanation and justifications specifically --

JUDGE RANDOLPH: Is that in a preamble because I just read the regulations?

MR. DEELEY: Yes, Your Honor. And we've cited to the Federal Registrar papers in our brief.

JUDGE RANDOLPH: Okay.

MR. DEELEY: That potential interpretation of Wisconsin Right to Life was specifically before the commission when it did this rulemaking and what the commission did was decide that the way to implement Wisconsin Right to Life was to exempt ads that another reasonable interpretation other than candidate advocacy from the financing restrictions, and at this time it is not found that those Wisconsin Right to Life ads that disclosure should not be required.

JUDGE RANDOLPH: These were the regulations promulgated in December?

MR. DEELEY: That's correct?

JUDGE RANDOLPH: And you had a quorum then?

MR. DEELEY: That's correct. So the commission's regulations in fact provide guidance to the regulated community so that now people know that disclosure is required, and Chief Justice Roberts' test specifically in our regulation about when the financing restrictions is required and when they're not.

And as we said in our brief, it appears to have had a speech promoting effect. We had a $6 million in disclosure of electioneering communications just in December alone, including some Wisconsin Right to Life ads that were issue ads that happen to include the names of presidential candidates, groups, the group disclosed the ads, the $2-million expenditure, and, in that particular case, they didn't have to disclose their donors. You only have to disclose your donors -- when corporations and unions run Wisconsin Right to Life ads, they only have to disclose donors if they raise the money specifically for the purpose of furthering electioneering communications or if they create -- they funded it out of a separate account specifically raised for the purpose of funding electioneering communications.

I think it's important to talk a little bit about what actually happened in McConnell. These disclosure provisions were upheld by eight justices. The Court noted that the act should constitutionally be applied to the entire range of electioneering communications and disclosure provisions do not

prevent anyone from speaking. We're not in a case where there's a financing restriction where a group wants to fund an ad out of a particular pot of money and federal law says you can't do that.

There is -- and I think another thing that is important to kind of cut through the fog on plaintiff's arguments is it is not the case that every ad that doesn't meet chief Justice Roberts' test is pure issue speech. In both Buckley and Wisconsin Right to Life, the Court talked about how campaign speech and issue speech dissolve in a practical application. So what we're often talking about with electioneering communications, those are ads that are -- refer to federal candidates and are run in the time period immediately preceding federal elections -- what we're often talking about are mixed message ads, and we now know from Wisconsin Right to Life that if there is another reasonable interpretation, sure, it kind of seems like a candidate ad, but, also, it seems like an issue ad or an ad for a documentary; those type of ads.

We now know that the financing restriction can't be applied, but that doesn't mean that they're pure issue speech. We have mixed message ads; for example, the questions ad in this case. It talks about Senator Clinton being a European socialist. So it also is advertising this movie. So, sure, there's a reasonable interpretation that maybe it's not a candidate ad, but that doesn't mean that it is pure issue speech. It's not true that all of a sudden Wisconsin Right to Life has returned us to this magic word state where anything other than the ads that meet the test as applied specifically to the financing restriction can't be regulated at all.

And another thing about the McConnell case, it held specifically how as applied challenges for the disclosure provisions will work. Drawing back on other cases, including the Buckley case -- it talked about the standard. Plaintiff has to show a reasonable probability of threats, harassments, and reprisals in order to succeed on an as applied challenge, and plaintiff has made no such showing here. There is no evidence of any harassment of donors. The only evidence is a statement in a compliant that maybe there will be marginal less donations because some donors wish to remain anonymous and a newspaper article talking about the location of F.B.I. files during President Clinton's administration.

This type of evidence has specifically been held inadequate in the Buckley case. There Buckley court talked about, well, one or two persons refused to make contributions because of the possibility of disclosure. On this record, the substantial public interest in disclosure identified by the legislative history of this act outweighs the harm generally alleged. The same type of general non-specific allegation here that does not rise to the level of threats, harassments, and reprisals.

This -- the plaintiff is in fact explicitly referred to itself as a mainstream organization affiliated with prominent office holders and former office holders. So we're not dealing with the socialist workers party or the NWACP in the 1950's, groups that were able to show that they should be exempt from disclosure requirements, and the Supreme Court approved that, and the other evidence that we've submitted shows that if indeed Citizens United donors would be subject to some kind of harassment, they would be

able to show it. They've had -- their members have been donating and publicly disclosing to plaintiff's PAC for over 13 years. About a thousand times, Citizens United donors have been disclosed -- in most cases with their names and their addresses listed, an yet plaintiff has submitted no evidence that they've been subject to any threats, harassment, or reprisals.

JUDGE ROBERTS: Well, on the issue of balance of harms, tell us how actually the FEC is harmed if the FEC is told, well, don't require the Citizens United donors to have their names disclosed.

MR. DEELEY: Well, both the commission and the public are harmed because an Act of Congress would not be in force as applied to those ads, and the public would not have the ability --

JUDGE ROBERTS: Which is nothing new. But it is not new to say an Act of Congress is not going to be enforced with respect to something, but go ahead.

MR. DEELEY: But, nevertheless, in the balance of harms, the courts, including the Supreme Court, have repeatedly held that that is a harm as the Court considers a preliminary injunction. The public suffers because they are unable to know who is funding the advertisements. When citizens in primary states are viewing ads that describe one of the candidates as a European Socialist, they don't have the ability to find out who's paying for this message that I'm receiving when I turn on my TV.

JUDGE ROBERTS: But how can I assess whether that's a greater harm than the harm of removing the cloak of secrecy from the donors to the plaintiff?

MR. DEELEY: You don't have to. The McConnell court already did that for you. The

McConnell court said that electioneering communications -- the governmental interest is sufficient. In particular applications maybe it would be -- it would work an unconstitutional harm if that disclosure would lead to reprisals against the donor or the organization.

JUDGE RANDOLPH: Isn't that correct with respect to likelihood of success on the merits? I'm merely asking about going through the four prong analysis of a preliminary injunction motion and identifying where the balance of harms comes out.

MR. DEELEY: Yes. Well, I think when we're talking about harm in the irreparable injury context I think --

JUDGE ROBERTS: I'm talking about the balance of harms' prong.

MR. DEELEY: Right. Well, it is similar though the fact that the public is losing the ability to find out who was funding the ad is a harm to the public, and the harm to plaintiff, the courts have talked about. Yes. It's true that there may be a few donors who are unwilling to contribute or aren't willing to contribute as much as a thousand dollars, which in this case is the threshold that leads to disclosure.

But the courts have held that that's insufficient in light of the important governmental interests in letting viewers have this information and giving the government the data so that they can monitor the electioneering communication spending that's occurring.

JUDGE LAMBERTH: Well, these donors know that they will be labeled part of the vast grant wing conspiracy once they're identified;isn't that a harm?

MR. DEELEY: That has been insufficiently recognized as constitutionally injurious harm in light of the important governmental interest. If it was enough that donating to one side of the aisle or the other was unconstitutional, then the entire FECA structure would be vulnerable because the amount of disclosure would dwindle very, very dramatically if that type of showing was sufficient --

JUDGE LAMBERTH: If that was enough.

MR. DEELEY: -- to get a constitutional exemption. And I think that just lastly on the movie, I think your questions were very good. It is the functional equivalent express advocacy just following the Chief Justice Roberts' test and the Commission's regulation -- the entire movie is about the character qualifications and fitness for Office of Senator Clinton. It repeatedly contains the indicia of express advocacy that Chief Justice Roberts talked about, mentioning the presidential election, Senator Clinton's candidacy --

JUDGE RANDOLPH: It's only the video on demand aspect of the distribution of this DVD that's at issue here?

MR. DEELEY: That is the only means of distribution that brings them within the coverage of the electioneering communication; that's correct. And it's important because they still have the ability to show their movie in theaters and DVD's and unlike in the context in Wisconsin Right to Life talked about with non-broadcast means which would in that case when Chief Justice Roberts was talking about newspaper ads as opposed to --

JUDGE RANDOLPH: Yeah. But it can't be run on television.

MR. DEELEY: It has to be paid for through Citizens United Federal Political Committee.

JUDGE RANDOLPH: The movie has not received the safe harbor seal of approval from the Commission, correct?

MR. DEELEY: No. Because it is the functional equivalent of a service advocacy.

JUDGE RANDOLPH: The movie is the equivalent by the Commission's lights or the counsel to the Commission's lights of express advocacy.

MR. DEELEY: Functional equivalent, yes.

JUDGE RANDOLPH: And given the fact that we're in the primary season and will be for quite some time now, any time that movie is shown on a broadcast, it would cover 50,00 people and probably be within 30 days of a primary election which means it can't be shown on television during the primary season.

MR. DEELEY: It can't be funded with plaintiff's general treasury funds. Plaintiff has a million dollars in cash on hand, and it's political committee --

JUDGE RANDOLPH: I didn't frame that up right. Here's my question: Suppose that NBC buys a DVD. They get online. They buy it from Citizens United, and then NBC puts that on television, the DVD, it can be shown, right, because NBC is exempt.

MR. DEELEY: Well, NBC is exempt. Now, you're talking about the media exemption?

JUDGE RANDOLPH: Right.

MR. DEELEY: That's a question that the commission would have to address whether --

JUDGE RANDOLPH: Well, the commission is defunct for the moment, so they're not going to be addressing anything, right?

MR. DEELEY: Right. That may be a different case. In this case, plaintiff is paying cable companies in order to have the movie available for viewers. It is essentially --

JUDGE RANDOLPH: I understand. What I'm trying to figure out is whether that means there's a complete blackout for any -- for television broadcasts of this movie until after the primary elections are over, and this does seem to me that a network or one of the cable channels could by the DVD and show it because the media has an exemption from all these regulations.

MR. DEELEY: There would be a question about whether the media exemption would apply in that circumstance, but in this case where we have a group paying a cable company --

JUDGE RANDOLPH: I don't know what the question would be, but every station or every broadcast network and all the rest of them are constantly bombarding the public with documentaries about candidates, and that's essentially what this is. It's a one-sided documentary, but, nevertheless, it's a documentary. I don't know. What's the question?

MR. DEELEY: The question would be whether or not the media exemption applies, and that would be a very different case. In this case when the plaintiff is paying to air the -- to make the movie available to viewers, a prior commission analyses has held that that's the type of indication that the media

exemption doesn't apply, and plaintiff has not asked for any media exemption.

JUDGE RANDOLPH: Okay. Well, you have some rebuttal I take it. You asked for 10 minutes. We'll give you 10 minutes.

MR. BOPP: Thank you.

MR. DEELEY: Thank you, Your Honor.

JUDGE RANDOLPH: Thank you.

MR. BOPP: Thank you. I didn't realize I had taken my 30 minutes.

JUDGE ROBERTS: Hold on.

(whereupon, the court reporter changed tapes at this time.)

MR. BOPP: First let me answer Judge Roberts question about Page 14. My statement stands. I know of no case that upheld a -- struck down a prohibition and upheld disclosure requirements. In footnote six on Page 14, they cite Balotti (Phonetic). Balotti only challenged the prohibition. Now, there was a footnote, dicta footnote, approving disclosure, but it was not challenged in Balotti, and as to Citizens against Rent Control, the only claim was against the contribution limit of $250 to a referendum committee that was struck down.

The Court in dicta pointed to the reports as a good thing, but, again, the reports were not challenged. So my statement stands, there is no case that I am aware of that upheld, that struck down a prohibition, and upheld a disclaimer. There are cases, Buckley, which struck down both prohibitions and disclaimers because they were not candidate related, and they were campaign finance laws.

Secondly, everything they say about disclosure as being -- benefitting the public is contingent on it being campaign related.

In other words, this is a threshold requirement: Is it campaign or campaign related, and the Court has been establishing tests, the express advocacy test, one, and certain circumstances, the Roberts' test in the electioneering communication area to implement that philosophy, and that is applicable whether it is a prohibition, a contribution limit, a disclaimer or whatever it might be.

Now, they want to cut Buckley different than Buckley cut the issue. Buckley said that either you have express advocacy or you have discussion of issues and candidates. Well, now, they want to move this line over here at the end, issues and candidates. Now, they want to say if you talk about the character of a candidate, it is now foreboden (Phonetic). We can regulate that. That's not the way Buckley cut it. That's not the way Justice Roberts cut it. Justice Roberts didn't say that if you talk about the character of someone, then it can be regulated. He said that it had to be -- there had to be no other reasonable interpretation then its calling for a vote for/or against a candidate. Criticizing somebody's character, criticizing somebody's conduct in office, criticizing somebody's position on an issue is just political speech. That's what Justice Roberts described it as. When he repeated the Buckley formulation of the constitutional protection to discussing, quote, issues and candidates, end of quote.

Now, the information -- now, it is true, also, that Justice Roberts gave Wisconsin Right to Life more than they asked for. Wisconsin Right to Life came in

and wanted an exception for grass roots lobbying. Rather than draw an exception, Justice Roberts defined the extent of the extent of -- in that case -- prohibition, leaving everything else unregulated. Now, this everything else includes issues. It includes discussions of candidates. It includes selling your political speech. It includes as Justice Roberts said on Page 200 – 2,667

JUDGE RANDOLPH: It doesn't include disclosure because the Wisconsin plaintiff, petitioners in that case, specifically said they're not challenging the disclosure.

MR. BOPP: Yes. It was not challenged in that case. It has been challenged in this case, and we're saying the principles, the rationale, the justifications that go through all four of those cases is equally applicable to disclaimers and to reports as it is to the prohibition.

Justice Roberts explained that, quote: Issue advocacy conveys information and educates. I mean there's no call to action to -- for information and education. In other words, he gave much greater breadth of protection of political speech than Wisconsin asked for. That's the state of the law. And when he went to Wisconsin Right to Life's ad, he explained that this thing has way no -- nothing to do with elections, you know, and that's where the language about character and fitness --

JUDGE RANDOLPH: Well, the state of the law is that the Supreme Court rightly or wrongly upheld provisions for anything that could be called under the statutory definition an electioneering communication. That's point one.

MR. BOPP: On its face.

JUDGE RANDOLPH: Point two is that your ads on the face of the statute -- not talking constitutional -- are electioneering communications.

MR. BOPP: Yes.

JUDGE RANDOLPH: All right. Therefore, what is it -- you call your challenge here as an applied challenge.

MR. BOPP: Yes.

JUDGE RANDOLPH: And I asked you this question at the outset of your argument -- what is it that makes your situation any different, unique, that would that render the Court's decision, the facial decision upholding these disclosure provisions, inapplicable?

MR. BOPP: Two, two things; first, Wisconsin Right to Life won. Where the U.S. Supreme Court held that as-applied challenges can be brought against the facial holding of McConnell; and two --

JUDGE RANDOLPH: Let's take that one. Okay.

MR. BOPP: Two.

JUDGE RANDOLPH: One; Wisconsin case did not change the statutory definition of electioneering communications.

MR. BOPP: True.

JUDGE RANDOLPH: True. The Supreme Court in McConnell upheld disclosure for all electioneering communications. So the McConnell case, I don't see has anything to whatever to do with the uniqueness of your situation.

MR. BOPP: I guess that was two. I wanted to address the legal issue first, is that the facial upholding of the disclaimers and disclosures does not

end this case. Wisconsin Right to Life won. The Supreme Court said you can bring as-applied challenges.

Now, and the second point is that we don't meet Roberts' test. These three ads -- they concede don't meet Roberts' test. We believe the movie does not meet Roberts' test. That is the constitutional test for whether or not, in our view, looking at Buckley and all the cases an ad can be regulated.

In fact, this is obviously not binding, but Chief Justice Roberts used the word "regulate". You can't regulate these. Probably 20 times. Okay. Now, you're not bound by that. I know the holding and --

JUDGE RANDOLPH: We've come around and around because the fact of the matter is that I could cite you 15 cases that say speech in the nature of the kind of ads that you're putting on and in fact are regulated.

MR. BOPP: I don't know of such a case in which any court has held that a non-campaign related ad which if you don't pass Roberts' test, it's not campaign related.

JUDGE RANDOLPH: Take a look at Lorlar (Phonetic); take a look at Central Hudson; take a look at Virginia Pharmacy. Every one of those cases has upheld regulations, restrictions, on advertising that's not campaign related.

MR. BOPP: Yes. Right. That's not campaign related. But those are commercial speech cases, and it was upheld on the--

JUDGE RANDOLPH: But you're advertising a DVD.

MR. BOPP: But it contains political speech. The FEC doesn't have the authority to regulate commercial speech. What they're doing here through the regulation is exempting political speech that has a certain characteristic, which is that you're wanting to sell something.

JUDGE RANDOLPH: The regulation exempts from prohibition of electioneering communication --

MR. BOPP: That's true. That's true.

JUDGE RANDOLPH: -- the commercial speech.

MR. BOPP: That's true. That's true.

JUDGE RANDOLPH: I mean there's a world turned upside down. Political speech is -- flat out political speech is prohibited and commercial speech is allowed. I understand that, but that's where the Supreme Court has wound up.

MR. BOPP: I don't think that's true with the Roberts' opinion, Your Honor. I'm troubled by McConnell. I represent plaintiffs there. I represent plaintiffs in the Wisconsin case. I think it is a whole new world with the Roberts' opinion. I mean the whole idea of circumventions out the door; deference is out the door. He says enough is enough. The tie goes to the speaker.

You read the McConnell opinion and you wonder whether any of those makes sense. Well, we have a new day, a new court, that is giving meaning to what McConnell said were genuine issue ads; dealt with whether or not they can be prohibited; adopted a test for function equivalent, and now the question is can you apply disclosures or disclaimers to it, and we urge you to grant the preliminary injunction.

JUDGE RANDOLPH: I just want to be clear: There's nothing in particular about your organization that makes you unique countless other organizations?

MR. BOPP: I agree with that.

JUDGE RANDOLPH: And there's nothing in particular about the content of these ads other than the fact that they're exempt or they have a safe harbor that makes them unique from any of the countless other kinds of ads that could be considered to have satisfied -- not satisfied the Roberts' test?

MR. BOPP: That is true. I think there are others that would be protected by Roberts' opinion, and if they -- people have to make a choice, though, right now as Michael Moore did. He didn't bring a lawsuit. He took Bush's name out of his ads. Well, I don't know how in the world Citizens United can advertise a movie that's called "Hillary The Movie" without mentioning Hillary Clinton. So they have a dilemma that they hope that this Court will resolve for them. Thank you.

JUDGE RANDOLPH: Okay. The case is submitted. Thank you very much.

THE DEPUTY CLERK: All rise. This Honorable Court stands adjourned.

[End of proceedings]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED,	
Plaintiff,	
v.	**Civil Action No. 07-2240 (ARR, RCL, RWR) (Three-Judge Court)**
FEDERAL ELECTION COMMISSION,	
Defendant.	

MEMORANDUM OPINION

For the reasons that follow we deny Citizens United's ("Citizens") motions for a preliminary injunction to enjoin the Federal Election Commission ("FEC") from enforcing provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA")[1], with respect to Citizens' advertisements for a movie—*Hillary: The Movie*—and its distribution of *The Movie* through cable TV video on-demand.

I

Citizens United is a nonprofit membership corporation, tax-exempt under Internal Revenue Code § 501(c)(4). (Am. Compl. ¶ 5.) Citizens produced

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[1] Pub. L. No. 107-155, 116 Stat. 81 (2002), codified at 2 U.S.C. § 431 *et seq.*

a movie titled *Hillary: The Movie*. (*Id.* Ex. 2; Notice [30] Regarding Joint Stip.) *The Movie* focuses on Senator Hillary Rodham Clinton's "Senate record, her White House record during President Bill Clinton's presidency, . . . her presidential bid," and includes "express opinions on whether she would make a good president." (Am. Compl. ¶ 14.) Citizens plans to distribute *The Movie* in January or February 2008 through theaters, video on-demand ("VOD") broadcasts, and DVD sales. (*Id.*) Citizens notified the court on January 7, 2008, that it had released *The Movie* for "public sale and exhibition." (Notice [30] Regarding Joint Stip.); *see* http://www.hillarythemovie.com (last visited Jan. 11, 2008) (offering *The Movie* on DVD for $23.95 and promoting screenings of the film in seven movie theaters across the country). *The Movie*'s release date coincides with the dates when many states will hold primary elections or party caucuses. Senator Clinton is a presidential candidate in those states. (Am. Compl. ¶ 17.) Citizens intends to fund at least three television advertisements—two 10-second advertisements, "Wait"[2] and "Pants,"[3] and one 30-

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[2] The script for the television advertisement, "Wait" reads as follows:
[Image(s) of Senator Clinton on screen]
"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."
[Film Title Card]
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com

[3] The script for the television advertisement, "Pants" reads as follows:
[Image(s) of Senator Clinton on screen]

second advertisement, "Questions"[4]—to coincide with the release of its movie. (*Id.* Ex. 1.) The advertisements promote *The Movie* and direct viewers to *The Movie*'s website for more information about the film and how to see or purchase it. (*Id.* ¶ 19.) If Senator Clinton becomes the Democratic presidential nominee, Citizens plans to broadcast the three advertisements and possibly other advertisements within 30 days before the Democratic National Committee Convention and within 60 days before the November general election—both periods are within BCRA's definition of an electioneering communication. (*Id.* ¶ 20); 2 U.S.C. § 434(f)(3)(A)(i)(II)(bb). Citizens has elected not to

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[Footnote continued from previous page]

"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit."
"Now, a movie about the everything else."
[Film Title Card][Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com

[4] The script for the television advertisement, "Questions" reads as follows:
[Image(s) of Senator Clinton on screen]
"Who is Hillary Clinton?"
[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . ."
[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . ."
[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . ."
"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie.
[Film Title Card]
[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.
[Visual Only] www.hillarythemovie.com

broadcast its advertisements pending resolution of this litigation. (Am. Compl. ¶ 26.) It has entered into negotiations to broadcast *The Movie* through the "Political Movies" component of a new nationwide VOD channel, "Elections '08," but has decided to forego the opportunity pending resolution of the current litigation because, according to Citizens, the broadcast would be banned under BCRA and, even if this were not so, the broadcast would require Citizens to disclose certain information and make certain statements as described below. (*Id.* ¶ 28-30.)

BCRA amended the Federal Election Campaign Act of 1971 ("FECA").[5] BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 2 U.S.C. § 431 *et seq.*). Passed in 2002, it represented "the most recent federal enactment designed to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *McConnell v. FEC*, 540 U.S. 93, 115 (2003) (internal citation omitted). BCRA introduced a new system for regulating what it termed "electioneering communications." Under BCRA § 201, an "electioneering communication" is:

> any broadcast, cable, or satellite communication which
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within

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[5] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 USC § 431 et seq.).

> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
>
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate

. . .

2 U.S.C. § 434(f)(3)(A). For presidential candidates, the communication must also be capable of being received by 50,000 or more persons. See 11 C.F.R. § 100.29(b)(3)(ii). Citizens recognizes that under this statutory definition, both its advertisements and a VOD[6] broadcast of *The Movie* would be electioneering communications. (Am. Compl. ¶¶ 17, 29.) Electioneering communications are subject to a host of restrictions imposed by BCRA. Three are relevant here: § 203, § 201, and § 311. Section 203 prevents corporations and labor unions from funding electioneering communications out of their general treasury funds, unless the communication is made to its stockholders or

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[6] The parties did not raise the issue of whether VOD was within the definition of "electioneering communication." However, a broadly worded FEC regulation defining "electioneering communications" indicates that VOD would be a "broadcast, cable, or satellite communication" because it is "disseminated through the facilities of a . . . cable television system." *See* 11 C.F.R. §§ 100.29(b)(1), (b)(3)(i) (indicating that "broadcast, cable, or satellite communications" include communications "aired, broadcast cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system").

members, to get out the vote, or to solicit donations for a segregated corporate fund for political purposes. 2 U.S.C. § 441b(b)(2). This provision does not bar electioneering communications paid for out of a segregated fund that receives donations only from stockholders, executives and their families. 2 U.S.C. §§ 441b(b)(2)(C), (b)(4)(A).[7] Any electioneering communication that is not prohibited is subject to the disclosure requirements of § 201 and the disclaimer requirements of § 311, which are set out in part II.B.

Citizens' complaint, filed on December 13, 2007,[8] contains two major claims: (1) that § 203's prohibition of corporate disbursements for electioneering communications violates the First Amendment on its face and as applied to *The Movie* and to the 30-second advertisement "Questions"[9]; and (2) that BCRA § 201 requiring disclosure and § 311 requiring disclaimers are unconstitutional as applied to Citizens' three advertisements (and to *The*

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[7] Corporations and labor unions may also contribute to Political Action Committees, which are permitted to make electioneering communications. *See McConnell*, 540 U.S. at 204 (citing *FEC v. Beaumont*, 539 U.S. 146, 162-63 (2003)).

[8] On December 14, 2007, Citizens' motion for a three judge district court was granted [14] pursuant to BCRA § 403 and 28 U.S.C. § 2284. On January 10, 2008, the three judge court held an expedited hearing on the motions for preliminary injunctions.

[9] Plaintiff's challenge regarding the prohibition of "Questions" will be denied as moot. The FEC, in its filings and at oral argument, conceded that the advertisement is exempt from the Prohibition. (Opp'n to 2d Mot. for Prelim. Inj. at 17.)

Movie, if Citizens broadcasts it in a manner that does not violate § 203).

II.

The court will not issue a preliminary injunction unless the movant shows that it has "1) a substantial likelihood of success on the merits, 2) that it would suffer irreparable injury if the injunction is not granted, 3) that an injunction would not substantially injure other interested parties, and 4) that the public interest would be furthered by the injunction." *Omar v. Harvey*, 479 F.3d 1, 18 (D.C. Cir. 2007) (citing *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)). Granting injunctive relief is an "extraordinary and drastic remedy," and it is the movant's obligation to justify, *"by a clear showing,"* the court's use of such a measure. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

A.

We will analyze first Citizens' likelihood of prevailing on the merits of its claims regarding *The Movie*. In *McConnell*, the Supreme Court upheld § 203 on its face, rejecting claims that the financing of "electioneering communications" constituting express advocacy or its functional equivalent were within the protection of the First Amendment. 540 U.S. at 203-09. *McConnell* did not, however, "purport to resolve future as-applied challenges." *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2661 (2007) (citation omitted) ("*WRTL*"). The Chief Justice's opinion in *WRTL* stated that an advertisement could not be considered the functional equivalent of

express advocacy unless it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[10] *Id.* at 2667. To promote the objectivity of this analysis, courts are to disregard contextual evidence of the corporation's intent in running an advertisement.[11] *See id.* at 2668.

Citizens wants us to enjoin the operation of BCRA § 203 as a facially unconstitutional burden on the First Amendment right to freedom of speech. The theory is that with respect to § 203, *WRTL* narrowed *McConnell* to such an extent that it "left the door open to facial invalidation based on the sort of circumstances that have now arisen." (2d Mot. for Prelim. Inj. Mem. at 2). For Citizens to prevail on this claim, we would have to overrule *McConnell*, which is to say that Citizens has no chance of prevailing. Only the Supreme Court may overrule its

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[10] The parties agree, as do we, that the Chief Justice's formulation is now the governing test for the functional equivalent of express advocacy. Although the Court's opinion in *WRTL* was fragmented, the Chief Justice's opinion approved the judgment of the district court on the narrowest grounds. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted).

[11] *WRTL* discounted evidence that included the corporation's other candidate-related advocacy, the timing of the advertisements, and the advertisement's reference to an Internet address that directed viewers to a website containing express advocacy against the election of candidates for federal office. 127 S. Ct. at 2668-69 (Opinion of Roberts, C.J.).

decisions. The lower courts are bound to follow them. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam).

With respect to Citizens's as-applied claims regarding *The Movie*, the first question under Chief Justice Roberts' *WRTL* opinion—and as it turns out, the last question—is whether the film is express advocacy or its functional equivalent. If it is, *McConnell* makes it likely that Citizens would not win on the merits of its claim that the First Amendment permits it to broadcast the movie within the electioneering communications period as currently funded. Citizens contends that *The Movie* is issue speech and, as it stated in oral argument, that issue speech is any speech that does not expressly say how a viewer should vote. The trouble is that the controlling opinion in *WRTL* stands for no such thing. Instead, if the speech cannot be interpreted as anything other than an appeal to vote for or against a candidate, it will not be considered genuine issue speech even if it does not expressly advocate the candidate's election or defeat. *WRTL*, 127 S. Ct. at 2667.

The Movie does not focus on legislative issues. *See id.*; 11 C.F.R. § 114.15(b). *The Movie* references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office. *See id.*; 11 C.F.R. § 114.15(b). Dick Morris, one political commentator featured in *The Movie*, has described the film as really "giv[ing] people the flavor and an understanding of why she should not be President." Dick Morris, Hillary's

Threat, Address (Mar. 2007) (available at www.citizensunited.orgiblog/?entryid=4563815). After viewing *The Movie* and examining the 73-page script at length, the court finds Mr. Morris's description to be accurate. *The Movie* is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her.[12] *The Movie* is thus the

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[12] A selection of excerpts from the movie are indicative of the film's message as a whole and serve to demonstrate the difficulty that this court had in its ultimately unsuccessful attempt to find a reasonable interpretation of *The Movie* that would take it out of the *WRTL* "functional equivalent to express advocacy" classification.

Excerpts include statements by the film's narrator, one of several political commentators or another interviewee stating:

"She's driven by the power. She's driven to get the power. That is the driving force in her life." (Am. Compl. Ex. 2 at 1.)

"She is the expert at not saying what she believes—she will run on attacking Republicans, and being the first woman president—oh isn't that amazing, she's a woman she can walk and talk." (*Id.*)

"She is steeped in controversy, steeped in sleaze, that's why they don't want us to look at her record." (*Id.* at 1-2.)

"Over the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many." (*Id.* at 6.)

"I mean think of what it says about Hillary Clinton that she was willing to put up with his open philandering, with anything in a skirt who wanders before his eyesight—all for the power—at least with Bill Clinton he was just good time Charlie. Hillary's got an agenda and she's willing to put up with that to

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[Footnote continued from previous page]

be [P]resident of the [U]nited [S]tates, she's got a to do list when she gets to the White House." (*Id.* at 21-22.)

"I think the American people have a right to as much of a public record as possible about Hillary Clinton. Those records should be released before the 2008 elections so that we can learn a lot more about exactly how much influence she had in the White House, what her positions were in the White House, and how she acted in the White House." (*Id.* at 60.)

"Finally, before America decides on our next president, voters should need no reminders of [] what's at stake—the well being and prosperity of our nation." (*Id.* at 68-69.)

"It[']s been said and I agree with it that this is the most personal political choice that Americans make. They want, they—their personality traits, their—will they consider a person that they could trust, that they would like, that they were comfortable with, and that's [where] I think Hillary Clinton as a candidate has great defects." (*Id.* at 69.)

"If she reverts to form, Hillary Clinton will likely be in the future what she has been in the past, which is a person, a woman, a politician of the left, and I don't think that's going to [be] good for the security of the United States." (*Id.* at 70.)

"I think we are at a very critical time in this country. I can tell you beyond a shadow of a doubt that uh, the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." (*Id.* at 71.)

"[T]his vote comes down to one thing: liberty. Do you believe in liberty or don't you? Economic liberty, free speech, protecting our borders, protecting our country from terrorism—the issue is liberty." (*Id.*)

"[W]e must not ever underestimate this woman. We must not ever understate her chances of winning. We mustn't be lolled into a state of security and complacency by the new found moderation that she likes to talk about. And we must never forget the fundamental danger that this woman [poses] to every value that we hold dear." (*Id.* at 72).

functional equivalent of express advocacy. *See WRTL*, 127 S. Ct. at 2667 (setting out the "functional equivalent" standard). As such, it falls within the holding of *McConnell* sustaining, as against the First Amendment, § 203 insofar as it bars corporations from funding electioneering communications that constitute the functional equivalent of express advocacy. There is no substantial likelihood that Citizens will prevail on its as-applied challenge with respect to *The Movie*.

B.

Citizens' proposed advertisements present a different picture. The FEC agrees that Citizens may broadcast the advertisements because they fall within the safe harbor of the FEC's prohibition regulations implementing *WRTL*. They did not advocate Senator Clinton's election or defeat; instead, they proposed a commercial transaction—buy the DVD of *The Movie*. *See WRTL*, 127 S. Ct. at 2667; 11 C.F.R. § 114.15(b). Although Citizens may therefore run the advertisements, it complains that requirements of § 201 and § 311 of BCRA, 2 U.S.C. §§ 434(0(2), 441 d, impose on it burdens that violate the First Amendment.

Section 201 is a disclosure provision requiring that any corporation spending more than $10,000 in a calendar year to produce or air electioneering communications must file a report with the FEC that includes—among other things—the names and

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[Footnote continued from previous page]

In sum, plaintiffs counsel's representation at oral argument that the movie did not exhort viewers to vote against Senator Clinton, is simply untrue.

addresses of anyone who contributed $1,000 or more in aggregate to the corporation for the purpose of furthering electioneering communications. §§ 434(0(1), (2)(F); 11 C.F.R. § 104.20(c)(9). Section 311 is a disclaimer provision. 2 U.S.C. § 441d. For advertisements not authorized by a candidate or her political committee, the statement "___ is responsible for the content of this advertising" must be spoken during the advertisement and must appear in text on-screen for at least four seconds during the advertisement. § 441d(d)(2). In addition, such advertisements are required to include the name, address, and phone number or web address of the organization behind the advertisement. § 441d(a)(3).

Citizens thinks that § 201 and § 311 are unconstitutional because its advertisements do not constitute express advocacy or the functional equivalent of express advocacy. The argument is that the Supreme Court's *WRTL* decision narrowed the constitutionally permissible scope of what could be considered an electioneering communication. Under Citizens' reading of *WRTL*, anything that is not express advocacy or not "susceptible of [a] reasonable interpretation other than as an appeal to vote for or against a specific candidate" cannot be constitutionally regulated by Congress under BCRA. See 127 S. Ct. at 2667.

We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in *WRTL*, reserving it for decision on an as-applied basis. In contrast, when the

McConnell Court sustained the disclosure provision of § 201 and the disclaimer provision of § 311, it did so for the "entire range of electioneering communications" set forth in the statute. *McConnell*, 540 U.S. at 196; *see also id.* at 230-31 (discussing § 311). Citizens's advertisements obviously are within that range.

Although Citizens styles its argument as an as-applied challenge, it offers only one distinction between its advertisements and the mine-run of speech that constitutes electioneering communication under BCRA. The distinction, so goes the argument, is that Citizens' speech is constitutionally protected, as *WRTL* holds. Whether the Supreme Court will ultimately adopt that line as a ground for holding the disclosure and disclaimer provisions unconstitutional is not for us to say.[13] We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment. *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 259-62 (1986) (striking down a prohibition, and noting that the disclosure provisions will apply to the newly permitted speech); *Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley*, 454 U.S. 290, 297-98 (1981) (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791-92 & n.32

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[13] *See Majors v. Abell*, 361 F.3d 349, 356-57 (7th Cir. 2004) (Easterbrook, J., dubitante).

(1978) (discussing how disclosure provisions can help offset the coercive aspects of corporate speech).

The *McConnell* Court did suggest one circumstance in which the requirement to disclose donors might be unconstitutional as-applied—if disclosure would lead to reprisals and thus "impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. at 198. To this, the Court added that the plaintiff must show a "reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals." *Id.* (quoting *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). Citizens' memorandum in support of its motion states that there may be reprisals, but it has presented no evidence to back up this bald assertion. In that respect, Citizens is thus in a similar position as the parties in *McConnell* who made the same assertion but presented no specific evidentiary support. *See* 540 U.S. at 199.

We therefore hold that Citizens has not established the requisite probability of prevailing on the merits of its arguments against the disclosure and disclaimer provisions—§ 201 and § 311, respectively.

C.

Citizens tells us that without a preliminary injunction it will not be able to broadcast *The Movie*, that it will have to disclose the identity of its contributors to the FEC if it runs the advertisements, and that some portion of the time it purchased for the advertisements would be consumed by the disclaimers BCRA requires. If Citizens had made more of a showing that it had a

chance of prevailing in this court on the merits, these kinds of harms might have warranted preliminary relief. But in the face of *McConnell*'s ruling that the disclosure and disclaimer provisions are constitutional and that the restriction on corporate speech advocating the defeat of a candidate does not violate the First Amendment, Citizens is unable to raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *see also FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001), *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), *Washington Metro. Area Transit Comm. v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977).

As to the remaining factors governing preliminary relief, we cannot say that enjoining enforcement of the BCRA provisions at issue would serve the public interest in view of the Supreme Court's determination that the provisions assist the public in making informed decisions, limit the coercive effect of corporate speech, and assist the FEC in enforcing contribution limits. *See McConnell*, 540 U.S. at 196, 205, 231.

* * *

Citizens' motion for preliminary injunction with respect to the § 203 Prohibition as applied to "Questions" shall be DENIED as moot as set forth in footnote 9 and shall be DENIED with respect to all other claims. A separate order shall issue this date.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District

Judges Royce C. Lamberth and Richard W. Roberts, on January 15, 2008.

United States District Court
District of Columbia

Citizens United, ***Plaintiff,*** ***v.*** **Federal Election Commission,** ***Defendant.***	**Case No. 07-2240** (ARR, RCL, RWR)

Affidavit of David N. Bossie

I, David N. Bossie, make this affidavit in support of Plaintiff's summary judgment motion and declare as follows:

1. I am the Chairman of the Board and President of Citizens United.

2. I have personal knowledge of Citizens United and its activities, and if called upon to testify I would competently testify as to the matters stated herein.

3. I verify again the factual statements in the *Amended Verified Complaint for Declaratory and Injunctive Relief* (Doc. #22) and provide the following supplemental information.

4. The documentary film *Hillary: The Movie* was completed on January 4, 2008, and was released to members of the news media in DVD format. A true and correct copy of the final transcript was filed with this Court as Document #32 (filed Jan. 7, 2008).

5. *Hillary* has been shown in theaters on the following 2008 dates in the cities indicated: Jan. 14

(Washington, DC); Jan. 16 (New York, NY); Jan. 17 (Las Vegas, NV); Jan. 22 (Greenville, SC); Jan. 23 (Tampa, FL); Jan. 24 (New York, NY); Jan. 30 (Phoenix, AZ); Feb. 1 (San Diego, CA); Feb. 2 (Santa Ana, CA); Feb. 11 (Seattle, WA); March 4 (Orlando, FL); Apr. 3 (Santa Barbara, CA); Apr. 21 (Brooklyn, OH).

6. *Hillary* is currently available for sale at www.hillarythemovie.com for $23.95 (plus shipping & handling) with patrons requested to allow two weeks for delivery. *Hillary* is also available at www.amazon.com for $21.99 (plus shipping & handling).

7. Based on long experience with marketing Citizens United's documentaries, it is my opinion that Citizens United's inability to broadcast the Ads set out in the complaint (the Ads are available for viewing at www.hillarythemovie.com) is decreasing sales of *Hillary* DVDs and tickets for theater screenings. In fact, it is impossible to do the usual theatrical release in numerous theaters due to the inability to broadcast the Ads.

8. Citizens United continues to plan to broadcast its Ads for *Hillary* and for a documentary concerning Barack Obama during electioneering communication periods before presidential primaries, the Democratic Party convention, and the general election in numerous states if timely judicial relief is granted, all as set out and verified in the original and amended complaints. The time-bound details of the advertising plans that were originally set out in the complaint, AVC ¶¶ 17, 20, are no longer possible, but HLW yet intends to do what broadcasting is feasible if it obtains the requested judicial relief in a timely fashion. And Citizens

United reaffirms its intention to do materially similar advertising in materially similar situations in the future.

9. Citizens United is planning a documentary film on presidential candidate Senator Barack Obama, which it anticipates being ready for release by June 2008. It will raise similar issues as *Hillary*, and Citizens United will similarly wish to broadcast ads that name Senator Obama and will be broadcast during electioneering communication periods. The ads and movie, if broadcast, will be electioneering communications. However, it is impossible to present the movie and ads to the Court now in a request for declaratory and injunctive relief because they are not prepared for the Court to review. The ads cannot even be prepared in advance because they will be based on materials from the movie, which is not ready now.

10. Citizens United could not obtain an FEC advisory opinion now, or in the near future, concerning the Senator Obama documentary because the documentary is not finished, the ads cannot yet be done, and there are not enough FEC Commissioners presently to enable the FEC to render advisory opinions.

11. Citizens United does not know now whether it will be offered an opportunity to broadcast the Obama documentary on television, as it was offered for *Hillary*, and such offers are usually made when a movie is completed or nearly completed.

12. Citizens United will be chilled as to the Obama documentary and its ads, just as it has been chilled with respect to *Hillary* and its Ads, based on how the FEC has analyzed *Hillary* and its Ads and Citizens United's ability to broadcast them free of

the Disclosure Requirements of which Citizens United complains.

13. The FEC concedes that the two 10-second ads fit its regulatory commercial transaction exception, but it asserts that the 30-second ad, "Questions," does not fall within that safe harbor. Opp'n to 2d Mot. for Prelim. Inj. (Doc. 33) at 17. However, the FEC does concede that "on balance" the "Questions" ad is protected from prohibition under the appeal-to-vote test of *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"). Seven days after the present suit was filed, the FEC was unsure whether "Questions" was a protected ad—under its regulatory test or *WRTL II*'s test—and declared that it needed more time to make up its mind. Opp'n to Mot. for Consol'n (Doc. 19) at 8. Seventeen days later, the FEC finally concluded that the 30-second ad was protected under *WRTL II*. The FEC said that (a) it was uncertain as to whether the ad fit the FEC rule's safe harbor, but (b) "on balance" it was a protected ad under *WRTL II*. *See* Doc. #33 at 17. This analysis indicates a *balancing* of unidentified factors.

14. As to *Hillary*, the FEC declared it was not protected by *WRTL II* from prohibition, based on identified phrases without mentioning any balancing. *See* Doc. #33 at 14. This analysis apparently differed from the balancing used as to Questions.

15. The FEC's delay and imprecision in analysis of these two communications, lack of bright lines, and apparent substitution of a balancing test for *WRTL II*'s appeal-to-vote test makes it impossible for Citizens United to know whether the FEC will consider its Obama documentary and ads to be

subject to prohibition as electioneering communications.

16. I verify under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

Executed on May 16, 2008.

/s/ David N. Bossie
David N. Bossie
Citizens United

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED,	)	
Plaintiff,	)	Civil Action No. 07-2240 (ARR,
v.	)	RCL, RWR)
FEDERAL ELECTION COMMISSION,	)	STATEMENT OF MATERIAL FACTS
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE DISPUTE

Pursuant to Fed. R. Civ. P. 56 and LCvR 7(h) and 56.1, Defendant Federal Election Commission ("Commission") submits the following statement of material facts as to which there is no genuine dispute.

THE PARTIES

1. Plaintiff Citizens United is a Virginia corporation holding tax-exempt status under section 501(c)(4) of the Internal Revenue Code. (Am. Compl. ¶ 5.)

2. The Commission is the independent agency of the United States responsible for the administration, interpretation, and civil enforcement

of the Federal Election Campaign Act ("FECA"). *See* 2 U.S.C. §§ 437c(b)(1), 437d(a),(e).

PLAINTIFF'S ELECTIONEERING COMMUNICATIONS

3. Plaintiff has produced a film entitled *Hillary: The Movie*. (*See* Am. Compl. ¶ 14.) Plaintiff's name and logo appear at the beginning of the film. (*See Hillary: The Movie* (available for viewing pursuant to Jan. 10, 2008 Order (Docket No. 37)).)

4. Plaintiff's film focuses on the ongoing presidential election, specifically Senator Hillary Clinton's candidacy for President of the United States. For example:

a. "[S]he will run on attacking republicans, and being the first woman president — oh isn't that amazing, she's a woman she can walk and talk." (Am. Compl. Exh. 2 at 1.)

b. "Hillary Rodham Clinton. Could she become the first female President in the history of the United States?" (*Id.* at 5.)

c. "Hillary Clinton points to her time in the White House as a large part of her qualification for the job as President." (*Id.*)

d. "Over the past 16 years Hillary Clinton has undoubtedly become one of the most divisive figures in America. How this makes her suited to unite the country as the next president is troubling to many." (*Id.* at 6.)

e. "There are any number of things in the Clinton's political history worth recalling before you go in to potentially vote for a Clinton, in this case a Hillary Clinton." (*Id.* at 9.)

f. "Hillary's got an agenda and she's willing to put up with that to be [P]resident of the [U]nited [S]tates, she's got a to do list when she gets to the White House." (*Id.* at 21-22.)

"I'm asking people to look at the record that is undisputed and to come to their own conclusions regarding the suitability of Hillary Clinton to acquire the highest office in this country." (*Id.* at 32.)

h. "As a presidential candidate, Hillary has made other promises that may also prove difficult to keep." (*Id.* at 39.)

i. "Both Clintons are well aware the war on terror could be [a] key issue in Hillary's run for the presidency." (*Id.* at 52.)

j. "Sandy Berger was fined, lost his security clearance for 3 years, and disgraced, especially in Washington. But he has resurfaced. Reportedly, Berger is now an adviser to the presidential campaign of . . . Hillary Rodham Clinton." (*Id.* at 57 (alterations omitted; ellipsis in original).)

k. "I think the American people have a right to as much of a public record as possible about Hillary Clinton. Those records should be released before the 2008 elections so that we can learn a lot more about exactly how much influence she had in the White House, what her positions were in the White House, and how she acted in the White House." (*Id.* at 60.)

l. "Candidate Clinton claims she is the most experienced." (*Id.* at 67.)

m. "It's worth remembering that a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House." (*Id.* at 68.)

n. "Finally, before America decides on our next president, voters should need no reminders of . . . what's at stake — the well being and prosperity of our nation." (*Id.* at 69.)

5. *Hillary: The Movie* is devoted to criticizing Senator Clinton's character and arguing that she lacks the qualifications for, and is not fit to become, President of the United States. For example:

a. "[S]he is steeped in controversy, steeped in sleaze, that's why they don't want us to look at her record." (*Id.* at 2.)

b. "After announcing her bid for the presidency, fellow Democrats including former Clinton confidant and Hollywood mogul David Geffen publicly questioned Hillary's integrity and truthfulness." (*Id.* at 7.)

c. "So, who is the real Hillary Clinton? Is she a [ ] brilliant trailblazer, poised to make history as the first female president, or is she ruthless, cunning, dishonest — willing to do anything for power?" (*Id.* at 8.)

d. "Is Hillary really the most qualified to hit the ground running if elected President? After all, she was First Lady for 8 years and now a Senator from New York. Referring to her opponents she's said, quote, 'there is one job we can't afford on-the-job training for: that is the job of our next President.'" (*Id.* at 35-36.)

e. "Hillary says we should elect her president because of her tremendous accomplishments in the United States Senate. . . . But is that the legislative gravitas and qualifications enough to elect her [P]resident of the [U]nited [S]tates? Is she kidding?" *(Id.* at 36.)

f. "There's one Hillary who says, 'I'm gonna bring the troops home right away when I'm elected President' and another Hillary who says, 'I'm gonna keep troops in Iraq indefinitely.' One of these two women is lying." (*Id.* at 47-48.)

g. "As much as those pardons reveal about Bill, an earlier pardon may have revealed even more about Hillary's character — and her willingness to do *anything* to get elected." (*Id.* at 61.)

h. "It[']s been said and I agree with it that this is the most personal political choice that Americans make. They want, they — their personality traits, their — will they consider a person that they could trust, that they would like, that they were comfortable with, and that's [where] I think Hillary Clinton as a candidate has great defects." (*Id.* at 69.)

i. "[I]f she weren't married to Bill Clinton, what is there that she has accomplished in her life-that would lead you to believe that she should become the most powerful person in the country?" (*Id.* at 69-70.)

j. "If she reverts to form, Hillary Clinton will likely be in the future what she has been in the past, which is a person, a woman, a politician of the left, and I don't think that's

going to [be] good for the security of the United States." (*Id.* at 70.)

k. "I can tell you beyond a shadow of a doubt that uh, the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." (*Id.* at 71.)

l. "[W]e must not ever underestimate this woman. We must not ever understate her chances of winning. We mustn't be lolled [sic] into a state of security and complacency by the new found moderation that she likes to talk about. And we must never forget the fundamental danger that this woman [poses] to every value that we hold dear." (*Id.* at 72.)

m. In addition to these oral statements, the film contains multiple visual attacks on Senator Clinton's character — generally in the form of abridged newspaper headlines — that are not reflected in the written script. For example, thirty-seven seconds into the movie, after a montage of headlines containing the phrase "Mrs. Clinton," the visual zooms in and lingers on the word "perjury" (omitting the remainder of the headline). Four seconds later, after a montage of headlines referring to the "First Lady," the visual zooms in and lingers on the word "lies" (again omitting the remainder of the headline).

6. *Hillary: The Movie* does not focus on legislative issues, and it does not take a position on an issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter; instead, the only focuses of the film are Senator Clinton's character and fitness for office and her actions in relation to certain controversies

during Bill Clinton's presidency. (*See, e.g.*, Am. Compl. Exh. 2 at 10-35 (discussing, *inter alia*, "travelgate"), 50-67 (discussing, *inter alia*, Bill Clinton's presidential pardons).) Legislative issues are mentioned only in the context of critiquing Senator Clinton's character and fitness for the presidency. (*See, e.g.*, *id.* at 46-47 (discussing immigration debate and concluding that "it raised the question can you withstand the criticism . . . and if [you're] gonna whine about people complaining about you, that doesn't suggest presidential stature or character"); *id.* at 47-50 (discussing Iraq war and concluding that Senator Clinton is "not flipping and flopping. [S]he's lying.").)

7. *Hillary: The Movie* is available for available for purchase by the general public on DVD, and it has been exhibited in movie theaters. (Bossie Aff. ¶¶ 115-6.)

8. Several of these theater showings occurred in states that had already held their presidential primaries or conventions by the date of the exhibition. *Compare* Bossie Aff. ¶ 5 (showings Feb. 11 in Wash., Mar. 4 in Fla., Apr. 3 in Calif., Apr. 21 in Ohio) *with* FEC, Electioneering Communications Periods, http://www.fec.gov/info/charts_ec_dates_prez.shtml#Presidential.

9. On December 20, 2007, Plaintiff received a solicitation to pay to have *Hillary: The Movie* distributed for four weeks through a nationwide cable-television video-on-demand system. (Am.

Compl. ¶ 28; *see also* Def.'s Exh. 8 (filed separately under seal).)[26]

10. Pursuant to this solicitation, the film would be broadcast on "Elections '08" (Am. Compl. ¶ 28), which bills itself as a "breakthrough platform [that] allows you to speak directly to voters — 24/7 — in their own living rooms. By crafting and controlling your own long-form campaign message, you reach voters with no media dilution or bias." Spot Cable, Elections '08 On Demand, http://www.spotcable.com/political_sub2.html (Def.'s Exh. 2).

11. Plaintiff wishes to pay to distribute its film through this medium within the thirty-day period before the Democratic national convention. (See Am. Compl. ¶ 29.)

12. No presidential primary or nominating convention is scheduled to take place until August 25, 2008. *See* FEC, Electioneering Communications Periods, http://www.fec.gov/info/charts_ec_datesprez.shtml#Presidential.

13. Plaintiff wishes to promote its film through television advertisements. (Bossie Aff. ¶ 8.)

14. These advertisements would mention Senator Clinton and would air on nationwide cable and network television within the thirty-day period before the Democratic national convention. (*See id.*)

15. The audio of the first intended ad, a 10-second ad entitled "Wait," is "If you thought you

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[26] Because Plaintiff has insisted that the terms of the December 2007 offer remain confidential (*see* First Supp. to Pl.'s Resp. to FEC's First Interrogs. at 5-6 (Def.'s Exh. 1)), this offer is being filed under seal.

knew everything about Hillary Clinton . . . wait 'til you see the movie." (Am. Compl. Exh. 1.) The second ad, a ten-second ad entitled "Pants," includes a narrator saying "First a kind word about Hillary Clinton," Ann Coulter saying "She looks good in a pant suit," and then a narrator saying "Now a movie about everything else." (*Id.*) The third, a thirty-second ad entitled "Questions," contains three quotations regarding Senator Clinton, including Ann Coulter saying "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda," and Dick Morris saying "Hillary is the closest thing we have in America to a European socialist." (*Id.*) All three ads contain images of Senator Clinton and, at the end, the visuals "Hillary: The Movie" and "www.hillarythemovie.com" appear on the screen. (*Id.*)

16. Plaintiff has stated that it would fund these advertisements from a bank account consisting solely of donations made for the purpose of furthering the production or distribution of electioneering communications (Am. Compl. ¶ 24), even though the use of a segregated account would likely increase Plaintiff's reporting obligations. *Compare* 11 C.F.R. § 104.20(c)(9) (reporting requirements for general treasury disbursements) *with* 11 C.F.R. § 104.20(c)(7)(ii) (reporting requirements for disbursements from separate bank account).

17. Since December 2006, twenty-eight individuals, two for-profit corporations, and three other entities have donated $1,000 or more to Plaintiff for the purpose of furthering the production or distribution of Plaintiff's electioneering communications. (First Supp. to Pl.'s Resp. to FEC's First Interrogs. at 10-11 (Def.'s Exh. 1).)

18. Four days after Senator Barack Obama won the Iowa presidential caucuses, Plaintiff announced its intent to produce and broadcast a "documentary" film about Senator Obama, as well as television advertising for that film. (See Mot. for Leave to File Aff. of David N. Bossie (Docket No. 35).)

ABSENCE OF CONSTITUTIONAL BURDENS

19. Citizens United Political Victory Fund ("CU-PVF"), is Plaintiff's political committee (or "separate segregated fund"), and it is registered with the Commission as such. Citizens United Political Victory Fund, Statement of Organization (June 15, 1994) (Def.'s Exh. 3).

20. As a political committee, CU-PVF files with the Commission publicly available, monthly reports identifying, *inter alia*, the name and address of each person who has donated $200 or more to CU-PVF in that calendar year. 2 U.S.C. § 434(a)(4)(B),(b)(3).

21. Since 1994, CU-PVF has filed approximately 160 reports, identifying a total of approximately 1,214 donations. Citizens United Political Victory Fund, All Campaign Finance Reports, http://query.nictusa.com/cgi-binfecimg/?C00295527 (Def.'s Exh. 4); Citizens United Political Victory Fund, Individuals Who Gave to This Committee, http://query.nictusa.comicgibin/com_ind/C00295527/ (Def.'s Exh. 5).

22. Citizens United also operates The Presidential Coalition, LLC, and 2007 Conservative Victory Committee, which are entities holding tax-exempt status under section 527 of the Internal Revenue Code. (See First Supp. to Pl.'s Resp. to FEC's First Interrogs. at 10 n.2 (Def.'s Exh. 1).)

23. As "527" organizations, these entities file annually with the Internal Revenue Service two to six publicly available reports listing, *inter alia*, the name, address, occupation, and employer of each person who has donated $200 or more to the organization in that calendar year. 26 U.S.C. § 527(j).

24. Since 2005, The Presidential Coalition has filed ten reports, identifying a total of approximately 11,500 donations.[27]

25. Ten of the twenty-eight individuals who have contributed $1,000 or more to Plaintiff for the purpose of furthering Plaintiff's electioneering communications have been publicly identified in IRS filings as donors to The Presidential Coalition. (First Supp. to Pl.'s Resp. to FEC's First Interrogs. at 10-11 (Def.'s Exh. 1).)

26. In addition, one individual and two other entities, who have donated a total of $173,500 to Plaintiff for the purpose of furthering Plaintiff's electioneering communications, are identified in the credits of *Hillary: The Movie*. (*Id.*)

27. Despite this extensive record of donor disclosure, there is no evidence before the Court that any of the persons who have been publicly identified as contributors to Plaintiff, CUPVF, or The Presidential Coalition have been subject to any

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[27] The Presidential Coalition's IRS filings are available by searching the IRS website at http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp. The Commission calculated the number of donations disclosed by multiplying the aggregate number of pages of donations in the reports (1,152) by the number of donations listed on each page (10).

threats, harassment, or reprisals as a result of their affiliation with Citizens United.

28. Far from suffering reprisals, Plaintiff holds itself out as a well connected, mainstream organization. Joe Murray, *Lawsuit Threatened Over CNN's 'Campaign Killers,'* The Bulletin (Dec. 6, 2007) (Def.'s Exh. 6) (quoting written statement by plaintiff's spokesman that "Citizens United [is] hardly a 'fringe' group (unless consistent and open association with the former Speaker of the House, a current leading presidential candidate and numerous other leading Republicans can be considered 'fringe')"). Plaintiff has, in fact, threatened to file suit against a news organization for referring to Citizens United as a "fringe militia." *See* Press Release, Citizens United to Sue CNN, http://www.citizensunited.org/press/?entryid=1972618 (Dec. 4, 2007) (Def.'s Exh. 7).

29. There is no evidence before the Court that the general public is misled by the electioneering communication disclosures or disclaimers.

Respectfully submitted,

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Dated: June 6, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED,	)	
Plaintiff,	)	Civil Action No. 07-2240 (ARR,
v.	)	RCL, RWR)
FEDERAL ELECTION COMMISSION,	)	STATEMENT OF GENUINE ISSUES
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S STATEMENT OF GENUINE ISSUES AND OBJECTIONS TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to LCvR 7(h) and 56.1, Defendant Federal Election Commission ("Commission") submits the following statement of genuine issues in opposition to Plaintiff's Statement of Undisputed Material Facts ("Pl.'s Facts"). The Commission's statements below are presented in numbered paragraphs corresponding to the paragraph numbers in Plaintiff's statement.

1-9. No response.

10. *Hillary: The Movie* is not "issue advocacy." (See Def.'s Statement of Material Facts As To Which There Is No Genuine Dispute ("Def.'s Facts") ¶¶ 4-6.) Furthermore, "[a]t the time of filing its complaint,"

the film was not "slated for . . . cable on-demand broadcast." (*See* Pl.'s Facts ¶ 40 (noting that offer for on-demand distribution was made on December 20, 2007).)

11. The transcript filed with the Court does not appear to be a "true and correct copy of the final transcript" of the film, for the filed transcript contains numerous placeholders (*see*, *e.g.*, Am. Compl. Exh. 2 at 2, 6, 9) and differs from the words actually spoken in the film. The filed document also omits description of many of the film's visuals.

12-13. No response.

14. This statement is not supported by the record before the Court. First, Mr. Bossie's "opinion" is improper in support of a motion for summary judgment. *See* Fed. R. Civ. P. 56(e)(1). Second, there has been no complete "inability" of Plaintiff to advertise its film in advance of theater screenings, as several of Plaintiff's screenings have been held outside the electioneering communication periods, and therefore Plaintiff was free to advertise for them in the relevant markets. (Def.'s Facts 8.) Finally, for the same reason, it has not been "impossible" for Plaintiff to theatrically release its film. (*See id.* ¶¶ 7-8.)

15. No response, except that the intentions of "HLW"[1] are immaterial to this action.

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[1] "HLW" appears to refer to Human Life of Washington, Inc., another client of Plaintiff's counsel. *See* http://www.jamesmadisoncenter.org/WA/Complaint-Final.pdf. The identical erroneous reference to HLW appears in Mr. Bossie's affidavit (¶8).

16. First, because *Hillary: The Movie* is not issue speech, but rather is focused on criticizing Senator Hillary Clinton's character, qualifications, and fitness for office (*id.* ¶¶ 5-6), Plaintiff's assertion that its film regarding Senator Obama will "raise similar issues as *Hillary*" is vague and ambiguous. Second, if Plaintiff's new film is released and broadcast in June or the first four weeks of July, it will not be an electioneering communication. (*See id.* ¶ 12.) Third, it is not "impossible to present the movie and ads to the Court now in a request for declaratory and injunctive relief' because Plaintiff can seek (and has sought) a declaratory judgment that all communications exempt from the electioneering communication funding restriction under *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL*"), are exempt from the disclosure requirements. (*See* Am. Compl. 35-36.) Finally, to the extent the film or ads regarding Senator Obama are not exempt from the funding restriction (*i.e.*, are not "*WRTL* ads"), such communications are immaterial to this action.

17. Plaintiffs assertion that it "could not obtain an FEC advisory opinion . . . in the near future" is speculative, as nominations to fill the Commission's vacancies were recently made by the President, 154 Cong. Rec. S3838 (May 6, 2008), and favorably reported to the full Senate, *id.* 54792 (May 22, 2008). In any event, if Plaintiff were to request an advisory opinion from the Commission upon completion of the film this month, there would be between four and eight weeks for the Commission to issue such an opinion before the next electioneering communication window opens. (*See* Def.'s Facts ¶ 12.) In addition, to the extent the film or ads

regarding Senator Obama are not *WRTL* ads, such communications are immaterial to this action.

18. There is no evidence before the Court supporting Plaintiffs assertion that offers to purchase 'infomercial' airtime are made only after the relevant communication is finalized; instead, the evidence indicates that Plaintiff can purchase such airtime whenever it chooses to do so. (*See* Def.'s Exh. 8 (filed under seal); see also Def.'s Facts ¶ 10.)

19. The disclosure requirements "d[o] not prevent anyone from speaking." *McConnell v. FEC*, 540 U.S. 93, 201 (2003) (internal quotation marks and alteration omitted). Furthermore, both *WRTL* and the Commission's regulations implementing that decision, *see* 11 C.F.R. § 114.15, provide extensive guidance as to whether an electioneering communication is or is not the functional equivalent of express advocacy. In the unlikely event that Plaintiff remains unclear as to the permissibility of its next film and ads after they have been completed, Plaintiff may request an advisory opinion from the Commission and will receive a timely response. *See* 2 U.S.C. § 437f(a).

20. On December 20, 2007, the Commission's brief stated:

> Although plaintiff's first two proposed ads appear to come within the *WRTL* exemption — thus placing Citizens United's constitutional claim squarely before the Court as applied to those two ads — "Questions" poses a closer question that the Commission has not had an adequate opportunity to address. Moreover, the Commission has not been asked through the advisory opinion process (*see* 2 U.S.C. § 4370

> to apply its new regulation to that or any other ad. Accordingly, the Commission is not yet prepared to present its full case on the merits concerning the "Questions" ad."

(Def.'s Mem. in Opp. to Pl.'s Mot. for Consol. at 8-9.) On January 8, 2008, the Commission's brief stated:

> Although the Commission now agrees that "Questions" is a *WRTL* ad, . . . there was no reason for the Commission to address this issue in the context of plaintiff's first preliminary injunction motion. The only question presented in the first motion was whether BCRA's EC *disclosure* provisions could constitutionally be applied to WRTL ads in general, and that question was already properly before the Court on the basis of plaintiff's "Wait" and "Pants" ads alone. (*See* Def.'s Opp. to Pl.'s Mot. to Consol. at 9; *see also* Def.'s First P.I. Opp. at 17 n.7).) In other words, plaintiff's first preliminary injunction motion purported to encompass *all WRTL* ads, and there were two such ads plainly presented by the Complaint, so whether "Questions" also met the *WRTL* definition had no bearing on the motion. Because (1) this determination was immaterial to the then-pending motion, (2) the appropriate application of the Commission's new regulations was less immediately obvious as to "Questions" than it was as to the other ads alleged in the original Complaint . . . , and (3) the FEC's Commissioners had begun to disperse for the holidays (as noted in the Commission's motion for an extension of time to respond to the current motion), the

> Commission's brief — filed five business days after plaintiff's first motion — simply did not take a position about whether "Questions" qualifies as a *WRTL* ad. . . .
>
> The Commission agrees with plaintiff that "Questions" is a *WRTL* ad exempt from the funding restriction pursuant to 11 C.F.R. § 114.15(c). This analysis was slightly more complicated than it was for plaintiff's "Wait" and "Pants" ads because, while the ten-second ads qualify for the safe-harbor of 11 C.F.R. § 114.15(b) by omitting any indicia of express advocacy and promoting a commercial transaction, "Questions" arguably addresses a candidate's "character, qualifications, [and] fitness for office." 11 C.F.R. § 114.15(b). Thus, the safe harbor provision may not apply to "Questions," but it is, "on balance," susceptible of a reasonable interpretation as a commercial advertisement for *Hillary: The Movie*, rather than solely as an appeal to vote against Senator Clinton. 11 C.F.R. § 114.15(c). Accordingly, "Questions" is exempt from the funding restriction of 2 U.S.C. § 441b(a),(b)(2) . . . .

(Def.'s Mem. in Opp. to Pl.'s Second Mot. for Prelim. Inj. at 11, 17.)

21. In response to Plaintiffs Amended Complaint, the Commission analyzed Plaintiff's film and ads under the standard set forth in *WRTL* and the Commission's regulations implementing that decision, 11 C.F.R. § 114.15. (*See, e.g.*, Def.'s Mot. to Dismiss Counts 3 & 4 of Pl.'s Am. Compl. at 4-10.)

22. Both *WRTL* and the Commission's implementing regulations, 11 C.F.R. § 114.15, provide extensive guidance as to whether an electioneering communication is or is not the functional equivalent of express advocacy. In the unlikely event that Plaintiff remains unclear as to the permissibility of its next film and ads after they have been completed, Plaintiff may request an advisory opinion from the Commission and will receive a timely response. *See* 2 U.S.C. § 437f(a). There was no "delay" or "imprecision" in the analysis in the Commission's briefs of Plaintiffs film and the "Questions" ad; that analysis was conducted under the plain language of *WRTL*, *supra* ¶ 21, promptly upon Plaintiffs addition of the funding restriction to this case, *supra* ¶ 20.

23. Plaintiff's film is susceptible of no reasonable interpretation other than as an appeal to vote against Senator Clinton, and it is therefore, at a minimum, the functional equivalent of express advocacy. (*See* Def.'s Facts ¶¶ 4-6.)

24. The electioneering communication funding restriction permits Plaintiff to broadcast electioneering communications, provided that the funds are disbursed from Plaintiffs separate segregated fund, or "PAC." *See* 2 U.S.C. § 441b(b)(2)(C). Furthermore, Plaintiff may fund an electioneering communication from its general corporate treasury if that communication is susceptible of a reasonable interpretation other than as an appeal to vote for or against a candidate. *WRTL*, 127 S. Ct. at 2667. To the extent that Plaintiff cites FEC Advisory Opinion 2004-30 for any proposition regarding electioneering communications that are not the functional equivalent of express

advocacy, that Advisory Opinion is immaterial because it was decided prior to *WRTL*.

25-28. No response.

29-30. Plaintiff's advertisements would not have been electioneering communications if Plaintiff had broadcast them in the states where Plaintiff screened its film after the Democratic primary. (*See* Def.'s Facts ¶ 8.) Nor would Plaintiff's advertisements be electioneering communications if Plaintiff were to broadcast them any time between now and the thirty days before the Democratic national convention. (*Id.* ¶ 12.)

31. "Questions," although exempt from the electioneering communication funding restriction, is not an "issue-advocacy ad." *See supra* ¶ 20. There is no support in the factual record for Plaintiff's allegations that "10-second ads [are] virtually impossible and 30-second ads extremely difficult to do" in light of FECA's disclaimer requirements. Furthermore, the phrases "virtually impossible" and "extremely difficult" are vague, both within this paragraph and in relation to paragraph 39 of Plaintiffs statement, which alleges that ten-second ads are "preclude[d]" and thirty-second ads must be "revise[d]."

32. No response.

33. Citizens United's assertion based on "belief" is improper in support of a summary judgment motion. *See* Fed. R. Civ. P. 56(e)(1).

34. The ads would be subject to the disclosure requirements because they would be electioneering communications under 2 U.S.C. § 434(f)(3). (*See* Pl.'s Facts ¶¶ 29, 33.)

35. Allegations "on information and belief' are improper in support of a motion for summary judgment, *see* Fed. R. Civ. P. 56(e)(1), and the cited newspaper article, which Plaintiff offers for the truth of its contents, is inadmissible hearsay. Fed. R. Evid. 801. In addition, the cited article was published on June 26, 1996, not June 12, 2007, and it is irrelevant and immaterial because it has nothing to do with Plaintiff.

36. Plaintiff's statement that it "will pay for the ads exclusively from a segregated bank account" (internal quotation marks omitted) is inconsistent with Plaintiffs statement that it "will not make any electioneering communications" if it is subject to disclosure, for the use of a "segregated bank account" would likely increase Plaintiffs disclosure obligations. *Compare* 11 C.F.R. § 104.20(c)(9) (reporting requirements for general treasury disbursements) *with* 11 C.F.R. § 104.20(c)(7)(ii) (reporting requirements for disbursements from separate bank account).

37. Plaintiffs assertions regarding "materially-similar ads" are so vague and ambiguous that they are irrelevant to this action.

38. Plaintiff has not broadcast — and is not broadcasting — its advertisements even during the times when the electioneering communication regulations are inapplicable. (*See* Pl.'s Facts ¶ 33.)

39. There is no support in the factual record for Plaintiff's allegations that electioneering communication disclaimers and disclosures "mislead the public." There also is no support in the factual record for Plaintiff's allegation that electioneering communication disclaimers "preclude" Plaintiff from airing ten-second ads or require Plaintiff to "revise"

its thirty-second ads. *See supra* ¶ 31. Finally, Plaintiff has not broadcast — and is not broadcasting — its advertisements even during the times when the electioneering communication regulations are inapplicable. (*See* Pl.'s Facts ¶ 33.)

40-41. No response.

42. The electioneering communication funding restriction permits Plaintiff to broadcast electioneering communications, provided that the funds are disbursed from Plaintiff's separate segregated fund, or "PAC." *See* 2 U.S.C. § 441b(b)(2)(C).

43-44. Plaintiff's allegations regarding "constitutional rights" and a "remedy at law" are not statements of fact.

Respectfully submitted,

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Dated: June 6, 2008

Exhibit 1

United States District Court
District of Columbia

Citizens United, ***Plaintiff,*** *v.* **Federal Election Commission,** ***Defendant.***	**Case No. 07-2240** (ARR, RCL, RWR) THREE-JUDGE COURT

First Supplement to Plaintiff's Responses to FEC's First Interrogatories

Pursuant to Federal Rule of Civil Procedure 33, Citizens United ("CU") submits these supplemental responses to *Defendant Federal Election Commission's First Set of Interrogatories to Plaintiff Citizens United* ("Interrogatories") served on CU. All prior objections are incorporated by reference and the following responses are made without waiving any objections.

Specific Objections & Responses

1. Describe in detail each instance in which a person has been subjected to threats, harassment, or reprisal because of that individual's association with you.

Supplemental Response. None.

2. For each person who has made or pledged to make a donation to the Account since January 1, 2007, indicate: (a) the dates

> of the person's donations or pledges (specifying whether each was a donation or a pledge); (b) the amounts of the person's donations or pledges; (c) whether the person is an individual, business corporation, nonprofit corporation, labor organization, or other person; (d) whether the person has been identified in any public filing with the Commission or the Internal Revenue Service as having donated to Citizens United Political Victory Fund or any entity organized under Section 527 of the Internal Revenue Code and affiliated or connected to you; and (e) whether the person is named in the credits of *Hillary: The Movie*.

Supplemental Response. As part of its objection, CU stated the following (emphasis added):

> As to any communications that would be "electioneering communications" *if* run within the statutory prohibition periods, CU is fully free to use any form of donations to pay for those communications, but such donations and expenditures are wholly irrelevant to any claim or defense in this case, FRCP 26(b)(1), even if such information had been requested.

In an April 4 letter, FEC counsel asked CU to clarify whether this sentence was intended to read: "'As to any communications that would *not* be ECs . . . .

The FEC-suggested reading is not what CU intended. The key to understanding CU's statement is the word "*if*," i.e., the objection speaks of communications that would otherwise fit the "electioneering communications" but for the fact that they are run *outside* the statutory 30-and 60-day

periods for "electioneering communications." The government has asserted no interest in BCRA, and none was recognized in *McConnell v. FEC*, 540 U.S. 93 (2003), in regulating communication that would otherwise fit the "electioneering communications" definition but are *not* run during electioneering communication periods. They are *not* "electioneering communications." There is no government interest in regulating them. CU is absolutely free to run its ads or its documentary outside the 30- and -60 day periods without *any* disclosure. The objection simply made the point that CU is free to receive and use donations into any account, including its general fund, and to use those funds for making communications that would be "electioneering communications" if run within the 30- and 60-day periods, all without any obligation to disclose any information about donors or their donations. And as to such wholly unregulable activity, any donations, receipts, or disbursements are wholly irrelevant to any claim or defense in this case. So long as CU does not make one of these communications within the 30- and 60-day periods, which it has declared it will not due absent the requested judicial relief, the government has no interest in requiring any disclosure, even in discovery, of the communications because they are *not* electioneering communications. The objection merely points out the obvious, i.e., that there is a large field of permissible activity (including receipts and disbursements) related to the documentary and ads that is not subject to regulation and so has no bearing on this litigation. And, as noted, CU will not make broadcast communications that would be "electioneering communications" during the 30- and 60-day time periods unless the court holds that communications

that are excluded from prohibition by the appeal-to-vote test, *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), are also excluded from disclosure by the same test. So there is no actually or potentially disclosable information in which the government has asserted an interest in disclosure, and, consequently, discovery into such information cannot be relevant to any claim or defense. CU repeats this objection in a slightly different form in the second paragraph of its objection to Interrogatory #3.

> 3. For each person who has made or pledged to make a donation to Citizens United for the purpose of furthering the production or public distribution of the Movies, indicate: (a) the dates of the person's donations or pledges (specifying whether each was a donation or a pledge); (b) the amounts of the person's donations or pledges; (c) whether the person is an individual, business corporation, nonprofit corporation, labor organization, or other person; (d) whether the person has been identified in any public filing with the Commission or the Internal Revenue Service as having donated to Citizens United Political Victory Fund or any organization you operate under Section 527 of the Internal Revenue Code; (e) whether the person is named in the credits of Hillary: The Movie; and (f) which Movie each donation or pledge was made to further.

Supplemental Response. CU supplements Attachment 1 with added information. See

infra (revised Attachment 1).

4. Describe in detail the factual basis for any belief you have that a person who has made a donation or pledge listed in response to Interrogatory 2 or Interrogatory 3 will be subject to threats, harassment, or reprisal if that person is publicly identified as having made the donation or pledge. In addition, identify any documents in your possession relating to this belief.

Supplemental Response. CU intends to recite in support of its court-recognized interests (as set out in its prior objections and responses) in avoiding invasion of privacy, reduced donors, reduced donations, etc. the evidence recited in such cases, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), and *McConnell v. FEC*, 540 U.S. 93 (2003), including materials from the record, e.g., the *McConnell* district court's findings of fact as to such matters. In addition, CU intends to do a literature search for available literature on the problems caused by disclosure requirements, and at present can cite the following items: Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (Institute for Justice, March 2007); Brian Doherty, *Disclosure Flaw: The perils of campaign-finance disclosure laws* (www.reason.com, March 2007); Brian Doherty, *How Campaign finance law hurts participation in politics* (www.reason.com, March 2007); Center for Competitive Politics, *Disclosure 50 years later* (www.campaignfreedom.org, Jan. 31, 2008); Rich Lowry, *Youtube Nation: Debate No One Can Control Makes for the Best Politics* (New York Post, www.nypost.com, March 27, 2007).

5. Describe in detail the factual basis for your allegation (Am. Compl. ¶ 27) that the reporting requirements will "in [your] belief based on long experience, substantially reduce the number of donors and amount of donations to Citizens United." Include all facts relating to the bases for the alleged "belief," numerical estimates of the "substantial[ ] reduc[tion]" in the "number of donors and amount of donations," and description of any specific donations that you believe you will not receive or that the donor will ask you to return unless you are exempted from the disclosure requirements. In addition, identify any documents in your possession relating to this belief.

Supplemental Response. None.

6. Describe in detail the factual basis for your allegation (Am. Compl. ¶ 27) that the disclaimer requirement will cause you "to mislead the public," and identify any documents in your possession relating to whether the public is misled by the requirement.

Supplemental Response. CU intends to cite to *WRTL II* and *McConnell*, and any other applicable cases that it may discover, for the manner in which the term "electioneering" is employed.

7. Indicate the source of the funds that you intend to use to pay (a) the "fee" mentioned in Paragraph 28 of the Amended Complaint, and (b) any other fee you intend to pay for the public distribution of either of the Movies. Indicate whether these funds will

be drawn from Citizens United's general treasury, the Account, or some other source.

Supplemental Response. None.

8. Describe in detail (a) the "contract offer[ ]" mentioned in Paragraph 28 of the Amended Complaint, and (b) any other offer you have received or expect to receive regarding public distribution of either of the Movies. Include the identity of the offeror and the material terms of the contract.

Supplemental Response. The FEC asks for details as to why CU wishes a protective order as to the offer, claiming that it "cannot determine from the response, . . . why a protective order would be required for the details of a commercial transaction between two corporations to publicly distribute a film." The I-EC response reveals a misunderstanding of how commercial transactions happen between corporations, most or all of whom do not place contract negotiations on the record for review by the public, competitors, and adversaries for a wide variety of legitimate reasons. It is doubtful that the FEC can cite many examples of corporations routinely putting their contract negotiations on the public record for all to see what the corporation is being offered, by whom, and for how much. As already stated in the first response to this interrogatory, CU believes that "the negotiations were confidential and CU reasonably fears that making the offer public might cause it to be withdrawn or might interfere with CU receiving similar future offers." To avoid that eventuality, CU does not wish to disclose the identity of the offeror. Moreover, CU does not wish to disclose the offer amount or other terms because it considers that

information also to be confidential, because disclosure of terms might alter future offers, and because, as already stated, "contract terms would be the subject of negotiations based on the actual timing of the judicial relief and the situation existing at the time," so that the offered cost for one offered option would not likely reflect what would actually be the cost and scope of the broadcasting done if CU were able to proceed with the broadcasting. CU has already provided, in the *Amended Complaint* the material terms that it believes do not require a protective order. CU believes that the sort of protective order employed in the *WRTL* case would be suitable. *See* attachments to cover letter.

> **9**. Describe any television or radio advertising that you paid to produce or air to promote any ofthe films listed at Paragraphs 9-13 of the Amended Complaint, including, for each film, the number of ads you aired, the geographic areas in which you aired them, and the production and airtime costs of each such ad.

Supplemental Response. None.

> **10**. For each of your planned television ads regarding the Hillary: The Movie, state the geographic areas in which you intend to air the ad, the networks on which you intend to air the ad, the number of times you intend to air the ad on each network, and the production and airtime costs of the ad.

Supplemental Response. None.

11. Describe any plans you have to air advertisements "materially-similar" to your advertisements for Hilary: The Movie, as described

in Paragraph 25 of the Amended Complaint. For each such ad, include the subject matter of the ad, the geographic areas in which you intend to air the ad, the networks on which you intend to air the ad, the number of times you intend to air the ad on each network, and the production and airtime costs of the ad.

Supplemental Response. None.

12. Describe in detail each reason that you intend to fund your advertising for Hillary: The Movie from the Account instead of from your general treasury.

Supplemental Response. None.

VERIFICATION

I declare under penalty of perjury that the foregoing *First Supplement to Plaintiff's Responses to FEC's First Interrogatories* is true and correct. Executed on April 8, 2008.

/s/ David N. Bossie
David N. Bossie
Citizens United

Dated: April 9, 2008

Respectfully Submitted,

/s/ James Bopp, Jr.

James Bopp, Jr.,
D.C. Bar #C00041
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* *Pro Hac Vice Motion granted*
Counsel for Plaintiff

Interrogatory No. 3, Attachment 1 (Revised, April 9, 2008)

Person #	(a) Date(s)	(b) Amounts	(c) Status	(d) Public Disclosure		(e) Film Credits
				FEC[1]	IRS-527[2]	
1	12/22/2006	$1000.00	Individual	No	Yes	No
2	02/27/2007	$1000.00	Individual	No	Yes	No
3	11/19/2007	$1000.00	Individual	No	No	No
4	11/20/2007	$1000.00	Individual	No	No	No
5	02/05/2007	$500.00	Individual	No	No	No
5	03/22/2007	$500.00	Individual	No	No	No
5	02/14/2007	$500.00	Individual	No	No	No
6	02/16/2007	$1000.00	Individual	No	Yes	No
7	04/18/2007	$1000.00	Individual	No	No	No
8	02/27/2007	$1000.00	Individual	No	No	No
9	12/14/2007	$1000.00	Individual	No	Yes	No
10	11/20/2007	$1000.00	Individual	No	No	No
11	04/18/2007	$1000.00	Individual	No	No	No
12	02/27/2007	$1000.00	Individual	No	No	No
13	01/09/2007	$1000.00	Individual	No	No	No
14	12/12/2007	$500.00	Individual	No	Yes	No
14	01/29/2008	$500.00	Individual	No	Yes	No
15	06/25/2007	$35.00	Individual	No	No	No
15	12/04/2007	$1000.00	Individual	No	No	No
16	02/27/2007	$1000.00	Individual	No	No	No
17	03/05/2007	$1000.00	Individual	No	No	No
18	02/19/2007	$1000.00	Individual	No	No	No
19	02/04/2008	$1000.00	Individual	No	No	No
20	12/03/2007	$1000.00	Individual	No	No	No
21	02/19/2007	$1000.00	Individual	No	No	No
22	01/22/2008	$1000.00	Individual	No	Yes	No
23	12/10/2007	$1000.00	Individual	No	No	No
24	04/20/2007	$500.00	Individual	No	Yes	No

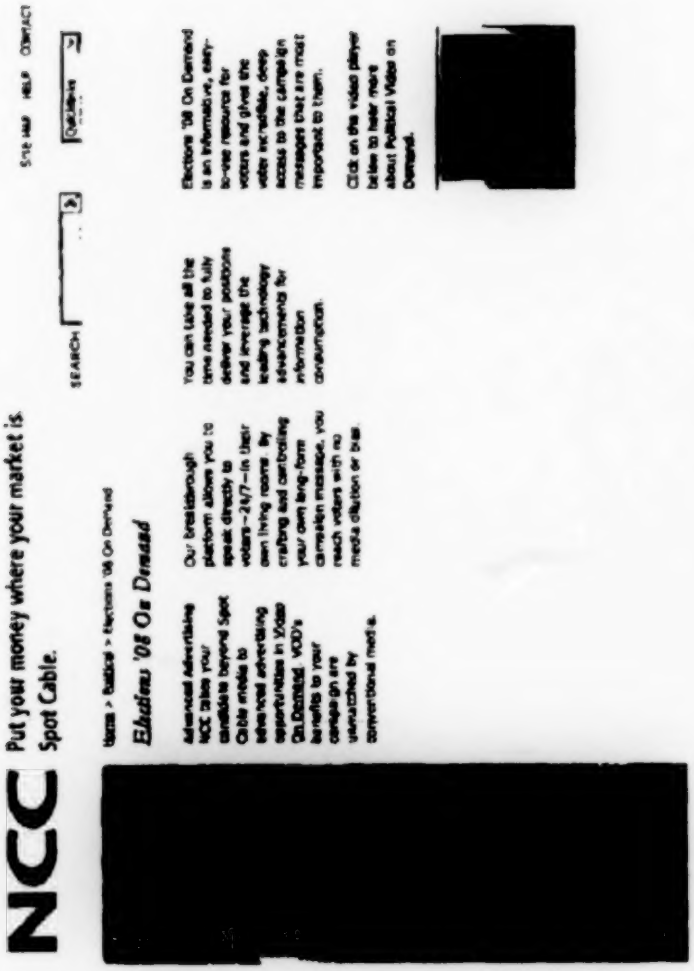
[1]Responses are based on contributions received between October 1998 and February 2008. Answers are based on a review of reports filed by CU-PVF and information available from the FEC's online search data-base of contributors. CU-PVF does not maintain contribution information dating back to its formation in 1994, and the FEC's online search database of contributors does not appear to include any CU-PVF donor information for periods prior to October 1998.

[2]Responses are based on reports filed by The Presidential Coalition, LLC and 2007 Conservative Victory Committee, which are the only Section 527 organizations filing reports with the IRS that are either affiliated with or connected to Citizens United.

24	02/26/2007	$500.00	Individual	No	Yes	No
25	12/11/2006	$1000.00	Individual	No	Yes	No
26	11/20/2007	$1000.00	Individual	No	Yes	No
27	03/12/2008	$1000.00	Individual	No	No	No
28	01/11/2008	$25000.00	Individual	No	No	Yes
28	07/26/2005	$100000.00	Individual	No	No	Yes
29	01/24/2008	$48500.00	Other Person	Yes[3]	No	Yes
30	08/15/2007	$1000.00	Bus. Corp.	No	No	No
31	08/22/2007	$2500.00	Other Person	No	No	No
32	08/15/2007	$1000.00	Other Person	No	No	No
33	08/08/2007	$1000.00	Bus. Corp.	No	No	No

[3]The FEC's online data base erroneously lists this entity as having made a contribution to CU-PVF in 2007. This is an error on the part of the FEC. CU-PVF did not receive a contribution from that person in 2007, nor did CU-PVF report that it received such a contribution. A review of the contributor's FEC report also reveals that it did not report having made a contribution to CU-PVF in 2007. The contributor correctly reported that the contribution was to Citizens United.

Exhibit 2


NCC
Put your money where your market is.
Spot Cable.
SEARCH
Elections '08 On Demand

Elections
'08
For more information on Political Advertising opportunities, contact a specialist.

----- Forward Message -----
From: Bob Carlstrom Bob_Carlstrom@spotcable.com
To: DaveBossie@yahoo.com
Cc: Ken Little Ken_Little@spotcable.com; Chuck Cowdrey Chuck_Cowdrey@spotcable.com
Sent: Thursday, December 20, 2007 4:00:35 PM
Subject: "Hillary: the Movie" and the Elections '08
National Cable TV On Demand Channel

To: David Bossie, Citizens United

Dave,

As you know, our company – NCC – is the established national marketing and sales representative for virtually the entire U.S. cable TV industry for both (i) microtargetable Spot Cable advertisements and (ii) "long form" paid advertisements, messages, and other constituent and voter communications through Television Video On Demand ("VOD'), free to the viewers and viewable at any time 24-7 by them. NCC was created by the industry to overcome the geographic limitations of the individual cable TV companies and to enable customers to deal with only one organization on national and regional advertising and VOD "buys." NCC is owned by Comcast, Time Warner Cable, and Cox, and now serves the entire industry nationally as its "one-stop shop."

In this connection, the cable TV industry has launched a major national initiative in the form of a single national On Demand channel called "Elections '08." This channel will be a national cable TV-based resource for the American people to use for direct information and communications from Presidential, Congressional, and State and Local candidates for elective office; the candidates will be able to discuss at length through their respective channel with any

topical sub-channels they choose to provide personal conversational discussions of their positions on the various issues, as well as to introduce themselves more fully so that the voters "get to know them." Moreover, Elections '08 will also be available to the national and state political parties and national public interest organizations to similarly outline through their own channel with any topical sub-channels they choose to establish detailed discussions delivered by their leaders. (Enclosed is a one-page description.)

In this connection, we are prepared to offer the following to include "*Hillary: The Movie*" under a "Political Movies" component of "Elections '08" -- the new national television On Demand channel sponsored by the U.S. cable TV industry -- which will be viewable in 30+ million digitally equipped cable TV subscribing households (HHs) of which there are over 70 million cable TV subscribing HHs today. Indeed, the end of 3Q 2007, there are now 34.5 million digitally equipped cable TV HHs that can access TV On Demand.

Accordingly, we suggest the following:

- Price: $.04 per digital cable TV VOD enabled HH nationally, assuming the duration of the film is in the range of 60 minutes.
- Duration: 4 weeks
- Accessibility: Any time for any cable TV VOD enabled HH accessing Elections '08
- Estimated Cost to Citizens United: $1.2 Million @ $.04/HH

- Regional and Not National = selecting individual states = to be negotiated.

Dave, I trust this is sufficient for purposes of your review.

Please realize this pricing is for a full US national footprint of digital boxes. If you wish to focus on individual regions or states, then there would be a price difference.

Finally, please recognize would be subject to content review.

My colleagues and I look forward to further discussions. (I have copied Ken Little , Executive Vice President, NCC and Chuck Cowdrey, Vice President, Political Strategy, who will join us in such discussions on behalf of the industry.)

Sincerely,

BOB CARLSTROM
VICE PRESIDENT - POLITICAL MARKETING
NCC
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* * *

Executive Summary: Elections '08 On Demand

12.17.07

Elections '08 On Demand is the major unified initiative of the US cable television industry to provide an innovative voter education cable TV On Demand channel, dedicated to delivering the in-depth campaign messages of America's political candidates, elected officials, and issue advocates into the homes of now almost 35 million American homes – that equates to well over 55 million voters and expected to reach 70 million homes by 2009.

In 2006, over 2.2 billion TV On Demand viewings were made by Americans and the rate of 2007 viewing in these 34.6 million homes is over 280 million viewings per month – and increasing. Indeed, as Americans continue to buy HDTV sets at increasing rates, the industry believes customers/voters will choose the living room experience over the computer both (i) to educate themselves on the candidates and the issues, and (ii) to make their voting decisions.

Elections '08 On Demand ("VOD") provides complete opportunity and control:

(1) To the voters to "watch what they want when they want" and hear longer, more meaningful and engaging individual candidate messages and discussions with no distractions on the

individual candidate's channel with its topical sub-channels.

(2) To the candidates – through "their own TV channel with topical sub-channels" – the genuine opportunity to speak conversationally to the voters in longer, more meaningful and engaging messages and discussions of the issues and positions, as well as personal biographies. This enables candidates to establish that all important "gut connection" with the voters, who now through On Demand television are able "to get to know them."

(3) To both the voters and candidates to take advantage of the time shifting pattern of media consumption.

Primary Goals of Elections '08

The primary goals and objectives of Elections '08 are to:

(1) Demonstrate cable television's commitment to better educate and better inform the American people of the elections process and candidates by enabling them to see and hear – at their time of choosing in the comfort of their living rooms – the candidates fully discuss the issues and their individual perspectives.

(2) Provide candidates for federal, state, and local government elected office the opportunity to reach all voters – and in particular, the independent and swing voters whose votes will determine the winner – through the major medium of television upon which 70% of the American people rely for their political information.

(3) Provide a single unified destination for informative, engaging voter resource for:

a. Non-partisan voter education video content, e.g., the League of Women Voters and other non-partisan voter education organizations;

b. Paid partisan political content that maximizes benefits and opportunities of the television medium to the political candidates and their campaigns; and

c. Public interest groups, associations, unions, and other organizations to communicate their respective views and position on important issues.

Industry Promotion

Elections '08 On Demand will be promoted and marketed aggressively within each market by the entire cable television industry using their own cable networks to drive audiences to the sight.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS UNITED,	
Plaintiff,	
v.	**Civil Action No. 07-2240 (ARR, RCL, RWR) (Three-Judge Court)**
FEDERAL ELECTION COMMISSION,	
Defendant.	

MEMORANDUM OPINION

This case returns to us on cross-motions for summary judgment. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Mills v. Winter*, 540 F. Supp. 2d 178, 183) (D.D.C. 2008). There are no genuine issues of material fact presented in this case. Based on the reasoning of our prior opinion, we find that the Federal Election Commission is entitled to judgment as a matter of law. *See Citizen United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (denying Citizens United's request for a preliminary injunction). Therefore, plaintiff's motion [52] for summary judgment will be **DENIED**, and defendant's Motion [55] for summary judgment will

be **GRANTED**.[1] Accordingly, judgment will be entered for defendant.

A separate order shall issue this date.

Signed by United States Circuit Judge A. Raymond Randolph, and United States District Judges Royce C. Lamberth and Richard W. Roberts, on July 18, 2008.

---

[1] Defendant's motion [43] to dismiss Counts 3 and 4 of the Amended Complaint will be **GRANTED** in part and **DENIED** in part as moot. As to Count 3, defendant's motion will be denied as moot. As to Count 4, defendant's motion to dismiss will be granted without prejudice by agreement of the parties.

APPELLANT'S BRIEF

114

Supreme Court, U.S.
FILED
JAN 8 - 2009
OFFICE OF THE CLERK

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal
From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLANT

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BOTH 49NH5F

QUESTIONS PRESENTED

1. Whether the prohibition on corporate electioneering communications in the Bipartisan Campaign Reform Act of 2002 ("BCRA") can constitutionally be applied to a feature-length documentary film about a political candidate funded almost exclusively through noncorporate donations and made available to digital cable subscribers through Video On Demand.

2. Whether BCRA's disclaimer, disclosure, and reporting requirements can constitutionally be applied to advertisements for that documentary film that the Federal Election Commission concedes are beyond its constitutional authority to prohibit.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Citizens United has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT 1

SUMMARY OF ARGUMENT 12

ARGUMENT 16

I. BCRA § 203 IS UNCONSTITUTIONAL AS APPLIED TO THE DISTRIBUTION OF CITIZENS UNITED'S DOCUMENTARY FILM THROUGH VIDEO ON DEMAND 16

A. The Government May Not Suppress Political Speech Except When Necessary To Prevent Corruption Or The Appearance Of Corruption 17

B. No Compelling Interest Supports The Government's Effort To Prohibit Video On Demand Distribution Of Citizens United's Documentary Film 21

1. The Government Has Failed To Demonstrate Any Anti-Corruption Rationale For Prohibiting Video On Demand Distribution Of Feature-Length Films 22

2. No Compelling Interest Supports The Government's Effort To Suppress Political Speech That Is Funded Overwhelmingly By Individuals 29

C. *Hillary: The Movie* Is Not The Functional Equivalent Of Express Advocacy 34

II. BCRA § 201 AND BCRA § 311 ARE UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED 42

A. The Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Strict Scrutiny 43

B. The Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Exacting Scrutiny 44

1. BCRA's Disclaimer Requirements Are Unconstitutional As Applied To Citizens United 45

2. BCRA's Disclosure Requirements Are Unconstitutional As Applied To Citizens United 51

3. BCRA's Reporting Requirements Are Unconstitutional As Applied To Citizens United 57

CONCLUSION 58

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. ACLU,
535 U.S. 564 (2002) 1

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 13, 14, 19, 30, 31, 32, 33

Broadrick v. Oklahoma,
413 U.S. 601 (1973) 42

Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982) 53

Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) 43, 49

Buckley v. Valeo,
424 U.S. 1 (1976) (per curiam) 18, 19, 30, 44, 45, 47, 49, 51, 53, 54

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 56

Davis v. FEC, 128 S. Ct. 2759 (2008) 30, 48, 53, 57

FEC v. Mass. Citizens for Life,
479 U.S. 238 (1986) 18, 31, 32, 33, 43, 54, 55

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 13, 17

FEC v. Wisc. Right to Life, Inc.,
127 S. Ct. 2652 (2007) ..... *passim*

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 14, 29, 30, 31, 43, 45, 47, 55

Fla. Star v. B.J.F.,
491 U.S. 524 (1989) 52

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston,
515 U.S. 557 (1995) 43, 45

McConnell v. FEC,
540 U.S. 93 (2003) ..... *passim*

McConnell v. FEC,
251 F. Supp. 2d 176 (D.D.C. 2003) (per curiam) 19, 20, 22, 24, 25, 26

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 44, 45, 47, 55

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974) 50

N.C. Right to Life, Inc. v. Leake,
525 F.3d 274 (4th Cir. 2008) 52

NAACP v. Alabama,
357 U.S. 449 (1958) 53, 54

NAACP v. Button,
371 U.S. 415 (1963) 35

Republican Party v. White,
536 U.S. 765 (2002) 28

Riley v. Nat'l Fed'n of the Blind, Inc.,
487 U.S. 781 (1988) 43, 45, 49

Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,
547 U.S. 47 (2006) 49

Talley v. California,
362 U.S. 60 (1960) 46

United States v. Grace,
461 U.S. 171 (1983) 27

Wisc. Right to Life, Inc. v. FEC,
546 U.S. 410 (2006) 4, 42

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I 1

STATUTES

2 U.S.C. § 434(f) 3, 56, 57
2 U.S.C. § 434(f)(3)(A)(i) 2
2 U.S.C. § 434(f)(3)(C) 27
2 U.S.C. § 441b(b)(2) 2, 20
2 U.S.C. § 441b(b)(2)(C) 2
2 U.S.C. § 441b(b)(4)(A) 2
2 U.S.C. § 441d(a)(3) 3
2 U.S.C. § 441d(d)(2) 3

REGULATIONS

11 C.F.R. § 100.29(b)(3)(ii) 2, 27
11 C.F.R. § 100.29(c)(2) 38
11 C.F.R. § 104.20 ..... 3, 56
11 C.F.R. § 114.10 30
11 C.F.R. § 114.10(d)(2) 3
11 C.F.R. § 114.15 4
11 C.F.R. § 114.15(b) 4
11 C.F.R. § 114.15(c) 5
11 C.F.R. § 114.15(f) 5

OTHER AUTHORITIES

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the three-judge district court denying appellant's motions for a preliminary injunction is reported at 530 F. Supp. 2d 274. J.A. 195a. The opinion of the three-judge district court granting appellee's motion for summary judgment is unreported. *Id.* at 261a.

JURISDICTION

The judgment of the three-judge district court was entered on July 18, 2008. The notice of appeal was filed on July 24, 2008. The jurisdictional statement was filed on August 15, 2008, and probable jurisdiction was noted on November 14, 2008. This Court has jurisdiction under § 403(a)(3) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 113-14.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of BCRA and BCRA's implementing regulations are reproduced in the appendix to this brief.

STATEMENT

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This constitutional injunction evidently was not in the forefront of Congress's mind when it enacted BCRA, a statute that imposes sweeping restrictions on core political speech. But, presumably, that statute did not diminish "our profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omit-

ted). As this Court recently reiterated, that commitment requires that a court "ensure that a compelling interest supports *each application* of a statute restricting speech." *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2671 (2007) ("*WRTL II*") (opinion of Roberts, C.J.). In holding that BCRA can constitutionally be applied to a documentary film presenting a critical biographical assessment of a political candidate and to television advertisements promoting that film, the three-judge district court failed to meet this most basic of First Amendment requirements.

1. BCRA imposed far-reaching restrictions on the right of corporations to fund political speech in the time period preceding a federal election. Most significantly, BCRA § 203 prohibits corporations from using their general treasury funds to finance "electioneering communications" (2 U.S.C. § 441b(b)(2)), which BCRA and its implementing regulations define as "any broadcast, cable, or satellite communication which refers to a clearly identified candidate for Federal office"; is made 60 days before a general election for the office sought by the candidate or 30 days before a primary election; and, in the case of a presidential candidate, "[c]an be received by 50,000 or more persons anywhere in the United States" (or, in the pre-primary period, in the State where the primary is being held). *Id.* § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(b)(3)(ii).

BCRA's prohibition on corporate electioneering communications does not extend to communications funded through a political action committee ("PAC") that receives donations only from a corporation's stockholders, its executive and administrative personnel, and their families. 2 U.S.C. § 441b(b)(2)(C), (b)(4)(A). The prohibition is also inapplicable to ideological, nonstock, nonprofit corporations that are not

established by for-profit corporations and that do not accept contributions from for-profit entities. 11 C.F.R. § 114.10(d)(2).

BCRA further established extensive reporting, disclosure, and disclaimer requirements for all electioneering communications, whether funded by a corporation, PAC, or individual. Section 201 of BCRA imposes reporting and disclosure requirements on any person who spends more than $10,000 in a calendar year to produce or air an electioneering communication. 2 U.S.C. § 434(f). Within 24 hours of each statutory "disclosure date," the person funding the communication is required to submit a statement to the Federal Election Commission ("FEC") that identifies itself as responsible for funding the communication and, in the case of a corporation or union, that discloses the name and address of all persons who donated $1,000 or more to the corporation or union since the beginning of the preceding calendar year for the purpose of funding electioneering communications. *Id.*; 11 C.F.R. § 104.20. In addition to these reporting and disclosure requirements, § 311 of BCRA requires electioneering communications to include the disclaimer that "_____ is responsible for the content of this advertising." 2 U.S.C. § 441d(d)(2). The disclaimer must be spoken during the advertisement and, for television advertisements, must appear on the screen "in a clearly readable manner" for at least four seconds. *Id.* The advertisement must also include the name, as well as the address, telephone number, or web address, of the person who funded the electioneering communication and state that the communication was not approved by any candidate or candidate's committee. *Id.* § 441d(a)(3).

This Court has already had several occasions to consider the constitutionality of various aspects of BCRA. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court upheld BCRA's prohibition on corporate electioneering communications, as well as its reporting, disclosure, and disclaimer requirements, against a facial First Amendment challenge. The Court made clear, however, in *Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*") (per curiam), that, "[i]n upholding" the prohibition on corporate electioneering communications "against a facial challenge, [*McConnell*] did not purport to resolve future as-applied challenges" to the statute. *Id.* at 411-12. The Court decided such an as-applied challenge in *WRTL II*, and concluded that the prohibition on corporate electioneering communications can only be constitutionally applied to advertisements that are express advocacy or the functional equivalent of express advocacy. 127 S. Ct. at 2667 (opinion of Roberts, C.J.). "[A] court should find that an ad is the functional equivalent of express advocacy," the Court explained, "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*

In response to *WRTL II*, the FEC promulgated regulations that purport to implement the decision's holding. 11 C.F.R. § 114.15. Those regulations establish a safe harbor for several categories of electioneering communications—including advertisements that propose a commercial transaction and do "not mention any election, candidacy, political party, opposing candidate, or voting by the general public" and do "not take a position on any candidate's or officeholder's character, qualifications, or fitness for office" (*id.* § 114.15(b))—and also specify the factors that the FEC will consider when determining

whether an advertisement is susceptible of no reasonable interpretation other than as an appeal to vote. *Id.* § 114.15(c). The regulations explicitly provide that BCRA's reporting, disclosure, and disclaimer requirements remain applicable to electioneering communications that cannot be constitutionally proscribed under *WRTL II*'s appeal-to-vote standard. *Id.* § 114.15(f).

2. Citizens United is a nonprofit membership corporation that has tax-exempt status under 26 U.S.C. § 501(c)(4) as an "organization[ ] not organized for profit but operated exclusively for the promotion of social welfare." J.A. 11a. Through a combination of education, advocacy, and grass-roots programs, Citizens United seeks to promote the traditional American values of limited government, free enterprise, strong families, and national sovereignty and security. *Id.*

Citizens United has an annual budget of approximately $12 million (J.A. 11a), and is funded predominantly by donations from individuals who support Citizens United's ideological message. *Id.* at 244a, 251a-52a. Citizens United also receives a small portion of its funding from corporate donations. *Id.*

One of the principal means through which Citizens United disseminates its political views is the production and distribution of feature-length documentary movies. J.A. 11a. Since 2004, Citizens United has produced movies on the War on Terror, illegal immigration, and the United Nations, among other political topics. *Id.* at 11a-12a. These movies have been shown in theaters across the country and sold on DVD by national retailers. *Id.* at 12a. A number of them have met with critical and popular

success. Citizens United's 2007 documentary film *Rediscovering God in America*, for example, was the top-selling historical documentary on Amazon.com soon after its release. *Id.*

In mid-2007, Citizens United began production of *Hillary: The Movie*, a biographical documentary about Senator Hillary Clinton, who was then a candidate to become the Democratic Party's nominee for President. J.A. 12a-13a. Although Senator Clinton's candidacy was the backdrop for the 90-minute documentary, neither the movie's narrator nor any of the individuals interviewed during the movie expressly advocated her election or defeat as President. *Id.* at 13a. The movie instead presents a critical assessment of Senator Clinton's record as a U.S. Senator and as First Lady in order to educate viewers about her political background. *Id.*

The documentary focuses principally on five aspects of Senator Clinton's political record: the Clinton Administration's firing of the White House Travel Office staff (J.A. 43a); incidents of official retaliation against a woman who accused President Clinton of sexual harassment (*id.* at 57a); Senator Clinton's failure to adhere to campaign finance restrictions while a candidate for U.S. Senate (*id.* at 72a); her record on job-creation, health-care, and national security issues (*id.* at 90a, 95a, 108a); and the Clinton Administration's abuse of the pardon power (*id.* at 130a).

The movie presents a series of interviews with political commentators, including Robert Novak, Dick Morris, and Ann Coulter (J.A. 36a, 39a, 40a), and with individuals who have had firsthand experience with Senator Clinton. For example, the movie presents an in-depth interview with Billy Dale, the

former director of the White House Travel Office, who was fired by the incoming Clinton Administration and later prosecuted for alleged criminal wrongdoing by the Clinton Justice Department. J.A. 44a-54a. The movie explains that Mr. Dale was eventually acquitted of all charges against him and that the Clinton Administration's handling of the Travel Office affair was condemned by an Independent Counsel investigation. *Id.* at 53a.

The movie also recounts President Clinton's decision to pardon a Puerto Rican nationalist who murdered four people and wounded 50 others in a 1975 New York City bombing. J.A. 131a. The movie reports that the U.S. Senate later voted 95-2 to condemn President Clinton's decision to pardon the bomber while his wife was seeking the Puerto Rican community's support for her Senate bid. *Id.* at 142a.

Citizens United's production of *Hillary* and proposed advertising campaign for the movie were financed with its general treasury funds. The more than $1 million in donations it received to fund the movie came almost exclusively from individuals and other noncorporate persons. J.A. 244a, 251a-52a. Of the 25 donations of $1,000 or more made to fund the movie, only two—totaling just $2,000—came from for-profit corporations. *Id.* at 252a.

3. *Hillary* was released in January 2008 and shown in theaters in six cities that month. J.A. 212a-13a. It was simultaneously made available for purchase on DVD through Citizens United's website and commercial retailers. *Id.* at 213a. The movie's release was accompanied by the publication of a companion book, *Hillary: The Politics of Personal Destruction*. *Id.* at 13a.

To promote the movie, Citizens United produced three advertisements—two of ten seconds' duration and one of thirty seconds' duration—that it intended to run on broadcast and cable television. J.A. 15a.[1]

Citizens United also received an offer from NCC, a company owned by three of the Nation's largest cable companies, to make *Hillary* available through Video On Demand to households that subscribe to digital cable television. J.A. 255a. Video On Demand allows digital cable subscribers to choose movies and other entertainment from an extensive list of

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[1] The script for the television advertisement "Wait" reads:

"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com

The script for "Pants" reads:

"First, a kind word about Hillary Clinton: [Ann Coulter Speaking & Visual] She looks good in a pant suit.
"Now, a movie about everything else."
[Visual Only] Hillary: The Movie.
[Visual Only] www.hillarythemovie.com

The script for "Questions," the thirty-second advertisement, reads:

"Who is Hillary Clinton?
[Jeff Gerth Speaking & Visual] "[S]he's continually trying to redefine herself and figure out who she is . . . .
[Ann Coulter Speaking & Visual] "[A]t least with Bill Clinton he was just good time Charlie. Hillary's got an agenda . . . .
[Dick Morris Speaking & Visual] "Hillary is the closest thing we have in America to a European socialist . . . .
"If you thought you knew everything about Hillary Clinton . . . wait 'til you see the movie."
[Visual Only] Hillary: The Movie. In theaters [on DVD] January 2007.
[Visual Only] www.hillarythemovie.com. J.A. 26a-27a.

programming options that are generally available 24 hours a day and not subject to preset air times. Video On Demand thus enables viewers to watch what they want, when they want, and further enhances viewers' freedom by enabling them to pause, rewind, and restart programming. *See* Wes Simpson, *Video Over IP: A Practical Guide to Technology and Applications* 377-80 (2006).

A digital cable subscriber can review the available programming options by selecting the Video On Demand feature on his cable converter box or remote control. When the subscriber orders a movie, a compressed data signal is transmitted from the cable company's digital server to the subscriber's set-top converter box, which decompresses the data signal, enabling the movie to be viewed on the television connected to the subscriber's converter box. That electronic signal is sent only to the subscriber who requests the Video On Demand program. The requested programming therefore can only be viewed by the subscriber who ordered it, and not by any other cable-system subscriber. If multiple subscribers order the same movie, then the cable company must transmit a separate electronic signal to each subscriber who placed an order. *See* Simpson, *supra*, at 377-80.

NCC proposed to include *Hillary* as one of the programs in its *Elections '08* Video On Demand feature, which made political programming available free of charge to digital cable subscribers interested in using their television "(i) to educate themselves on the candidates and the issues, and (ii) to make their voting decisions." J.A. 258a. NCC proposed a fee of $1.2 million, or one cent per Video-On-Demand-enabled household per week, to make *Hillary* available through Video On Demand. *Id.* at 256a.

4. Because Senator Clinton was a candidate in the presidential primaries that the Democratic Party was holding between January and June 2008, and because the movie and advertisements mentioned Senator Clinton's name, they potentially constituted "electioneering communications" within the meaning of BCRA.

Citizens United filed suit against the FEC in the United States District Court for the District of Columbia challenging BCRA's constitutionality as applied to the movie and advertisements. In its amended complaint, Citizens United explained that, in the absence of judicial relief, it would be unable to finalize its deal to distribute the movie through Video On Demand because the FEC considered the movie to be a prohibited electioneering communication under *WRTL II*. J.A. 19a-20a. Citizens United further explained that, even though the FEC had conceded that its television advertisements for *Hillary* were not the functional equivalent of express advocacy and thus could not be prohibited under *WRTL II*, it was unable to run those advertisements because complying with BCRA's reporting and disclosure requirements would require Citizens United to reveal the identity of its donors—thereby subjecting them to potential retaliation and chilling further donations—and because BCRA's disclaimer requirements would significantly impair the effectiveness of its 10- and 30-second advertisements. *Id.* at 18a-19a.

Pursuant to BCRA § 403(a)(1), a three-judge district court was empaneled. Citizens United sought a preliminary injunction from that court prohibiting the FEC from applying BCRA's restrictions on electioneering communications to the movie or the advertisements. Citizens United argued that, under *WRTL II*, the FEC could not constitutionally bar dis-

tribution of the movie through Video On Demand because the movie could reasonably be interpreted as a biographical documentary about Senator Clinton, rather than as an "appeal to vote" for or against her. Citizens United further argued that BCRA's reporting, disclosure, and disclaimer requirements cannot be constitutionally applied to any electioneering communication that does not constitute express advocacy or its functional equivalent under *WRTL II*, and that these requirements therefore could not be applied either to the advertisements or to the movie.

The three-judge district court concluded that Citizens United lacked a likelihood of success on the merits and denied its motion for a preliminary injunction. J.A. 209a-10a. The district court held that a Video On Demand broadcast of the movie "was within the definition of 'electioneering communication'" set forth in BCRA and its implementing regulations (*id.* at 199a n.6), and that, under *WRTL II*, the FEC could constitutionally proscribe the movie's broadcast. *Id.* at 206a. Relying on a "selection of excerpts from the movie," the district court concluded that the "film's message as a whole" was the "functional equivalent of express advocacy" because it "references the election and Senator Clinton's candidacy, and it takes a position on her character, qualifications, and fitness for office." *Id.* at 203a, 204a n.12, 206a. According to the district court, the movie is "susceptible of no other interpretation than to inform the electorate that Senate Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." *Id.* at 204a.

The district court also held that application of BCRA's reporting, disclosure, and disclaimer requirements to Citizens United's advertisements does

not violate the First Amendment. J.A. 209a. The district court reasoned that, when *McConnell* sustained the reporting and disclosure requirements of BCRA § 201 and the disclaimer requirements of BCRA § 311, "it did so for the 'entire range of electioneering communications' set forth in the statute" and that "Citizens's advertisements obviously are within that range." *Id.* at 208a (quoting *McConnell*, 540 U.S. at 196). In so concluding, the district court declined to give any weight to the undisputed fact that, under *WRTL II*, Citizens United's advertisements cannot be constitutionally proscribed by the FEC, and expressed skepticism that this Court would "adopt[ ] that line as a ground for holding the disclosure and disclaimer provisions unconstitutional." *Id.* at 208a.

The district court thereafter granted summary judgment to the FEC for the same reasons that it denied Citizens United's motion for a preliminary injunction. J.A. 261a. This Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The decision of the three-judge district court should be reversed. BCRA's prohibition on corporate electioneering communications cannot be constitutionally applied to Citizens United's documentary film, *Hillary: The Movie*, and its disclaimer, disclosure, and reporting requirements cannot be constitutionally applied to advertisements promoting that film.

I. BCRA § 203 is unconstitutional as applied to *Hillary: The Movie*.

A. This Court has identified only one compelling interest that is even conceivably sufficient to justify governmental restrictions on political speech: pre-

venting *quid pro quo* corruption and the appearance of such corruption in the electoral process. *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

B.1. Although that compelling anti-corruption interest may be served by government restrictions on 30- or 60-second broadcast advertisements that constitute express advocacy or its functional equivalent, that interest is categorically inapplicable to restrictions on feature-length movies distributed through Video On Demand. In contrast to short broadcast advertisements—which generally target unwilling recipients—feature-length movies are directed at a self-selected audience willing to invest 90 minutes of their time to watch a movie. And where that movie is offered through Video On Demand, the viewers must affirmatively request the movie from their cable provider. *Hillary* and other feature-length political movies distributed through Video On Demand are therefore far less likely than broadcast advertisements to reach and persuade undecided voters and thereby influence the outcome of an election.

2. Moreover, any anti-corruption interest that the government might have in regulating some feature-length political movies distributed through Video On Demand would not reach movies that, like *Hillary*, are funded primarily through individual donations. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990)—which held for the first time that the government has a compelling interest in forestalling the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form" (*id.* at 660)—was wrongly decided and should be overruled because it is flatly at odds with the well-established principle that First Amendment protection does not

depend upon the identity of the speaker. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

In any event, *Austin*'s reasoning does not justify suppression of *Hillary*, which was funded overwhelmingly by donations from individuals. Thus, unlike in *Austin*, it cannot even conceivably be argued that Citizens United's funding bore "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660.

C. Even if the government did have a compelling interest in prohibiting the Video On Demand distribution of some movies funded overwhelmingly with individual donations, that interest would be inapplicable to *Hillary* because it is not express advocacy or the functional equivalent of express advocacy.

Hillary presents a critical biographical assessment of Senator Clinton's public record. The documentary film does not urge viewers to vote for or against Senator Clinton in the Democratic Presidential primaries, but instead recounts significant events during her time as a U.S. Senator and First Lady in order to inform viewers about her political background. The possibility that, after "voters hear the information" *Hillary* conveys, they may "choose—uninvited by the [movie]—to factor it into their voting decisions" cannot transform this biographical documentary into an appeal to vote. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.).

To be sure, *Hillary* is a highly critical assessment of Senator Clinton's record and several political commentators featured in the movie express concerns about her fitness for office. But the fact that *Hillary* offers a conservative critique of Senator Clinton's record simply reinforces the absence of a *quid pro quo* corruption interest here: None of Senator

Clinton's Democratic presidential rivals would ever have viewed *Hillary* as a contribution to his primary campaign in need of repayment.

II. The application of BCRA's disclosure, disclaimer, and reporting requirements to Citizens United's movie and advertisements is also unconstitutional.

A. Any content-based restriction on political speech must survive strict scrutiny. Because the government has conceded that Citizens United's advertisements promoting *Hillary* are not express advocacy or its functional equivalent, and because the district court erred when it concluded that the movie itself is the functional equivalent of express advocacy, the government lacks a compelling interest in applying BCRA's disclaimer, disclosure, and reporting requirements to Citizens United in this case.

B. These requirements are also unconstitutional under the government's version of "exacting scrutiny."

Neither the government's interest in providing information to the electorate nor its interest in enforcing substantive campaign-finance restrictions is sufficient to sustain application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United. The informational interest is inapplicable to the advertisements because they promote a documentary movie—encouraging viewers to see *Hillary* in the theater, purchase it on DVD, or download it through Video On Demand. A requirement that Citizens United identify itself as responsible for those advertisements and disclose the names of its donors might assist the public in their movie-viewing decisions but would not provide them with information relevant to the electoral process. Such a

requirement would be equally uninformative as applied to the movie because the movie already includes extensive credits that provide much of the same information to viewers.

The government's interest in enforcing campaign-finance laws is also insufficient to sustain the application of BCRA's disclaimer, disclosure, and reporting requirements in this case because the government concedes that the only substantive campaign finance restriction at issue—BCRA § 203's prohibition on corporate electioneering communications—is inapplicable to Citizens United's advertising. And because the district court erred in concluding that BCRA § 203 could be applied to *Hillary*, the enforcement interest also is inapplicable to the movie.

In any event, any marginal informational or enforcement interest that the government may have in applying BCRA's disclaimer, disclosure, and reporting requirements to Citizens United is manifestly outweighed by the burdens that those requirements would impose upon Citizens United's constitutionally protected speech, including a dramatic reduction in the effectiveness of its 10- and 30-second advertisements, a significant increase in its compliance costs, and the deterrence of future donations.

ARGUMENT

I. BCRA § 203 Is Unconstitutional As Applied To The Distribution Of Citizens United's Documentary Film Through Video On Demand.

The district court upheld the application of BCRA's prohibition on corporate electioneering communications to *Hillary: The Movie* because it

concluded that the government had a compelling anti-corruption interest in prohibiting Citizens United from distributing its documentary film. That decision is incorrect because whatever anti-corruption interest the government may have when regulating 30-second political advertisements financed with funds from for-profit corporations is categorically inapplicable to feature-length documentary films distributed through Video On Demand and financed almost exclusively with individual donations. In any event, even if the government could proscribe some such films, it would be unconstitutional for the government to prohibit the distribution of *Hillary* because that film is a critical biographical documentary that does not constitute express advocacy or the functional equivalent of express advocacy under the standard articulated in *WRTL II*.

A. The Government May Not Suppress Political Speech Except When Necessary To Prevent Corruption Or The Appearance Of Corruption.

No less than other content-based restrictions on speech, any effort by the government to suppress political speech is subject to strict scrutiny, under which "the *Government* must prove that [the restriction] furthers a compelling interest and is narrowly tailored to achieve that interest." *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.). "[T]he only legitimate and compelling government interests thus far identified for restricting campaign finances" are "preventing corruption or the appearance of corruption." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985). The "hallmark" of this brand of corruption of elected officials "is the financial *quid pro quo*: dollars for political favors." *Id.*

In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), this Court reviewed an extensive and "deeply disturbing" legislative record detailing the phenomenon of "large contributions . . . given to secure a political *quid pro quo* from current and potential office holders." *Id.* at 26-27. Recognizing that such *quid pro quo* corruption undermined "the integrity of our system of representative democracy," the Court upheld certain campaign contribution limits established by the Federal Election Campaign Act ("FECA") as a "precisely" "focuse[d]" means of stamping out the corrupting influence of large contributions. *Id.* at 26-27, 28.

Buckley, however, took a very different approach with respect to the regulation of independent expenditures. Even after narrowing FECA's definition of "expenditures" to include only express advocacy—*i.e.*, speech employing the so-called "magic words" advocating the election or defeat of a particular candidate (*Buckley*, 424 U.S. at 44)—the Court still invalidated FECA's restriction on independent expenditures. The Court concluded that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. Such expenditures, the Court reasoned, "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive," thus "alleviat[ing] the danger that expenditures will be given as *quid pro quo* for improper commitments from the candidate." *Id.* at 47.

After striking down a federal restriction on independent expenditures as applied to express advocacy funded primarily by individual donors (*see FEC v. Mass. Citizens for Life*, 479 U.S. 238, 256-65 (1986) ("*MCFL*")), the Court broke sharply from the teach-

ings of *Buckley* in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). To sustain a state ban on independent expenditures as applied to express advocacy funded primarily by for-profit corporate members, the Court uncovered another form of "corruption"—beyond that of *quid pro quo* exchanges of campaign support for official actions—that warranted regulation: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. And, although *Buckley* had found that independent expenditures did not "pose dangers of real or apparent corruption comparable to those identified with large campaign contributions" (424 U.S. at 46), in *Austin* the Court reasoned that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." 494 U.S. at 660. The Court thus upheld Michigan's ban on corporations' expenditures of general treasury funds for express advocacy of the election or defeat of state candidates.

Subsequent election cycles witnessed a "spectacular rise" in broadcast advertisements by corporations and labor unions that avoided the use of "magic words" but nevertheless were "candidate-centered." *McConnell v. FEC*, 251 F. Supp. 2d 176, 527 (D.D.C. 2003) (Kollar-Kotelly, J.). "[T]o stanch" that "virtual torrent of televised election-related ads during the periods immediately preceding federal elections" (*McConnell*, 540 U.S. at 207), Congress enacted BCRA in 2002, § 203 of which prohibited corporations and unions from using general treasury funds

to finance "electioneering communications." 2 U.S.C. § 441b(b)(2).

To defend Congress's effort "[t]o stanch" this political speech (*McConnell*, 540 U.S. at 207), lawyers defending BCRA amassed an "elephantine" litigation record (*McConnell*, 251 F. Supp. 2d at 209 n.40) that purported to establish that: (1) "*Buckley*'s magic words requirement is functionally meaningless" because "advertisers [can] easily evade the line by eschewing the use of magic words" and because "they would seldom choose to use such words even if permitted" (*McConnell*, 540 U.S. at 193); (2) television and radio advertisements are the "most prevalent," "most visible," "most powerful," and "most effective" form of campaign communications and that, accordingly, "broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections" (*McConnell*, 251 F. Supp. 2d at 569-71, 573 (Kollar-Kotelly, J.)); (3) "candidates are acutely aware of third-party interest groups who run candidate-centered issue advertisements on [their] behalf," "candidates appreciate the support of those organizations," and they "feel indebted to those who spend money to help get them elected" (*id.* at 555-56); and (4) the public perceives that elected officials "demonstrate their appreciation" and pay off their "indebtedness" through "favored access, or increased legislative influence, or both." *Id.* at 557; *id.* at 800 (Leon, J.).

"[G]round[ing]" its analysis "in the evidentiary record before the Court" (*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.)), the *McConnell* majority rejected a facial challenge to BCRA's prohibition on corporations' expenditure of general treasury funds to finance electioneering communications. Based on

the litigation record before it, the Court concluded that the government had a compelling anti-corruption interest in suppressing not just corporate expenditures for express advocacy, but also corporate expenditures for "issue ads broadcast" immediately before an election that "are the functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206.

Addressing an as-applied challenge to BCRA's restriction on electioneering communications in *WRTL II*, the Court held that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667 (opinion of Roberts, C.J.). The Court explained that advertisements that are susceptible of other interpretations—including "advocacy [that] conveys information and educates"—"are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *Id.* at 2667, 2672. Because the government's suppression of Wisconsin Right to Life's political speech was not narrowly tailored to combat "*quid pro quo* corruption" of elected officials, it could not be sustained. *Id.* at 2671.

B. No Compelling Interest Supports The Government's Effort To Prohibit Video On Demand Distribution Of Citizens United's Documentary Film.

The district court assumed that, if *Hillary: The Movie* was susceptible of no interpretation other than an appeal to vote against Hillary Clinton in the Democratic presidential primaries, then the government had a compelling interest in suppressing it.

The assumption might have been warranted if *Hillary: The Movie* were of a piece with the "virtual torrent of televised election-related ads" at issue in *McConnell*. 540 U.S. at 207. But as the film's title suggests, it is not: It is a feature-length documentary film that Citizens United sought to distribute (but was barred from distributing) through Video On Demand technology and that was funded almost exclusively by individuals. Strict scrutiny requires a reviewing court to "ensure that a compelling interest supports *each application* of a statute restricting speech." *WRTL II*, 127 S. Ct. at 2671 (opinion of Roberts, C.J.). This, the district court failed to do.

1. The Government Has Failed To Demonstrate Any Anti-Corruption Rationale For Prohibiting Video On Demand Distribution Of Feature-Length Films.

a. *McConnell*'s holding that the government may prohibit corporate general treasury expenditures for broadcast advertisements that "are the functional equivalent of express advocacy" (540 U.S. at 206) is predicated on the *McConnell* district court's finding that, of all forms of political speech, "broadcast advertising is the most effective form of communicating an electioneering message" and therefore poses the most acute risk of corruption. *McConnell*, 251 F. Supp. 2d at 647 (Kollar-Kotelly, J.); *see also id.* at 569-73. Other forms of communication, such as the Internet, direct mail, and newspaper advertising are not "nearly as effective as broadcast advertising" and therefore are not "as problematic." *Id.* at 572. BCRA's restriction on electioneering communications was narrowly tailored, the district court concluded, because, as limited to "Radio & Television Adver-

tisements," it reached "only the media that were found by Congress to be problematic." *Id.* at 569; *see also id.* at 573 ("The primary definition of electioneering communication is narrowly tailored to only the communication media that was problematic . . . broadcast advertisements . . . .").

Broadcast advertising is more effective at influencing elections—"problematic" in Judge Kollar-Kotelly's view—than other modes of communication because of the audience that broadcast advertising can reach. Because they are interspersed among segments of a program a viewer or listener has selected, broadcast advertisements are able to reach individuals who would not otherwise choose to receive the message conveyed in the advertisement. And because most advertisements are short in duration, many unwilling recipients will endure the brief interruption in programming and receive a message they otherwise would not choose to hear. To avoid the unwanted message, a viewer or listener must change the broadcast channel and thereby risk missing some portion of the program he was viewing or listening to before the advertising interruption. For better or worse, evading broadcast advertisements is not as easy as hanging up the phone, turning the page of the newspaper, or discarding unwanted direct mail. *See* E.D. Dover, *Images, Issues, and Attacks* 7 (2006) ("Television ads are different [than print ads] . . . in that passive viewers essentially have an ad thrust in front of them and frequently respond by watching it.").

It is the fact that broadcast advertisements can reach the vast number of voters who are not sufficiently engaged in the political process or otherwise motivated to seek information about candidates that makes broadcast advertisements so effective at in-

fluencing the outcome of elections. Marion Just et al., *Thirty Seconds or Thirty Minutes: What Viewers Learn from Spot Advertisements and Candidate Debates*, 40 J. Comm. 120, 122 (1990) ("The most important effects of political commercials occur not among politically attentive people but among moderately or less interested voters, who view them as they watch regular programming."). Broadcast advertisements, far more often than other forms of campaign communication, are able to persuade viewers or listeners to vote for a candidate for whom they otherwise would not.

b. There is no evidence in the record of this case—or *McConnell*—to support the notion that feature-length films distributed through Video On Demand are anywhere near as effective as broadcast advertisements at influencing the outcome of elections. To the contrary, as Judge Kollar-Kotelly recognized, forms of communication that require individuals to "opt-in"—to "make a choice to . . . watch the program"—are likely to attract viewers that are "more predisposed to the [speaker's] views about political candidates than the undecided voter watching a sitcom on a Thursday evening and viewing a thirty-second issue advertisement critical of [a candidate]." *McConnell*, 251 F. Supp. 2d at 571, 646 (Kollar-Kotelly, J.). Because the sitcom advertisement is "aired throughout programming without any viewer choice," it is more likely to reach the "undecided voter" and thereby influence the outcome of the election; the broadcast advertisement thus poses a "much more powerful" "risk of corrupting the political process" than a communication that requires its recipients to "opt-in." *Id.* at 571, 646. At least for Judge Kollar-Kotelly, the element of "viewer choice" was a "critical distinction" that separated media that

posed "powerful" risks of corruption from those that did not. *Id.* at 571, 646.

A feature-length film distributed through Video On Demand requires viewers to "opt-in" at two separate levels. First, the viewer must choose to invest the time to watch the entire film. *Hillary* is 90 minutes in length—180 times as long as the typical campaign advertisement. Given the investment of time required, the only persons likely to watch the film are those who are interested enough in the subject matter to want to learn what Citizens United has to say about Hillary Clinton. That self-selecting audience bears little resemblance to that of any broadcast political advertisement.

Once an individual has decided to invest the time to view the feature-length film, he still must find a theater in which to view it, obtain a DVD copy of it, or order it through a Video On Demand service provider. In the case of Video On Demand—the only method of distribution at issue in this case—the viewer must locate the film he wishes to watch among the numerous Video On Demand offerings, and then send an electronic signal to the Video On Demand provider that directs the provider's digital server to send a digital data signal containing a scrambled and compressed version of that film to the viewer's converter box. *See* Simpson, *supra*, at 377-80. The converter box, in turn, unscrambles and decompresses the data signal, and allows the film to be watched on the television connected to the viewer's converter box. *Id.* Thus, to view a film through Video On Demand, the viewer must not only choose to invest the time to watch a feature-length film, but also to instruct the Video On Demand service provider to transmit the film to his converter box.

This type of Video On Demand service, which was not widely available in 2003 when the district court and this Court first considered the constitutionality of BCRA's prohibition on corporate electioneering communications, is analogous in every relevant respect to an Internet user's download of video content—a "form[ ] of media" Judge Kollar-Kotelly found to be "completely different" from "television and radio advertising." *McConnell*, 251 F. Supp. 2d at 571. Indeed, the *only* difference is that in the Video On Demand context the viewer receives the requested video content via cable or satellite, whereas in the Internet context, the viewer receives the video content via the Internet (which, depending on the viewer's Internet service provider, may or may not include the facilities of a cable or satellite company). As if to prove the point, numerous *Internet* companies—such as Amazon.com—are now offering "video-on-demand" delivery of video content.

Whether offered through a cable service provider or an Internet service provider, it is the Video On Demand *viewer* who requests the content from a digital server, which then routes a data signal to the viewer (and only to that viewer). The fact that the viewer chooses the content, rather than the content choosing the viewer, fundamentally alters the composition of the audience and is a "crucial distinction" that separates speech that could not possibly corrupt elected officials from speech found in the past to present a risk of such corruption.[2]

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[2] While the element of viewer choice in Video On Demand transactions means that BCRA's restrictions on electioneering communications cannot be constitutionally applied to films distributed through Video On Demand, the fact that each Video On Demand transmission is directed only to the requester's con-

c. Moreover, the fact that the government sought to suppress only the Video On Demand distribution of *Hillary*, while leaving Citizens United free to distribute the film during the pre-election window in theaters and on DVD, betrays its asserted anti-corruption rationale as a pretext for simple suppression of speech. It cannot seriously be maintained that the Video On Demand distribution of *Hillary* is any more corrupting either of Senator Clinton's Democratic primary opponents or the political process generally than if Citizens United sent a free DVD to every person who ordered the film through Video On Demand (or to every registered voter in a primary

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[Footnote continued from previous page]

verter box means that the Video On Demand transmissions are not electioneering communications at all. To be an electioneering communication, a communication must be able to be received by 50,000 persons. *See* 2 U.S.C. § 434(f)(3)(C); 11 C.F.R. § 100.29(b)(3)(ii). Because, unlike a broadcast, it is sent only to the requesting converter box (as opposed to a geographic area), a Video On Demand transmission will generally be viewed only by the members of the household who requested the Video On Demand program. Unless the recipient converter box is located in a sold-out football stadium, the transmission will not be able to be viewed by 50,000 people. Although Citizens United did not present this argument to the district court, the district court appeared to pass upon it (*see* J.A. 199a n.6), and the canon of constitutional avoidance suggests that this Court should consider it even if the district court had not. *See, e.g., United States v. Grace*, 461 U.S. 171, 175-76 (1983) ("Appellees did not make a statutory construction argument before the lower courts, but at oral argument, the question was raised whether § 13k reached the types of conduct in which appellees engaged, and we should answer it."). Here, the inescapable fact is that, in Video On Demand technology, each communication from the content provider's digital server is directed to a single converter box. That fact is an appropriate and nonconstitutional basis for resolving this aspect of the case.

State). Yet, the government demands the suppression of the former, and not the latter.

As applied to feature-length films, the government's restriction is even more "woefully underinclusive" than the speech restriction this Court struck down in *Republican Party v. White*, 536 U.S. 765 (2002). In *White*, the Court concluded that the State's asserted "objective of open-mindedness" was a mere fiction because the speech restriction prohibited judges from announcing their "views on disputed legal or political issues" only when the judge was a candidate and otherwise permitted such speech both before and after the judge was elected. *Id.* at 768, 780. At least in *White*, however, the State prohibited the targeted speech at certain times and not others. Here, while the government claims that extirpation of corruption from our political process demands that it prevent individuals from using a Video On Demand service to view *Hillary* or similar films in their homes in the run-up to elections, it is perfectly willing to let the *same* individuals view the *same* films in their *same* homes during the *same* period of time, as long as they use a DVD player to do so.

To be sure, the government is entitled to regulate "one step at a time," but where the First Amendment is concerned, this Court has approved such incremental regulation only where it addresses the "phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207-08. Nothing in this record, the *McConnell* record, or common sense supports the contention that one digital data transmission and storage format (Video On Demand) is more acutely corrupting of the political process—"more problematic" one might say—than another (DVDs). And in the absence of any factual or logical basis for the line the government has drawn between

the Video On Demand and DVD formats, the fact that the government seeks to prohibit only the Video On Demand distribution of *Hillary* and other feature-length films profoundly "undermines the likelihood of a genuine state interest" supporting BCRA's application to such films. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978).

It is the government's burden to "prove" that "a compelling interest justifies *each application* of a statute restricting speech." *WRTL II*, 127 S. Ct. at 2664, 2671 (opinion of Roberts, C.J.). With respect to feature-length films distributed through Video On Demand, the government has failed to carry that burden. It has made no showing that restricting Video On Demand distribution of *Hillary* and similar films will further its asserted anti-corruption rationales, much less the required showing that the restriction is necessary to achieve those ends.

2. No Compelling Interest Supports The Government's Effort To Suppress Political Speech That Is Funded Overwhelmingly By Individuals.

If there existed a substantial governmental anti-corruption interest in prohibiting the Video On Demand distribution of biographical documentary films, it would not extend to films, like *Hillary*, that are funded overwhelmingly by individuals.

The FEC's claim of authority to prohibit Video On Demand distribution of *Hillary*—and other speech of nonprofit advocacy corporations—rests on this Court's decision in *Austin*, which held that a State could prohibit an advocacy group funded predominantly by for-profit corporations (the Michigan Chamber of Commerce) from using general treasury

funds for express advocacy (494 U.S. at 659), and on *McConnell*'s apparent extension of *Austin* to all nonprofit corporations not falling within the "carefully defined category of entities" directly at issue in *MCFL*. *McConnell*, 540 U.S. at 210. The FEC's longstanding position is that, if a nonprofit advocacy corporation accepts *any* contribution from a for-profit entity or labor union—even a single dollar—the FEC may prohibit that advocacy group from using its general treasury funds for electioneering communications. *See* 11 C.F.R. § 114.10 (exempting from the electioneering communication prohibition only ideological, nonstock, nonprofit corporations that receive no funding from for-profit corporations or from business activities).

Austin was wrongly decided and should be overruled. *Austin*'s assertion that the government has a compelling interest in forestalling "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" (494 U.S. at 660) is sharply at odds with the more venerated principle, articulated in *Buckley* and recently reaffirmed in *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008), that "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley*, 424 U.S. at 49. Nor can it be reconciled with *Bellotti*'s recognition that political speech is no less valuable "because the speech comes from a corporation rather than an individual." 435 U.S. at 776-77; *see also id.* ("[t]he inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual"). In-

deed, *Austin*'s assertion that the government must police the "distorting effects" of corporate wealth on the marketplace of ideas (494 U.S. at 660) was rejected almost verbatim in *Bellotti*, which held that the fear that "corporations are wealthy and powerful and their views may drown out other points of view" could not justify suppression of corporations' political speech. 435 U.S. at 789.

Moreover, the "immense aggregations of wealth" of which *Austin* complained are accumulated as often by individuals as by corporations. And there is absolutely no reason to think that an advocacy group funded predominantly by one or two individuals—such as George Soros's Fund for America or the Wyly brothers' Republicans for Clean Air—is any more reflective of the public's support for the group's ideals than a group funded exclusively by for-profit corporations. The for-profit corporations, at least, must respond to their shareholders through their boards of directors.

But whatever the continuing vitality of *Austin*, its rationales clearly do not support a ban on speech that, like *Hillary*, is funded predominantly by individuals. *MCFL* held that a voluntary membership organization committed to a political purpose does not lose its First Amendment rights simply by taking the corporate form. Although the "resources in the treasury of a *business corporation* . . . are not an indication of popular support for the corporation's political ideas," nonprofit advocacy groups that take the corporate form "do not pose that danger of corruption" because they are "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 258-59 (emphasis added). Their "resources . . . are not a function of [their] success in the economic mar-

ketplace, but [their] popularity in the political marketplace." *Id.*

None of the rationales marshaled in support of the result in *Austin* can justify suppression of speech that is funded overwhelmingly by individuals who know their money will be put to use for advocacy. This is far from a scenario where, as the Court said of the Michigan Chamber of Commerce in *Austin*, the entity's power in the marketplace of ideas has "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. Nor is it a case where donors are funding "varied purposes, several of which are not inherently political," and therefore "many of its members may be . . . reluctant to withdraw as members even if they disagree with the [advocacy group's] political expression"—creating a hypothetical asymmetry between the political speech and the views of the donors financing it. *Id.* at 662, 663 (citation omitted).

The question here is whether Citizens United's documentary is more like the speech in *MCFL*—funded entirely by individuals—or the speech in *Austin*—funded by a membership that was "more than three-quarters" for-profit corporations. *Austin*, 494 U.S. at 664. The answer is clear: More than *ninety-nine percent* of the funding for *Hillary* came from individuals. J.A. 244a, 251a-52a. Because nearly all of its support came from individuals who share in its ideological vision, Citizens United's ability to disseminate its ideas through its documentary film reflects precisely its individual members' support for that speech.

The FEC's one-dollar-and-you're-out rule turns the First Amendment on its head. It *presumes* that even the most miniscule amount of support from a

for-profit corporation either will make an advocacy group's speech unreflective of its individual members' views, or will arrogate to that advocacy group power within the marketplace of ideas beyond that the group has earned based on the "public's support" for its mission. Such a presumption is incompatible with strict scrutiny, which "give[s] the benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). It is the government's burden to rebut the presumption in favor of speech through *proof*—not supposition—that the corporate donations to a nonprofit advocacy group unfairly leverage the corporate donors' "success in the economic marketplace" to fund speech that substantially outstrips the advocacy group's "popularity in the political marketplace." *MCFL*, 479 U.S. at 258-59.

Here, more than $1 million was donated to Citizens United to fund the production and distribution of *Hillary*. Twenty-five persons gave more than $1,000 to Citizens United for that purpose. J.A. 251a-52a. Of the more than $200,000 raised from these large donors, only $2,000—less than 1%—was donated by for-profit corporations. *Id.* The percentage of contributions that Citizens United received from for-profit corporations would doubtless be even smaller if the numerous contributions of less than $1,000 were taken into account.

It is inconceivable that these donations gave Citizens United any "unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257. Whatever else can be said of the movie, it cannot seriously be contended that its funding bore, as asserted in *Austin*, "little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. The individual donors who provided virtually all of

the funding for Citizens United's documentary knew that they were supporting the documentary and donated precisely for that reason.

C. *Hillary: The Movie* Is Not The Functional Equivalent Of Express Advocacy.

Even if one assumes that the First Amendment permits the government to subject the Video On Demand distribution of a feature-length documentary film underwritten almost entirely by individuals to the same regulatory regime as broadcast advertisements of for-profit corporations, the FEC's proscriptive power would extend only to those films that are "equivalent to contributions" and that "pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.). That category would include only films that constitute "express advocacy" or its "functional equivalent." *Id.* A communication "is the functional equivalent of express advocacy only if [it] is susceptible of *no reasonable interpretation* other than as an appeal to vote for or against a specific candidate." *Id.* at 2667 (emphasis added).

The parties agree that *Hillary* is not express advocacy. *See* Def.'s Mot. for Summ. J. 37. Accordingly, even under the FEC's expansive view of its own authority, the government may prohibit Video On Demand distribution of *Hillary* only if the film cannot reasonably be interpreted as anything other than an appeal to Democratic presidential primary voters to vote for someone other than Hillary Clinton in those elections. Because the FEC is seeking to prohibit distribution of the *whole* film and not just what it considers to be its corrupting parts, the FEC

bears the burden of demonstrating that the *entire* 90-minute film is susceptible of no reasonable interpretation other than as an appeal to Democratic primary voters to vote against Senator Clinton. And because "the distinction between discussion of . . . candidates and advocacy of election or defeat of candidates may often dissolve in practical application," if *Hillary* presents a "debatable case," it must be resolved in favor of "the speaker, not the censor." *WRTL II*, 127 S. Ct. at 2669 & n.7 (opinion of Roberts, C.J.) (internal quotation marks omitted). It is Citizens United's "First Amendment freedoms" at stake in this case after all, and those freedoms "need breathing space to survive." *Id.* at 2666 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

But this Court need not rely on "breathing space," because this 90-minute film is not remotely an "appeal to vote." *Hillary* is a documentary film that examines certain historical events—frequently through interviews of persons who participated in those events alongside Senator Clinton—in an effort to educate its viewers about the background, character, and beliefs of Senator Clinton. For example, it tells the story of Billy Dale, who was fired by the Clinton Administration as the Director of the White House Travel Office after more than thirty years of service. J.A. 43a-53a. The documentary also reviews the fundraising practices and alleged violations of the campaign finance laws by Senator Clinton and President Clinton. *Id.* at 65a-87a. Later, the film examines Senator Clinton's involvement as First Lady in the Clinton Administration's efforts to reform healthcare, and uses that as a launching point to explore her views on healthcare reform. *Id.* at 95a-104a. And there is a substantial exposition of her views on the Iraq War, starting with her vote to

authorize the war and tracing her shift to oppose the war by the time she started to campaign for the Presidency. *Id.* at 108a-12a. Throughout, the film presents the views of an array of political commentators, many of them distinguished and well-known, such as Robert Novak, John Fund, Michael Barone, and Newt Gingrich.

The film is therefore best viewed as a rigorously researched critical biography designed to "convey[ ] information and educate[ ]" viewers about a presidential candidate. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). In this regard, it is similar to the numerous critical candidate biographies found in bookstores, such as Bay Buchanan's *The Extreme Makeover of Hillary (Rodham) Clinton*—books that themselves are intended as answers to the ubiquitous and self-serving campaign autobiographies of the candidates. *See, e.g.*, Joe Biden, *Promises to Keep: On Life and Politics* (2008). Whether they agree or disagree with the film's underlying critique of Senator Clinton, even well-informed viewers could learn a great deal about her from the film. And to the extent that the film is, as *Publishers Weekly* said of *The Extreme Makeover of Hillary (Rodham) Clinton*, "a sermon for the choir" (The Week of 7/23/07, *at* http://www.publishersweekly.com/article/CA6462022.html), the "choir" likely would find *Hillary* entertaining as well as informative.

To support its conclusion that *Hillary* is "susceptible of no other interpretation than . . . that viewers should vote against her," the district court relied on a "selection of excerpts from the movie" that the court found "indicative of the film's message as a whole." J.A. 204a n.12. Yet *none* of those excerpts suggests that the viewer take any action at all—much less the *specific* act of voting against Senator Clinton in a

Democratic presidential primary. In the absence of such an unambiguous call to action, it is difficult to envision any language or images, or mix of the two, that must invariably be interpreted as an "appeal to vote." The possibility that, after "voters hear the information" conveyed in *Hillary*, they may "choose—uninvited by the [movie]—to factor it into their voting decisions" does not transform this biographical documentary into an appeal to vote against Senator Clinton. *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.).

The only portion of *Hillary* that even conceivably could be characterized as an "appeal to vote" comes approximately 83 minutes into the 90-minute film when various political commentators state their views as to Senator Clinton's qualifications to be President. It was in that context that conservative commentator Robert Novak said that "I think Hillary Clinton as a candidate has great defects" (J.A. 145a); Frank Gaffney, founder and president of the Center for Security Policy, said that "I don't think [a Hillary Clinton presidency] is going to be good for the security of the United States" (*id.* at 147a); and Buzz Patterson, former military aide to President Clinton, said that "the Hillary Clinton that I know is not equipped, not qualified to be our commander in chief." *Id.* at 149a.

Such a discussion of a candidate's character, qualifications, or fitness for office would have been commonplace on *Meet the Press* or any other of the countless television and radio programs populated by political commentators, and the district court erred in holding that it would have been a felony for Citizens United to broadcast the same political speech. The First Amendment does not admit of a view of the freedom of speech under which only those fortunate

enough to have their speech sanctified by the FEC as a "news story, commentary, or editorial" may say what they wish about a candidate's qualifications and fitness for office (11 C.F.R. § 100.29(c)(2)), while all others must keep their discussion of candidate qualifications so anodyne as not to pique the interest of even the most aggressive FEC regulator, risk felony prosecution, or (as the FEC undoubtedly prefers) remain silent.

The government locates support for the district court's conclusion in the lead opinion of *WRTL II*, which reasoned that certain issue advertisements were *not* appeals to vote because, among other things, they did *not* "take a position on a candidate's character, qualifications, or fitness for office." 127 S. Ct. at 2667 (opinion of Roberts, C.J.). But it does not follow from that line of reasoning that *every* pointed discussion of a candidate's qualifications and fitness for office *must* be interpreted as an appeal to vote for or against that candidate. In many cases, a speaker's expression of his view as to a candidate's qualifications and fitness for office will be just that—the speaker's expression of his own viewpoint. In the absence of words of express advocacy, the expression of a viewpoint as to a candidate's character, qualifications, or fitness for office may be *necessary* to establish that the communication constitutes an appeal to vote for or against that candidate, but it is not itself sufficient.

Whether a speaker's assessment of a candidate's qualifications can and should be interpreted as an appeal to vote for or against that candidate will depend frequently on the context in which it arises. Broadcast as a 10-second advertisement, the unadorned statement, "John McCain is too old to be President," conceivably could be considered by some

as an appeal to vote against Senator McCain because, in the absence of any contextual discussion, many in the audience might not evaluate the advertisement's statement as part of a larger debate over the competing candidates' fitness for office. They may very well view it, like many of the advertisements blanketing the airwaves in the run-up to the recent election, as an appeal to vote against Senator McCain.

On the other hand, if a documentary producer created a program that investigated the question whether Senator McCain was healthy enough to be President, probed his health history, and concluded the program with an interview with a commentator expressing the view that "John McCain is too old to be President," that documentary would be understood as contributing to an important debate about a candidate's medical fitness to hold office. (In fact, numerous "news" programs aired segments on exactly this topic in July 2008 after Senator McCain had a mole removed from his face. *See* CNN, McCain Health Scare (aired July 28, 2008), *transcript at* http://transcripts.cnn.com/TRANSCRIPTS/0807/28/ec.01.html. The context in which the evaluation of the candidate's fitness arose—as part of a detailed factual investigation of the issue—would make clear that the program was not a blunt appeal to vote against Senator McCain. The program instead would be understood by its audience principally as providing information about Senator McCain's health and, possibly, as imparting one commentator's view as to his fitness to hold the office of President.

Hillary is not a broadcast advertisement and, taken as a whole, the 90-minute film plainly is susceptible to interpretations other than as an appeal to vote against Senator Clinton. As noted above, like

any candidate biography, *Hillary* should be understood principally as providing its audience with historical information about the candidate, and, perhaps, some measure of entertainment as well. In this respect, it is analogous to *Fahrenheit 911*, which, though critical of President Bush, could not be viewed solely as an appeal to vote against him because it also provided viewers with extensive information about the 9/11 terrorist attacks and the Nation's (as well as President Bush's) response to them. Similarly, the fact that *Hillary* includes—after approximately 85 minutes of detailed information concerning Senator Clinton's record as First Lady and Senator—various commentators' opinions that Senator Clinton would be a poor choice for President, cannot convert the *entire* film into an appeal to vote. Taken as a whole, the film can still reasonably be interpreted by its audience as conveying information about Senator Clinton's political past in order to educate viewers about her background. Indeed, the film's presentation of these commentators' critical views about Senator Clinton no more converts the entire work into an appeal to vote *against* her than its inclusion of self-laudatory campaign statements by Senator Clinton herself transforms the film into an appeal to vote *for* her. J.A. 32a-33a.

Even more fundamentally, however, the Video On Demand distribution of Citizens United's film cannot possibly be viewed as "equivalent" to the type of campaign "contribution" that raises the specter of *quid pro quo* corruption of elected officials. *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.). But for the threat of FEC enforcement, Citizens United would have distributed *Hillary* through Video On Demand in January 2008, as the first Democratic presidential primaries were getting underway. The

notion that Senator Obama would have viewed the Video On Demand distribution of *Hillary* as a contribution to his amply financed campaign, and that President-Elect Obama, "know[ing] who [his] friends are" (*McConnell*, 540 U.S. at 129), would now feel beholden to Citizens United (and, more specifically, to the two corporations that provided a total of less than one percent of *Hillary*'s production costs), is patently absurd. The self-selecting audience of an overtly conservative documentary like *Hillary* likely would not have included a significant number of Democratic primary voters. Accordingly, none of Senator Clinton's Democratic presidential rivals ever would have viewed the distribution of *Hillary* as a contribution to his primary campaign in need of repayment, "and the *quid-pro-quo* corruption interest" therefore "cannot justify regulating [it]." *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.).

The government cannot defend its censoring of *Hillary* by reference to abstractions about the "functional equivalent of express advocacy." Strict scrutiny demands that it prove that suppression of *this film* is necessary to combat real or apparent corruption. Because it cannot adduce any reason to believe—much less any proof—that Video On Demand distribution of *Hillary* posed any danger of actual or apparent corruption of Senator Clinton's rivals in the Democratic presidential primary, the First Amendment should have protected Citizens United's right to distribute its film. More the pity that it could not do so when it mattered most.

II. BCRA § 201 AND BCRA § 311 ARE UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED.

The district court upheld the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United because it construed *McConnell* as foreclosing all as-applied challenges to those requirements, except for challenges by groups whose members would be subject to a "'reasonable probability'" of reprisals if their identities were disclosed. J.A. 209a.

This was error. As this Court made clear in *WRTL I*, *McConnell* rejected a *facial* challenge to BCRA, but did not purport to foreclose any future as-applied challenges. *WRTL I*, 546 U.S. at 411-12. *McConnell*'s facial analysis therefore did not resolve whether BCRA's disclaimer, disclosure, and reporting requirements can constitutionally be applied to advertisements promoting a political documentary about a presidential candidate or to the documentary movie itself where neither the advertisements nor the movie constitutes express advocacy or its functional equivalent. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (where an overbreadth challenge fails, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which" a statute, "assertedly, may not be applied").

As applied in this case, BCRA's disclaimer, disclosure, and reporting requirements violate the First Amendment because the application of those requirements to Citizens United's advertisements and movie does not further a compelling—or even an important—government interest.

A. The Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Strict Scrutiny.

Unlike in *McConnell*, where the plaintiffs faced the "heavy burden" of demonstrating the facial invalidity of BCRA's disclaimer, disclosure, and reporting requirements (540 U.S. at 207), in this as-applied challenge, the *government* bears the burden of establishing that the speech restrictions imposed by these provisions are compatible with the First Amendment. *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.); *Bellotti*, 435 U.S. at 786.

To meet this burden, the government must satisfy the stringent requirements of strict scrutiny because it is defending the constitutionality of content-based restrictions on political speech. *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.); *see also MCFL*, 479 U.S. at 256, 261; *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 n.12 (1999). This Court's review of BCRA's oral and written disclaimer requirements should be especially stringent because those requirements compel Citizens United "to utter statements" in its advertisements and political documentary that it "would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (internal quotation marks omitted). The Court examines such compelled speech requirements with particular skepticism. *See Riley v. Nat'l Fed'n of the Blind, Inc.*, 487 U.S. 781, 798, 800 (1988) (the government may "not dictate the content of speech absent [a] compelling necessity" that is furthered by "narrowly tailored" means).

The application of BCRA § 201 and BCRA § 311 to Citizens United's movie and advertisements cannot survive strict scrutiny. As the government con-

cedes, the only arguably compelling governmental interest in the campaign-finance setting—the government's interest in preventing corruption and the appearance of corruption—is inapplicable to electioneering communications that are not express advocacy or the functional equivalent of express advocacy. *WRTL II*, 127 S. Ct. at 2671-72 (opinion of Roberts, C.J.); *see also* Def.'s Mot. for Summ. J. 19 n.12. Because it is undisputed that Citizens United's advertisements are not express advocacy or its functional equivalent—and because the district court erred when it concluded that Citizens United's documentary movie was the functional equivalent of express advocacy (*see supra* Part I)—the government does not have a compelling interest in applying BCRA's disclaimer, disclosure, and reporting requirements to the advertisements or the movie. As applied to Citizens United, those requirements are therefore unconstitutional.

B. The Disclaimer, Disclosure, And Reporting Requirements Cannot Survive Exacting Scrutiny.

Perhaps recognizing that it cannot prevail under strict scrutiny, the government contends that so-called "exacting scrutiny" applies to BCRA's disclaimer, disclosure, and reporting requirements. Under exacting scrutiny, there must be a "substantial relation" between a "sufficiently important" "governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64, 66. The application of these requirements to restrictions on political speech is virtually indistinguishable from strict scrutiny. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995) (requiring narrow

tailoring as part of exacting scrutiny); *Bellotti*, 435 U.S. at 786, 795 (requiring a compelling interest).

Although the better view is that strict scrutiny applies to any content-based restriction on political speech (*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.))—including BCRA's disclaimer, disclosure, and reporting requirements—the distinction between strict and exacting scrutiny is ultimately irrelevant in this case because the government cannot satisfy either standard. In *McConnell*, the Court identified three "important" governmental interests that could conceivably sustain the application of BCRA's disclaimer, disclosure, and reporting requirements: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196; *see also Buckley*, 424 U.S. at 66-68. None of these "important" governmental interests is applicable in this case.

1. BCRA's Disclaimer Requirements Are Unconstitutional As Applied To Citizens United.

The First Amendment generally gives a speaker the right to choose what to say and "what not to say." *Hurley*, 515 U.S. at 573. This includes the choice not to utter "statements of fact the speaker would rather avoid." *Id.*; *see also Riley*, 487 U.S. at 797-98. These First Amendment principles apply with particular force to measures that require a speaker to disclose his identity. *See McIntyre*, 514 U.S. at 348 ("the identity of the speaker is no different from other components of [a] document's content that the author is free to include or exclude"). For that reason, the Court has repeatedly invalidated such requirements.

Id.; *see also Talley v. California*, 362 U.S. 60, 64-65 (1960).

BCRA § 311 would require Citizens United to include oral and written disclaimers in its advertisements for *Hillary* identifying itself as responsible for the content of those advertisements. The government concedes that its interest in deterring actual corruption and avoiding the appearance of corruption cannot sustain the application of BCRA's disclaimer requirements to Citizens United's advertisements because they are not express advocacy or the functional equivalent of express advocacy. Neither of the government's other purportedly "important" interests is sufficient to uphold the application of BCRA's disclaimer requirements to Citizens United.

a. The disclaimer requirements cannot be upheld in this case based on the government's interest in "providing the electorate with information." *McConnell*, 540 U.S. at 196.

Citizens United's advertisements promote its documentary film about a presidential candidate and attempt to persuade viewers to see the movie in a theater, purchase it on DVD, or download it through Video On Demand. It is undisputed that the advertisements neither expressly nor impliedly advocate the election or defeat of that candidate. A disclaimer informing viewers that Citizens United funded these advertisements therefore would not provide viewers with relevant "electora[l] . . . information." At most, it would provide the public with information that may bear upon their decision whether to view the movie. But this Court has never suggested (and the government has not argued) that the Federal *Election* Commission has any business at all—much less an important governmental interest—in providing

viewers with information that may be relevant to their selection of documentary movies. *See Buckley*, 424 U.S. at 80 (narrowing FECA's reporting requirement to "spending that is unambiguously related to the campaign of a particular federal candidate" in order to avoid vagueness and overbreadth problems).

In any event, it is unclear how the information conveyed in BCRA's disclaimer requirements would help viewers evaluate the advertisements' message that they should buy tickets for, purchase, or download *Hillary*. As this Court has recognized, "[p]eople are intelligent enough to evaluate the source of an anonymous writing" and fully capable of "evaluat[ing] its anonymity along with its message." *McIntyre*, 514 U.S. at 348 n.11 (internal quotation marks omitted). If viewers are unclear about who is responsible for the advertisements promoting *Hillary*, then they will presumably discount the advertisements' message and will be less likely to follow their exhortation to view the movie.

Moreover, the underinclusivity of BCRA's disclaimer requirements belies the notion that the government enacted those measures to further some ill-defined interest in providing information to members of the public considering whether to view a political documentary. The fact that the disclaimer requirements apply exclusively to broadcast advertisements—and do not extend to print or Internet advertising—makes it highly unlikely that these requirements were enacted to further the government's purported informational interest. If Congress were truly enacting legislation to advance that interest, it would not have left large swaths of documentary-related advertising unregulated. *See Bellotti*, 435 U.S. at 765 ("singl[ing] out" "a particular kind of" speech for

regulation "undermines the likelihood of a genuine state interest").[3]

b. The government's interest in "gathering the data necessary to enforce more substantive electioneering restrictions" also is insufficient to uphold BCRA's disclaimer requirements in this case. *McConnell*, 540 U.S. at 196.

The government's so-called "enforcement" interest is inapplicable where the substantive campaign-finance restrictions underlying that interest cannot be enforced against the person from whom the government seeks to "gather[ ] . . . data." For that reason, in *Davis*, the Court invalidated the disclosure requirements of BCRA's "Millionaire's Amendment" because the substantive contribution limits that the "disclosure requirements were designed to implement" were unconstitutional. 128 S. Ct. at 2775.

Here, the only "substantive electioneering restriction" that BCRA's disclaimer requirements could conceivably be designed to implement—the prohibition on corporate electioneering communications—is unconstitutional as applied to Citizens United's advertisements because those advertisements are not express advocacy or its functional equivalent. Def.'s Mot. for Summ. J. 19 n.12. The government thus has no legitimate interest in using BCRA's disclaimer requirements to "gather[ ] . . . data" about the person responsible for those advertisements because that

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[3] The imposition of BCRA's disclaimer requirements on advertisements for political documentaries is also far removed from Congress's authority under Article I, Section 4 of the Constitution to regulate elections, which is the constitutional authority that presumably underpins Congress's enactment of BCRA.

information cannot be used for enforcement purposes.

c. Even if there were a marginal informational or enforcement benefit attributable to the application of BCRA's disclaimer requirements to Citizens United's advertisements, that benefit would be outweighed by the fact that the disclaimer requirements substantially decrease both the quantity and effectiveness of Citizens United's speech, while substantially increasing its cost.

This Court has often invalidated laws that "interfere[ ] with a speaker's desired message." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006); *see also Riley*, 487 U.S. at 799. These constitutional concerns apply with full force in the campaign-finance context, where the Court has repeatedly expressed reservations about "restriction[s] on the *quantity* of political expression." *Buckley*, 424 U.S. at 55 (emphasis added); *see also Am. Constitutional Law Found.*, 525 U.S. at 194-95.

BCRA's disclaimer requirements impose a substantial burden on Citizens United's speech. It takes approximately four seconds to utter the oral disclaimer that "Citizens United is responsible for the content of this advertising." The oral disclaimer would therefore consume at least 40% of Citizens United's 10-second advertisements and 13% of its 30-second advertisement. The disclaimer—along with contact information for Citizens United—must also appear on the screen for at least four seconds of each advertisement.

Complying with these disclaimer requirements would significantly impair Citizens United's ability to use these advertisements to promote *Hillary*. Citizens United would no longer be able to use the 10-

second advertisements to communicate its 10-second promotional message to viewers. It would instead be required either to expend additional funds to pay for a longer advertisement sufficient to convey its 10-second promotional message as well as BCRA's oral disclaimer, or to reduce that promotional message to no more than six seconds' duration. The oral and written disclaimers would also distort the message of Citizens United's advertisements by suggesting to viewers—most of whom are undoubtedly familiar with the disclaimers from the ubiquitous campaign advertisements aired preceding every election—that those advertisements convey a campaign-related message, rather than a message promoting a documentary film. Those viewers disinterested in political advertising may interpret BCRA's disclaimers as a signal to tune out Citizens United's advertisements altogether.

The government's informational and enforcement interests—which have, at most, minimal force in this case—are a constitutionally insufficient ground for imposing these serious constraints on Citizens United's ability to promote its political documentary. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243, 258 (1974) (invalidating a right-to-reply statute partly because of the financial and opportunity costs of the speech that the statute compelled).[4]

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[4] In any event, even if some burden on Citizens United's speech were constitutionally tolerable, the government-authored disclaimers would not be sufficiently tailored to further its informational and enforcement interests because the government could convey the same information to viewers by shortening the oral disclaimer to "_____ is responsible for this ad" and omitting the redundant written disclaimer that the communication was not approved by any candidate or candidate's committee. This alternative formulation would remove

2. BCRA's Disclosure Requirements Are Unconstitutional As Applied To Citizens United.

For many of the same reasons, neither the government's informational interest nor its enforcement interest is sufficient to uphold the application of BCRA's disclosure requirements to Citizens United.

a. This Court has recognized that, where speech constitutes express advocacy or the functional equivalent of express advocacy, disclosing the identity of the donors who fund that speech may "provide[ ] the electorate with information 'as to where political campaign money comes from' . . . in order to aid the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67. In facially upholding BCRA § 201's disclosure requirements, *McConnell* similarly concluded that the "First Amendment interests of individual citizens seeking to make informed choices in the political marketplace" can be an adequate basis for requiring persons engaged in campaign-related speech to disclose donor information. 540 U.S. at 197 (internal quotation marks omitted).

This informational interest is inapplicable to Citizens United's advertisements because they do not expressly or impliedly advocate a candidate's election or defeat. They instead promote a documentary movie about a political candidate and attempt to persuade viewers to see the movie in a theater, purchase it on DVD, or download it through Video On De-

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[Footnote continued from previous page]

approximately two seconds from the oral disclaimer and minimize the oral and written disclaimers' distorting effect on Citizens United's promotional message.

mand. Although providing viewers with information about the source of funding for these advertisements could theoretically help them make informed movie-selection decisions—at least if one indulges the assumption that viewers will examine the FEC's voluminous donor records before deciding whether to view the movie promoted by Citizens United's advertisements—it will not help viewers "make informed choices in the political marketplace." *McConnell*, 540 U.S. at 197 (internal quotation marks omitted); *see also N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 282-83 (4th Cir. 2008) ("Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related.").

The government's invocation of its purported informational interest in this case has no logical stopping point. If the government is correct that this interest can sustain the imposition of extensive disclosure requirements on a person that funds a television advertisement promoting a political documentary film, the government could similarly rely on that interest to regulate publishers' and retailers' advertisements for other political works, such as candidate autobiographies. And, if that is the case, then BCRA is fatally underinclusive because it does not reach advertisements in nonbroadcast formats. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 540-41 (1989) (holding that a statute prohibiting the publication of particular information in certain media but not in others was unconstitutionally underinclusive).

b. The government's enforcement interest is similarly insufficient to uphold BCRA's disclosure requirements in this case. Although disclosure requirements may sometimes be a valid means of

gathering data necessary "to detect violations" of "more substantive electioneering restrictions" (*McConnell*, 540 U.S. at 196), the government has conceded that those "more substantive restrictions"—BCRA's prohibition on corporate electioneering communications—cannot be imposed upon Citizens United's advertisements because those advertisements are not express advocacy or its functional equivalent. The government therefore has no enforcement-based interest in mandating the disclosure of Citizens United's donors. *See Davis*, 128 S. Ct. at 2775.

c. Moreover, any informational or enforcement interest that the government has in applying BCRA's disclosure requirements to Citizens United's advertisements is outweighed by the significant burdens that those requirements would impose on the First Amendment rights of Citizens United and its donors.

Compelled donor disclosure can have grave consequences for a political organization's financial supporters. As this Court has recognized, disclosing the identity of an organization's supporters can "expose contributors to harassment or retaliation" by those who disagree with the group's political message. *Buckley*, 424 U.S. at 68. For this reason, disclosure requirements are unconstitutional where the organization challenging the requirements can demonstrate "a reasonable probability that the compelled disclosure of [the organization's] contributors' names will subject them to threats, harassment, or reprisals." *McConnell*, 540 U.S. at 198 (internal quotation marks omitted); *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982); *NAACP v. Alabama*, 357 U.S. 449, 451, 462-63 (1958).

Public disclosure of Citizens United's donors would also have adverse consequences for Citizens United itself because it could not file the requisite disclosure statement with the FEC without incurring substantial administrative costs. *See MCFL*, 479 U.S. at 254 (plurality opinion) ("[d]etailed record-keeping and disclosure obligations . . . impose administrative costs that many small entities may be unable to bear"). Moreover, even if Citizens United were able to absorb these costs, public disclosure would inevitably deter some of its donors from making future contributions—further weakening Citizens United's financial position and impairing its ability to continue communicating its political message to the public. *Buckley*, 424 U.S. at 68.

Deterring future donations would also infringe upon the associational rights of Citizens United's donors, many of whom "contribute to" the organization "in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *MCFL*, 479 U.S. at 261; *see also NAACP*, 357 U.S. at 460, 462. By deterring future contributions, the application of BCRA's disclosure requirements would chill the constitutionally protected political speech of Citizens United's supporters.

d. None of the decisions on which the district court relied is sufficient to sustain the disclosure requirements' application to Citizens United.

The district court's reliance on *MCFL* is misplaced. J.A. 208a. As an initial matter, the Court did not squarely address whether donor disclosure requirements can constitutionally be applied to *MCFL* corporations, but instead observed that, on their own terms, the disclosure provisions of FECA

would extend to such organizations. 479 U.S. at 262. *MCFL* therefore did not determine the bounds of the government's constitutional authority to mandate donor disclosure. In any event, the donor disclosure provisions at issue in *MCFL* applied only to "communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 248-49. But it is undisputed that Citizens United's advertisements are not express advocacy or its functional equivalent. Thus, even if an *MCFL* corporation that engages in express advocacy can be required to disclose its funding sources in order to further the government's informational or enforcement interest, those interests are inapplicable to corporate speech that promotes the sale and download of a documentary film about a political candidate.

The district court also invoked a footnote in *Bellotti*, where the Court hinted that it might view disclosure requirements more favorably than outright prohibitions on corporate political speech. J.A. 208a (citing *Bellotti*, 435 U.S. at 791 n.32). But the Court has already dismissed that footnote as "dicta." *McIntyre*, 514 U.S. at 353-54. Moreover, that dicta "did not necessarily apply to [all] independent communications" but is instead confined to disclosure requirements for coordinated expenditures, which are not at issue in this case. *Id.* at 354; *see also id.* (noting that *Buckley*—on which the *Bellotti* footnote relied—"concerned contributions to the candidate or expenditures authorized by the candidate"). Finally, *Bellotti* referred to the possible disclosure of the "source of advertising," but it apparently did not contemplate the extensive donor disclosure requirements that BCRA imposes on persons who fund electioneering communications. 435 U.S. at 792 n.32.

Nor does *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), support the district court's conclusion. As in *MCFL* and *Bellotti*, the Court did not squarely consider the constitutionality of the municipal disclosure provision referenced in that case. In any event, the disclosure provision in *Citizens Against Rent Control* is readily distinguishable from BCRA's disclosure requirements because it only mandated disclosure of significant contributors "twice during the last seven days of a campaign." *Id.* at 294 n.4. In contrast, BCRA imposes substantially more onerous requirements that mandate the periodic disclosure of donors funding electioneering communications. 2 U.S.C. § 434(f); 11 C.F.R. § 104.20. Moreover, the disclosure requirement in *Citizens Against Rent Control* was a narrowly tailored provision that applied only to committees that were formed to support or oppose ballot measures. *See* 454 U.S. at 291, 294 n.4. The reach of BCRA § 201 extends well beyond the electoral setting, extending to *any* broadcast communication that mentions a candidate for federal office in the period preceding an election. The Court's passing reference to the modest disclosure requirement in *Citizens Against Rent Control* thus has little, if any, bearing on BCRA.

Ultimately, the district court's reliance on these decisions seems to be premised on the assumption that imposing disclosure requirements is less constitutionally problematic than banning communications outright. The district court's "it could be worse" rationale is a manifestly insufficient basis for upholding the application of BCRA's disclosure requirements to Citizens United.

3. BCRA's Reporting Requirements Are Unconstitutional As Applied To Citizens United.

BCRA § 201 also imposes a reporting requirement that provides that, within 24 hours of each statutory "disclosure date," the person funding the communication must submit a statement to the FEC identifying itself as responsible for funding the communication. 2 U.S.C. § 434(f). The application of that requirement to Citizens United's advertisements is also unconstitutional.

The government's informational interest is inadequate to sustain the application of BCRA's reporting requirements to Citizens United's advertisements because those advertisements promote a documentary movie and reporting their airing to the FEC therefore would not provide the electorate with information relevant to their voting decisions. Moreover, the government's enforcement interest is also insufficient because the government has acknowledged that it cannot constitutionally prohibit Citizens United's advertisements, and there accordingly is no possibility that the government will "detect violations" of "more substantive electioneering restrictions" from Citizens United's reporting. *McConnell*, 540 U.S. at 196; *see also Davis*, 128 S. Ct. at 2775.

Like the disclaimer and disclosure requirements, BCRA's reporting requirements are therefore unconstitutional as applied to Citizens United.[5]

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[5] Although the foregoing analysis is focused on the application of BCRA's disclaimer, disclosure, and reporting requirements to Citizens United's advertisements, those requirements are also unconstitutional as applied to the movie itself. As explained above (*see supra* Part I), the movie is not express advo-

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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cacy or its functional equivalent. The application of the disclaimer, disclosure, and reporting requirements to the Video On Demand distribution of the movie therefore would not further the government's anti-corruption interest. Because the government cannot prohibit the movie under BCRA's prohibition on corporate electioneering communications, its enforcement interest also is not implicated. Finally, the government's informational interest is insufficient to sustain this application of the disclaimer, disclosure, and reporting requirements because the movie itself contains extensive credits that identify Citizens United as responsible for the movie and that disclose the names of the individuals who worked on the movie and a number of the persons who funded it. The application of BCRA's disclaimer, disclosure, and reporting requirements to the movie would therefore provide viewers with little information not already included in the movie itself.

APPENDIX

2 U.S.C. § 434 provides in relevant part:

§ 434. Reporting requirements

* * *

(f) Disclosure of electioneering communications

(1) Statement required

Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing the information described in paragraph (2).

(2) Contents of statement

Each statement required to be filed under this subsection shall be made under penalty of perjury and shall contain the following information:

(A) The identification of the person making the disbursement, of any person sharing or exercising direction or control over the activities of such person, and of the custodian of the books and accounts of the person making the disbursement.

(B) The principal place of business of the person making the disbursement, if not an individual.

(C) The amount of each disbursement of more than $200 during the period covered by the statement and the identification of the person to whom the disbursement was made.

(D) The elections to which the electioneering communications pertain and the names (if known) of the candidates identified or to be identified.

(E) If the disbursements were paid out of a segregated bank account which consists of funds contributed solely by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8) directly to this account for electioneering communications, the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date. Nothing in this subparagraph is to be construed as a prohibition on the use of funds in such a segregated account for a purpose other than electioneering communications.

(F) If the disbursements were paid out of funds not described in subparagraph (E), the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date.

(3) Electioneering communication

For purposes of this subsection—

(A) In general

(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate. Nothing in this subparagraph shall be construed to affect the interpretation or application of section 100.22(b) of title 11, Code of Federal Regulations.

(B) Exceptions

The term "electioneering communication" does not include—

(i) a communication appearing in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, unless such facilities are owned or controlled by any political party, political committee, or candidate;

(ii) a communication which constitutes an expenditure or an independent expenditure under this Act;

(iii) a communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(iv) any other communication exempted under such regulations as the Commission may promulgate (consistent with the requirements of this paragraph) to ensure the appropriate implementation of this paragraph, except that under any such regulation a communication may not be exempted if it meets the requirements of this paragraph and is described in section 431(20)(A)(iii) of this title.

(C) Targeting to relevant electorate

For purposes of this paragraph, a communication which refers to a clearly identified candidate for Federal office is "targeted to the relevant electorate" if the communication can be received by 50,000 or more persons—

(i) in the district the candidate seeks to represent, in the case of a candidate for Representative in, or Delegate or Resident Commissioner to, the Congress; or

(ii) in the State the candidate seeks to represent, in the case of a candidate for Senator.

(4) Disclosure date

For purposes of this subsection, the term "disclosure date" means—

(A) the first date during any calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000; and

(B) any other date during such calendar year by which a person has made disbursements for the direct costs of producing or airing electioneering communications aggregating in excess of $10,000 since the most recent disclosure date for such calendar year.

(5) Contracts to disburse

For purposes of this subsection, a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(6) Coordination with other requirements

Any requirement to report under this subsection shall be in addition to any other reporting requirement under this Act.

(7) Coordination with Internal Revenue Code

Nothing in this subsection may be construed to establish, modify, or otherwise affect the definition of political activities or electioneering activities (including the definition of participating in, intervening in, or influencing or attempting to influence a political campaign on behalf of or in opposition to any candidate for public office) for purposes of the Internal Revenue Code of 1986.

* * *

2 U.S.C. § 441b provides:

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 791(h) of Title 15, the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 431 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment,

or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a

result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall

make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 434(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of Title 26) made under section 434(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8). For purposes of the preceding sentence, the term "provided directly by

individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) of this section if an entity described in subsection (a) of this section directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) of this section shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 434(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection—

(A) the term "section 501(c)(4) organization" means—

(i) an organization described in section 501(c)(4) of Title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with Title 26

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of Title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 434(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 434(f)(3)(C) of this title.

2 U.S.C. § 441d provides:

§ 441d. Publication and distribution of statements and solicitations

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 434(f)(3) of this title), such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

(b) No person who sells space in a newspaper or magazine to a candidate or to the agent of a candidate, for use in connection with such candidate's campaign, may charge any amount for such space which exceeds the amount charged for comparable use of such space for other purposes.

(c) Specification

Any printed communication described in subsection (a) of this section shall—

(1) be of sufficient type size to be clearly readable by the recipient of the communication;

(2) be contained in a printed box set apart from the other contents of the communication; and

(3) be printed with a reasonable degree of color contrast between the background and the printed statement.

(d) Additional requirements

(1) Communications by candidates or authorized persons

(A) By radio

Any communication described in paragraph (1) or (2) of subsection (a) of this section which is transmitted through radio shall include, in addition to the requirements of that paragraph, an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication.

(B) By television

Any communication described in paragraph (1) or (2) of subsection (a) of this section which is transmitted through television shall include, in addition to the requirements of that paragraph, a statement that identifies the candidate and states that the can-

didate has approved the communication. Such statement—

(i) shall be conveyed by—

(I) an unobscured, full-screen view of the candidate making the statement, or

(II) the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate; and

(ii) shall also appear in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds

(2) Communications by others

Any communication described in paragraph (3) of subsection (a) of this section which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: "_____ is responsible for the content of this advertising." (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

11 C.F.R. § 100.29 provides:

§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).

(a) *Electioneering communication* means any broadcast, cable, or satellite communication that:

(1) Refers to a clearly identified candidate for Federal office;

(2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and

(3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

(b) For purposes of this section—

(1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a television station, radio station, cable television system, or satellite system.

(2) *Refers to a clearly identified candidate* means that the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated through the fa-

cilities of a television station, radio station, cable television system, or satellite system.

(ii) In the case of a candidate for nomination for President or Vice President, *publicly distributed* means the requirements of paragraph (b)(3)(i) of this section are met and the communication:

(A) Can be received by 50,000 or more persons in a State where a primary election, as defined in 11 CFR 9032.7, is being held within 30 days; or

(B) Can be received by 50,000 or more persons anywhere in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention.

(4) A *special election* or a *runoff election* is a primary election if held to nominate a candidate. A *special election* or a *runoff election* is a general election if held to elect a candidate.

(5) *Targeted to the relevant electorate* means the communication can be received by 50,000 or more persons—

(i) In the district the candidate seeks to represent, in the case of a candidate for Representative in or Delegate or Resident Commissioner to, the Congress; or

(ii) In the State the candidate seeks to represent, in the case of a candidate for Senator.

(6)(i) Information on the number of persons in a Congressional district or State that can receive a communication publicly distributed by a television station, radio station, a cable television system, or satellite system, shall be available on the Federal Communications Commission's Web site, http://www.fcc.gov. A link to that site is available on

the Federal Election Commission's Web site, http://www.fec.gov. If the Federal Communications Commission's Web site indicates that a communication cannot be received by 50,000 or more persons in the specified Congressional district or State, then such information shall be a complete defense against any charge that such communication constitutes an electioneering communication, so long as such information is posted on the Federal Communications Commission's Web site on or before the date the communication is publicly distributed.

(ii) If the Federal Communications Commission's Web site does not indicate whether a communication can be received by 50,000 or more persons in the specified Congressional district or State, it shall be a complete defense against any charge that a communication reached 50,000 or more persons when the maker of a communication:

(A) Reasonably relies on written documentation obtained from the broadcast station, radio station, cable system, or satellite system that states that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates);

(B) Does not publicly distribute the communication on a broadcast station, radio station, or cable system, located in any Metropolitan Area in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates); or

(C) Reasonably believes that the communication cannot be received by 50,000 or more persons in the specified Congressional district (for U.S. House of Representatives candidates) or State (for U.S. Senate candidates or presidential primary candidates).

(7)(i) *Can be received by 50,000 or more persons* means—

(A) In the case of a communication transmitted by an FM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's protected or primary service contour, that the population of the Congressional district or State is 50,000 or more; or

(B) In the case of a communication transmitted by an FM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the protected or primary service contour, that the population of the part of the Congressional district or State lying within the station's or network's protected or primary service contour is 50,000 or more; or

(C) In the case of a communication transmitted by an AM radio broadcast station or network, where the Congressional district or State lies entirely within the station's or network's most outward service area, that the population of the Congressional district or State is 50,000 or more; or

(D) In the case of a communication transmitted by an AM radio broadcast station or network, where a portion of the Congressional district or State lies outside of the station's or network's most outward service area, that the population of the part of the Congressional district or State lying within the station's or network's most outward service area is 50,000 or more; or

(E) In the case of a communication appearing on a television broadcast station or network, where the Congressional district or State lies entirely within the station's or network's Grade B broadcast contour, that the population of the Congressional district or State is 50,000 or more; or

(F) In the case of a communication appearing on a television broadcast station or network, where a portion of the Congressional district or State lies outside of the Grade B broadcast contour—

(1) That the population of the part of the Congressional district or State lying within the station's or network's Grade B broadcast contour is 50,000 or more; or

(2) That the population of the part of the Congressional district or State lying within the station's or network's broadcast contour, when combined with the viewership of that television station or network by cable and satellite subscribers within the Congressional district or State lying outside the broadcast contour, is 50,000 or more; or

(G) In the case of a communication appearing exclusively on a cable or satellite television system, but not on a broadcast station or network, that the viewership of the cable system or satellite system lying within a Congressional district or State is 50,000 or more; or

(H) In the case of a communication appearing on a cable television network, that the total cable and satellite viewership within a Congressional district or State is 50,000 or more.

(ii) Cable or satellite television viewership is determined by multiplying the number of subscribers within a Congressional district or State, or a part thereof, as appropriate, by the current national average household size, as determined by the Bureau of the Census.

(iii) A determination that a communication can be received by 50,000 or more persons based on the application of the formula at paragraph (b)(7)(i)(G) or (H) of this section shall create a rebuttable presumption that may be overcome by demonstrating that—

(A) One or more cable or satellite systems did not carry the network on which the communication was publicly distributed at the time the communication was publicly distributed; and

(B) Applying the formula to the remaining cable and satellite systems results in a determination that the cable network or systems upon which the communication was publicly distributed could not be received by 50,000 persons or more.

(c) The following communications are exempt from the definition of *electioneering communication*. Any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication does not include communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the Internet, including electronic mail; or telephone communications;

(2) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. A news story distributed through a broadcast, cable, or satellite television or radio station owned or controlled by any political party, political committee, or candidate is nevertheless exempt if the news story meets the requirements described in 11 CFR 100.132(a) and (b);

(3) Constitutes an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations;

(4) Constitutes a candidate debate or forum conducted pursuant to 11 CFR 110.13, or that solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum; or

(5) Is paid for by a candidate for State or local office in connection with an election to State or local office, provided that the communication does not promote, support, attack or oppose any Federal candidate. *See* 11 CFR 300.71 for communications paid for by a candidate for State or local office that promotes, supports, attacks or opposes a Federal candidate.

11 C.F.R. § 104.20 provides:

§ 104.20 Reporting electioneering communications (2 U.S.C. 434(f)).

(a) *Definitions.*

(1) *Disclosure date* means:

(i) The first date on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000; or

(ii) Any other date during the same calendar year on which an electioneering communication is publicly distributed provided that the person making the electioneering communication has made one or more disbursements, or has executed one or more contracts to make disbursements, for the direct costs of producing or airing one or more electioneering communications aggregating in excess of $10,000 since the most recent disclosure date during such calendar year.

(2) *Direct costs of producing or airing electioneering communications* means the following:

(i) Costs charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent; or

(ii) The cost of airtime on broadcast, cable or satellite radio and television stations, studio time, material costs, and the charges for a broker to purchase the airtime.

(3) *Persons sharing or exercising direction or control* means officers, directors, executive directors or

their equivalent, partners, and in the case of unincorporated organizations, owners, of the entity or person making the disbursement for the electioneering communication.

(4) *Identification* has the same meaning as in 11 CFR 100.12.

(5) *Publicly distributed* has the same meaning as in 11 CFR 100.29(b)(3).

(b) *Who must report and when.* Every person who has made an electioneering communication, as defined in 11 CFR 100.29, aggregating in excess of $10,000 during any calendar year shall file a statement with the Commission by 11:59 p.m. Eastern Standard/Daylight Time on the day following the disclosure date. The statement shall be filed under penalty of perjury, shall contain the information set forth in paragraph (c) of this section, and shall be filed on FEC Form 9. Political committees that make communications that are described in 11 CFR 100.29(a) must report such communications as expenditures or independent expenditures under 11 CFR 104.3 and 104.4, and not under this section.

(c) *Contents of statement.* Statements of electioneering communications filed under paragraph (b) of this section shall disclose the following information:

(1) The identification of the person who made the disbursement, or who executed a contract to make a disbursement, and, if the person is not an individual, the person's principal place of business;

(2) The identification of any person sharing or exercising direction or control over the activities of the person who made the disbursement or who executed a contract to make a disbursement;

(3) The identification of the custodian of the books and accounts from which the disbursements were made;

(4) The amount of each disbursement, or amount obligated, of more than $200 during the period covered by the statement, the date the disbursement was made, or the contract was executed, and the identification of the person to whom that disbursement was made;

(5) All clearly identified candidates referred to in the electioneering communication and the elections in which they are candidates;

(6) The disclosure date, as defined in paragraph (a) of this section;

(7)(i) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications not permissible under 11 CFR 114.15, consisting of funds provided solely by individuals who are United States citizens, United States nationals, or who are lawfully admitted for permanent residence under 8 U.S.C. 1101(a)(20), the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year; or

(ii) If the disbursements were paid exclusively from a segregated bank account established to pay for electioneering communications permissible under 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year.

(8) If the disbursements were not paid exclusively from a segregated bank account described in paragraph (c)(7) of this section and were not made by

a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each donor who donated an amount aggregating $1,000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year.

(9) If the disbursements were made by a corporation or labor organization pursuant to 11 CFR 114.15, the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, which was made for the purpose of furthering electioneering communications.

(d) *Recordkeeping.* All persons who make electioneering communications or who accept donations for the purpose of making electioneering communications must maintain records in accordance with 11 CFR 104.14.

(e) *State waivers.* Statements of electioneering communications that must be filed with the Commission must also be filed with the Secretary of State of the appropriate State if the State has not obtained a waiver under 11 CFR 108.1(b).

11 C.F.R. § 110.11 provides:

§ 110.11 Communications; advertising; disclaimers (2 U.S.C 441d).

(a) *Scope.* The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee;

and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.

(b) *General content requirements.* A disclaimer required by paragraph (a) of this section must contain the following information:

(1) If the communication, including any solicitation, is paid for and authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state that the communication has been paid for by the authorized political committee;

(2) If the communication, including any solicitation, is authorized by a candidate, an authorized committee of a candidate, or an agent of either of the foregoing, but is paid for by any other person, the disclaimer must clearly state that the communication is paid for by such other person and is authorized by such candidate, authorized committee, or agent; or

(3) If the communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person

who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

(c) *Disclaimer specifications.*

(1) *Specifications for all disclaimers.* A disclaimer required by paragraph (a) of this section must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

(2) *Specific requirements for printed communications.* In addition to the general requirement of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on any printed public communication must comply with all of the following:

(i) The disclaimer must be of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer in twelve (12)-point type size satisfies the size requirement of this paragraph (c)(2)(i) when it is used for signs, posters, flyers, newspapers, magazines, or other printed material that measure no more than twenty-four (24) inches by thirty-six (36) inches.

(ii) The disclaimer must be contained in a printed box set apart from the other contents of the communication.

(iii) The disclaimer must be printed with a reasonable degree of color contrast between the background and the printed statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(2)(iii) if it is printed in black text on a

white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(iv) The disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication, except on communications, such as billboards, that contain only a front face.

(v) A communication that would require a disclaimer if distributed separately, that is included in a package of materials, must contain the required disclaimer.

(3) *Specific requirements for radio and television communications authorized by candidates.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication that is authorized or paid for by a candidate or the authorized committee of a candidate (see paragraph (b)(1) or (b)(2) of this section) that is transmitted through radio or television, or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio must include an audio statement by the candidate that identifies the candidate and states that he or she has approved the communication; or

(ii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must include a statement that identifies the candidate and states that he or she has approved the communication. The candidate shall convey the statement either:

(A) Through an unobscured, full-screen view of himself or herself making the statement, or

(B) Through a voice-over by himself or herself, accompanied by a clearly identifiable photographic or similar image of the candidate. A photographic or similar image of the candidate shall be considered clearly identified if it is at least eighty (80) percent of the vertical screen height.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the television communication. To be clearly readable, this statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the text of the statement. A statement satisfies the color contrast requirement of this paragraph (c)(3)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the statement is no less than the color contrast between the background and the largest type size used in the communication.

(iv) The following are examples of acceptable statements that satisfy the spoken statement requirements of paragraph (c)(3) of this section with respect to a radio, television, or other broadcast, cable, or satellite communication, but they are not the only allowable statements:

(A) "I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement."

(B) "My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message."

(4) *Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a communication not authorized by a candidate or a candidate's authorized committee that is transmitted through radio or television or through any broadcast, cable, or satellite transmission, must comply with the following:

(i) A communication transmitted through radio or television or through any broadcast, cable, or satellite transmission, must include the following audio statement, "XXX is responsible for the content of this advertising," spoken clearly, with the blank to be filled in with the name of the political committee or other person paying for the communication, and the name of the connected organization, if any, of the payor unless the name of the connected organization is already provided in the "XXX is responsible" statement; and

(ii) A communication transmitted through television, or through any broadcast, cable, or satellite transmission, must include the audio statement required by paragraph (c)(4)(i) of this section. That statement must be conveyed by an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over.

(iii) A communication transmitted through television or through any broadcast, cable, or satellite transmission, must also include a similar statement that must appear in clearly readable writing at the end of the communication. To be clearly readable, the statement must meet all of the following three requirements:

(A) The statement must appear in letters equal to or greater than four (4) percent of the vertical picture height;

(B) The statement must be visible for a period of at least four (4) seconds; and

(C) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. A disclaimer satisfies the color contrast requirement of this paragraph (c)(4)(iii)(C) if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

(d) *Coordinated party expenditures and independent expenditures by political party committees.*

(1)(i) For a communication paid for by a political party committee pursuant to 2 U.S.C. 441a(d), the disclaimer required by paragraph (a) of this section must identify the political party committee that makes the expenditure as the person who paid for the communication, regardless of whether the political party committee was acting in its own capacity or as the designated agent of another political party committee.

(ii) A communication made by a political party committee pursuant to 2 U.S.C. 441a(d) and distributed prior to the date the party's candidate is nominated shall satisfy the requirements of this section if it clearly states who paid for the communication.

(2) For purposes of this section, a communication paid for by a political party committee, other than a communication covered by paragraph (d)(1)(ii) of this section, that is being treated as a coordinated expenditure under 2 U.S.C. 441a(d) and that was made with the approval of a candidate, a candidate's authorized committee, or the agent of either shall identify the political party that paid for the communication and shall state that the communication is authorized by the candidate or candidate's authorized committee.

(3) For a communication paid for by a political party committee that constitutes an independent expenditure under 11 CFR 100.16, the disclaimer required by this section must identify the political party committee that paid for the communication, and must state that the communication is not authorized by any candidate or candidate's authorized committee.

(e) *Exempt activities.* A public communication authorized by a candidate, authorized committee, or political party committee, that qualifies as an exempt activity under 11 CFR 100.140, 100.147, 100.148, or 100.149, must comply with the disclaimer requirements of paragraphs (a), (b), (c)(1), and (c)(2) of this section, unless excepted under paragraph (f)(1) of this section, but the disclaimer does not need to state whether the communication is authorized by a candidate, or any authorized committee or agent of any candidate.

(f) *Exceptions.*

(1) The requirements of paragraphs (a) through (e) of this section do not apply to the following:

(i) Bumper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed;

(ii) Skywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; or

(iii) Checks, receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message.

(2) For purposes of this section, whenever a separate segregated fund or its connected organization solicits contributions to the fund from those persons it may solicit under the applicable provisions of 11 CFR part 114, or makes a communication to those persons, such communication shall not be considered a type of public communication and need not contain the disclaimer required by paragraphs (a) through (c) of this section.

(g) Comparable rate for campaign purposes.

(1) No person who sells space in a newspaper or magazine to a candidate, an authorized committee of a candidate, or an agent of the candidate, for use in connection with the candidate's campaign for nomination or for election, shall charge an amount for the space which exceeds the comparable rate for the space for non-campaign purposes.

(2) For purposes of this section, comparable rate means the rate charged to a national or general rate advertiser, and shall include discount privileges usually and normally available to a national or general rate advertiser.

11 C.F.R. § 114.15 provides:

§ 114.15 Permissible use of corporate and labor organization funds for certain electioneering communications.

(a) *Permissible electioneering communications.* Corporations and labor organizations may make an electioneering communication, as defined in 11 CFR 100.29, to those outside the restricted class unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(b) *Safe harbor.* An electioneering communication is permissible under paragraph (a) of this section if it:

(1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;

(2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

(3) Either:

(i) Focuses on a legislative, executive or judicial matter or issue; and

(A) Urges a candidate to take a particular position or action with respect to the matter or issue, or

(B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

(c) *Rules of interpretation.* If an electioneering communication does not qualify for the safe harbor in paragraph (b) of this section, the Commission will consider whether the communication includes any indicia of express advocacy and whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.

(1) A communication includes indicia of express advocacy if it:

(i) Mentions any election, candidacy, political party, opposing candidate, or voting by the general public; or

(ii) Takes a position on any candidate's or officeholder's character, qualifications, or fitness for office.

(2) Content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate includes content that:

(i) Focuses on a public policy issue and either urges a candidate to take a position on the issue or urges the public to contact the candidate about the issue; or

(ii) Proposes a commercial transaction, such as purchase of a book, video or other product or service, or such as attendance (for a fee) at a film exhibition or other event; or

(iii) Includes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.

(3) In interpreting a communication under paragraph (a) of this section, any doubt will be resolved in favor of permitting the communication.

(d) *Information permissibly considered.* In evaluating an electioneering communication under this section, the Commission may consider only the communication itself and basic background information that may be necessary to put the communication in context and which can be established with minimal, if any, discovery. Such information may include, for example, whether a named individual is a candidate for office or whether a communication describes a public policy issue.

(e) *Examples of communications.* A list of examples derived from prior Commission or judicial actions of communications that have been determined to be permissible and of communications that have been determined not to be permissible under paragraph (a) of this section is available on the Commission's Web site, http://www.fec.gov.

(f) *Reporting requirement.* Corporations and labor organizations that make electioneering communications under paragraph (a) of this section aggregating in excess of $10,000 in a calendar year shall file statements as required by 11 CFR 104.20.

APPELLEE'S BRIEF

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In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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QUESTIONS PRESENTED

1. Whether the three-judge district court correctly concluded that appellant's film about then-Senator Hillary Clinton is the functional equivalent of express advocacy under the test set forth in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

2. Whether the three-judge district court correctly held that the reporting and disclaimer requirements of federal campaign finance law may permissibly be applied to advertisements that are not the functional equivalent of express advocacy.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Summary of argument 10
Argument:
I. BCRA's restrictions on corporate financing of electioneering communications are constitutional as applied to appellant's film 13
A. This Court has upheld Congress's power to restrict corporations from using their treasury funds to finance express advocacy or its functional equivalent 14
B. *Hillary* is the functional equivalent of express advocacy because it focuses on Senator Clinton's candidacy and character 16
C. There is no other constitutional basis for exempting appellant's film from the corporate financing restriction 23
1. Video-on-demand has no special constitutional status 23
2. *Hillary*'s 90-minute length gives it no special constitutional status 26
3. The "overtly conservative" nature of *Hillary*'s advocacy does not entitle appellant to use corporate treasury funds to broadcast the film 28
4. Appellant's purported use of funds acquired from individuals to finance the film at issue here does not entitle it to a constitutional exemption from BCRA Section 203's restrictions 29

Table of Contents—Continued: Page

D. Appellant presents no basis for overruling this Court's decision in *Austin* 33
II. BCRA's reporting and disclaimer requirements are constitutional as applied to appellant's film and advertisements 36
A. Disclosure requirements are subject to intermediate scrutiny 37
B. As applied to advertisements that fall within BCRA's definition of "electioneering communication," but that are not the functional equivalent of express advocacy, BCRA's reporting and disclaimer requirements are substantially related to important governmental interests 39
1. The government has an important interest in providing information to the public 40
2. The government has an important interest in facilitating enforcement of funding regulations 46
C. Appellant demonstrates no First Amendment burden arising from the disclosure provisions 48
1. Appellant presents no evidence that the disclosure requirements would cause appellant or its donors to suffer reprisals 48
2. Appellant presents no evidence that the reporting requirements would chill speech 50
3. The disclaimer requirements impose no constitutionally significant burdens 51
Conclusion 55

TABLE OF AUTHORITIES

Cases: Page

Austin v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) 15, 20, 32, 33
Brown v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982) 49
Buckley v. *American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) 37, 43, 50
Buckley v. *Valeo*, 424 U.S. 1 (1976) ..... *passim*
Citizens Against Rent Control v. *City of Berkeley*, 454 U.S. 290 (1981) 44
Davis v. *FEC*, 128 S. Ct. 2759 (2008) 35, 37, 48
FEC v. *Beaumont*, 539 U.S. 146 (2003) 15, 31
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ..... *passim*
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 15, 33, 35
FEC v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ..... *passim*
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 15, 33, 35, 36, 44
Florida League of Prof'l Lobbyists, Inc. v. *Meggs*, 87 F.3d 457 (11th Cir.), cert. denied, 519 U.S. 1010 (1996) 44
Hurley v. *Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) 38
Johanns v. *Livestock Mktg. Ass'n*, 544 U.S. 550 (2005) .. 42
Marks v. *United States*, 430 U.S. 188 (1977) 7

Cases—Continued: Page

McConnell v. *FEC*:
540 U.S. 93 (2003) ..... *passim*
251 F. Supp. 2d 176 (D.D.C. 2003) 4, 27, 50
McIntyre v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995) 38, 51
National Elec. Mfrs. Ass'n v. *Sorrell*, 272 F.3d 104 (2d Cir. 2001), cert. denied, 536 U.S. 905 (2002) 54
NCAA v. *Smith*, 525 U.S. 459 (1999) 24
Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) 41, 44
North Carolina Right to Life, Inc. v. *Leake*, 525 F.3d 274 (4th Cir. 2008) 45
Randall v. *Sorrell*, 540 U.S. 230 (2006) 34, 35
Riley v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) 38
United States v. *Harriss*, 347 U.S. 612 (1954) 44, 50
United States v. *International Union UAW*, 352 U.S. 567 (1957) 33
United States v. *Virginia*, 518 U.S. 515 (1996) 37
Washington State Grange v. *Washington State Republican Party*, 128 S. Ct. 1184 (2008) 52

Constitution, statutes, regulations and rules:

U.S. Const. Amend. I 13, 37, 40, 48, 55
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81:
§ 201, 116 Stat. 88 5
§ 203, 116 Stat. 91 ..... *passim*

Statutes, regulations and rules—Continued: Page

§ 311, 116 Stat. 105 5
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.* 2
2 U.S.C. 431(f)(1) (Supp. IV 1974) 5
2 U.S.C. 431(9)(B)(i) 20
2 U.S.C. 434(f)(1) 5
2 U.S.C. 434(f)(2)(E) 5
2 U.S.C. 434(f)(3)(A)(i) 4, 26
2 U.S.C. 434(f)(3)(B)(i) 4, 20
2 U.S.C. 441b 33
2 U.S.C. 441b(a) 2, 4, 25
2 U.S.C. 441b(b)(2) 4
2 U.S.C. 441b(b)(2)(C) 3
2 U.S.C. 441d(a)(3) 5
2 U.S.C. 441d(d)(2) 6
5 U.S.C. 7323(a)(3) 14
11 C.F.R.:
Section 100.26 26
Section 100.29(a)(2) 4
Section 100.29(b)(3)(ii) 4
Section 100.29(b)(7)(i)(G) 24
Section 100.29(b)(7)(ii) 24
Section 100.29(c)(1) 20
Section 100.155 26
Section 104.20(c) 5
Section 104.20(c)(7) 5
Section 104.20(c)(9) 30

Regulations and rules—Continued: Page

Section 110.11(b)(3) 5
Section 110.11(c)(4) 6
Section 110.11(c)(4)(i) 52
Section 110.11(c)(4)(iii)(A) 53
Section 114.10 ..... 3, 30
Section 114.15 17
Sup. Ct. R.:
Rule 14.1(a) 34
Rule 18.3 34

Miscellaneous:

Citizens United:
Hillary: The Movie (visited Feb. 17, 2009) <http://www.hillarythemovie.com> 51
Hype: The Obama Effect (visited Feb. 17, 2009) <http:// www.hypemovie.com> 14
Federal Election Comm'n:
Advisory Op. 2004-30 (Sept 10, 2004) <http://saos.nictusa.com/aodocs/2004-30.pdf> 20
Disclosure Reports—Filer ID C00295527 (visited Feb. 17, 2009) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527> 49
Individuals Who Gave to This Committee: Citizens United Political Victory Fund (visited Feb. 17, 2009) <http://query.nictusa.com/cgi-bin/com_ind/C00295527> 49
Frank Greve, *TV Uses Flag, Prayers to Portray Reagan as Leader*, Miami Herald, Sept. 12, 1984, *available in* 2008 WLNR 203856 27

Miscellaneous—Continued: Page

William Safire, *Safire's Political Dictionary* (2008) 27

Brian Steinberg, *Custom National TV Spots Are Close: Verklin*, Advertising Age, Sept. 22, 2008, *available in* 2008 WLNR 18294102 26

Calvin Woodward, *Open Primaries in Texas and Ohio Will Test Clinton*, Hous. Chron., Feb. 24, 2008, *available in* 2008 WLNR 3699542 29

In the Supreme Court of the United States

No. 08-205

CITIZENS UNITED, APPELLANT

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FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE
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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion of the three-judge district court granting appellee's motion for summary judgment (J.A. 261a-262a) is unreported. The opinion of the three-judge district court denying appellant's motions for preliminary injunctions (J.A. 195a-211a) is reported at 530 F. Supp. 2d 274.

JURISDICTION

The decision of the three-judge district court was entered on July 18, 2008. A notice of appeal was filed on July 24, 2008 (J.S. App. 22a-23a). The jurisdictional statement was filed on August 14, 2008. This Court noted probable jurisdiction on November 14, 2008. The jurisdiction of this Court rests on Section 403(a)(3) of

the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 113.

STATEMENT

Appellant is a nonprofit corporation that produced a movie critical of then-Senator Hillary Clinton, who was at that time a candidate for the Democratic presidential nomination. Appellant wished to use its treasury funds to pay cable companies to broadcast the film before and during the 2008 presidential primary elections, contrary to a federal prohibition on the use of corporate treasury funds to finance "electioneering communications" as defined by federal law. Appellant also sought to run advertisements promoting the film without complying with federal reporting and disclaimer requirements. Appellant filed suit against the Federal Election Commission (Commission or FEC), alleging that those federal financing restrictions and disclosure requirements were unconstitutional as applied. A three-judge district court granted summary judgment for the Commission.

1. a. Since 1907, federal law has restricted corporations from using their general treasury funds to influence federal elections. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The restriction on a corporation's independent "expenditure[s]" has been construed to encompass "express advocacy," *i.e.*, the financing of communications that expressly advocate the election or defeat of a clearly identified candidate. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-249 (1986) (*MCFL*).

The general prohibition on express advocacy by corporations in federal elections has two principal exceptions. First, a corporation may establish a "separate segregated fund," commonly called a political action committee (PAC), to finance those disbursements. 2 U.S.C. 441b(b)(2)(C). The money in a corporation's PAC, which is raised from individuals associated with the corporation, can be contributed directly to candidates for federal office, and it may be used without limitation to pay for independent expenditures to communicate to the general public the corporation's views on such candidates.

Second, this Court has held that certain small, ideologically-oriented corporations may use their treasury funds for express advocacy notwithstanding the general financing restriction. That exception applies to corporations that (1) were "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) were "not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 264; see *McConnell* v. *FEC*, 540 U.S. 93, 210-211 (2003); 11 C.F.R. 114.10 (implementing *MCFL* exception). Corporations possessing these characteristics are commonly referred to as "*MCFL* organizations." *E.g.*, *McConnell*, 540 U.S. at 210.

b. Section 203 of BCRA extended the longstanding ban on corporate express electoral advocacy to an additional category of political spending. 116 Stat. 91. After this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), corporations and labor unions crafted political communications that avoided the so-

called magic words of express electoral advocacy. They financed those communications with "hundreds of millions of dollars" from their general treasuries "'while concealing their identities from the public,'" including by "'hiding behind dubious and misleading names.'" *McConnell*, 540 U.S. at 127, 196-197 (quoting *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003) (three-judge court)). "Congress enacted BCRA to correct the flaws it found in the existing system." *Id.* at 194.

Accordingly, Congress required any corporation or labor union that sponsors an "electioneering communication" to pay for it with PAC rather than general treasury funds. See 2 U.S.C. 441b(a) and (b)(2).[1] The term "electioneering communication" is defined, in the context of elections for President or Vice President, as a "broadcast, cable, or satellite communication" that (1) refers to a clearly identified candidate; and (2) is made within 60 days before a general election, within 30 days before a presidential nominating convention, or within 30 days before a presidential primary election in the state holding that primary. 2 U.S.C. 434(f)(3)(A)(i); 11 C.F.R. 100.29(a)(2) and (b)(3)(ii). The definition generally excludes any broadcast "communication appearing in a news story, commentary, or editorial." 2 U.S.C. 434(f)(3)(B)(i).

2. a. Federal law has also long required disclosure of the dollar amounts expended on campaign activity. FECA required donors to disclose not only contributions to political candidates, but also "the use of money or other valuable assets 'for the purpose of . . . influencing' the nomination or election of candidates for federal

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[1] *MCFL* organizations are excepted. See *McConnell*, 540 U.S. at 211.

office." *Buckley*, 424 U.S. at 77 (quoting 2 U.S.C. 431(f)(1) (Supp. IV 1974)). The Court in *Buckley* upheld that requirement after construing it to avoid vagueness concerns. *Id.* at 76-84.

b. BCRA Section 201 added a requirement that any person who spends more than $10,000 to broadcast an electioneering communication must promptly file a comparable disclosure statement with the Commission. 2 U.S.C. 434(f)(1). The statement must identify the person making the disbursement; the amount and date of the disbursement; and, in the case of an electioneering communication made by a corporation, all those who contributed "$1,000 or more to the corporation * * * for the purpose of furthering electioneering communications." 11 C.F.R. 104.20(c). If the disbursement is made out of a "segregated bank account" established for electioneering communications, the report need only identify those who contributed $1000 or more to that segregated account. 2 U.S.C. 434(f)(2)(E); 11 C.F.R. 104.20(c)(7).

c. BCRA Section 311 added a separate requirement that a televised electioneering communication must include both written and oral disclaimers. The screen must display (1) "the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication," and (2) a statement "that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a)(3); 11 C.F.R. 110.11(b)(3). The communication must also include a statement that the entity funding the communication "is responsible for the content of this advertising," and that statement must be both (1) made orally by a representative of the entity making the communication and (2) printed "for a period of at least 4 sec-

onds" in text meeting specified size and contrast requirements. 2 U.S.C. 441d(d)(2); 11 C.F.R. 110.11(c)(4).

3. Soon after BCRA was enacted, appellant and other plaintiffs challenged the constitutionality of numerous BCRA provisions, including the reporting and disclaimer requirements that are at issue in this appeal. See Br. for Appellants Congressman Ron Paul, *et al.*, at iii, *McConnell*, *supra* (No. 02-1747). This Court rejected the plaintiffs' facial challenges to the corporate-funding restrictions, reporting obligations, and disclaimer requirements applicable to electioneering communications.

The Court in *McConnell* discussed its prior decisions upholding state and federal restrictions on corporate electoral advocacy. 540 U.S. at 204-205. The Court explained that, "[i]n light of [those] precedents, plaintiffs d[id] not contest that the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office." *Id.* at 205. The Court further explained that, "to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy," the same governmental interests apply equally to corporate financing of electioneering communications. *Id.* at 206. Based on a voluminous record examining the use of corporate-funded ads that influenced elections without using express advocacy, the Court concluded that BCRA's restrictions on the financing of electioneering communications are facially valid. *Id.* at 207.

The Court also upheld BCRA's reporting requirements. The Court explained that those requirements serve three valid purposes: "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data nec-

essary to enforce more substantive electioneering restrictions." 540 U.S. at 196. Although the Court noted the possibility of future as-applied challenges by plaintiffs for whom disclosure represented an unusually severe burden, it concluded that none of the plaintiffs before it had shown such a burden. *Id.* at 198-199. Three other Justices, while rejecting much of the Court's reasoning, agreed that BCRA's reporting requirements (with one exception not relevant here) are constitutional because they "substantially relate" to the informational interest identified in the Court's opinion. *Id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part).

The Court in *McConnell* also upheld BCRA's disclaimer requirements. 540 U.S. at 230-231. Chief Justice Rehnquist, writing for eight Members of the Court, explained that BCRA's "inclusion of electioneering communications in the [pre-existing disclaimer] regime bears a sufficient relationship to the important governmental interest of 'shed[ding] the light of publicity' on campaign financing." *Id.* at 231 (quoting *Buckley*, 424 U.S. at 81).

4. Four years later, in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL*), this Court sustained an as-applied challenge to Section 203. The Chief Justice's controlling opinion,[2] joined by Justice Alito, acknowledged *McConnell*'s holding that Congress may regulate corporate financing of communications that constitute the functional equivalent of express advocacy. The opinion then held that "an ad is the functional equivalent of express advocacy only if the ad is suscepti-

[2] The Chief Justice's opinion is controlling because he "concurred in the judgment[] on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (citation omitted).

ble of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 2667. Three other Justices concluded that BCRA Section 203 is unconstitutional on its face and would have overruled the Court's contrary holding in *McConnell*. *Id.* at 2684-2687 (Scalia, J., concurring in part and concurring in the judgment).

5. Shortly before the 2008 presidential primaries began, appellant was preparing to release a film about then-Senator Hillary Clinton, entitled *Hillary: The Movie*. Appellant intended to distribute the film through theaters, DVD sales, video-on-demand broadcasts, and other broadcast means while Senator Clinton was a candidate for President. J.A. 19a, 196a. The video-on-demand broadcast apparently would have involved paying approximately $1.2 million to a consortium of cable companies, which in return would make the movie available to the companies' subscribers. J.A. 19a, 256a. Appellant also produced three television advertisements for the movie. J.A. 196a-197a & nn.2-4. Those advertisements mentioned Senator Clinton by name and therefore would have fallen within BCRA's definition of "electioneering communication" if they had been broadcast during the 30-day period before a primary election in which Senator Clinton was a candidate. See J.A. 198a-199a.

In December 2007, appellant filed suit in federal district court. The complaint alleged that BCRA Section 203 and the reporting and disclaimer requirements were unconstitutional as applied to both the film and the proposed advertisements, and that Section 203 was facially unconstitutional. See J.A. 200a-201a. The FEC conceded that Section 203 could not be applied to the advertisements because those advertisements were not the

functional equivalent of express advocacy as the lead opinion in *WRTL* used that term.

The three-judge district court denied preliminary injunctive relief on each of appellant's claims. J.A. 195a-211a. Appellant filed an interlocutory appeal in this Court, which dismissed the appeal for want of jurisdiction. 128 S. Ct. 1732 (2008) (No. 07-953). The district court then granted summary judgment to the Commission "[b]ased on the reasoning of [the court's] prior opinion" denying preliminary injunctive relief. J.A. 261a-262a.

a. The district court held that BCRA's ban on the use of corporate treasury funds to finance electioneering communications is constitutional as applied to *Hillary* because the film is the functional equivalent of express advocacy. J.A. 203a-206a. The court found that the film "is susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." J.A. 204a.

b. The district court also rejected appellant's contention that BCRA's reporting and disclaimer provisions are unconstitutional as applied to appellant's proposed advertisements. J.A. 206a-209a. The court explained that this Court in *McConnell* had upheld those provisions on their face, and that appellant had offered no specific evidence of reprisals or other unconstitutional burdens that could distinguish its challenge from the one rejected in *McConnell*. *Ibid.* The district court also observed that, in various contexts, this Court "has written approvingly of disclosure provisions triggered by political speech even though the speech itself was consti-

tutionally protected under the First Amendment." J.A. 208a.

c. The district court noted at the preliminary-injunction stage that appellant could not prevail on its facial challenge unless *McConnell* were overruled. J.A. 202a. In its subsequent motion for summary judgment, appellant stated that it no longer intended to pursue its facial challenge. 07-CV-2240 Docket entry No. 52, at 1-2 (May 16, 2008) ("[Appellant] hereby advises the Court of its intent to abandon the count and asks the Court to consider the count moot and not rule on it."). The parties subsequently stipulated to the dismissal of the facial challenge. See *id.* Nos. 53 (May 22, 2008), 54 (May 23, 2008).

SUMMARY OF ARGUMENT

I. This Court has repeatedly sustained federal statutes implementing Congress's compelling interest in ensuring the integrity of federal elections. In *McConnell*, the decision controlling here, the Court held that Congress may validly prohibit corporations and labor unions from using the wealth amassed in their treasuries to finance either express electoral advocacy or electioneering communications that are the functional equivalent of express advocacy. The Court therefore sustained BCRA Section 203 against a facial challenge. Subsequently, in *WRTL*, the lead opinion declined to reconsider *McConnell*'s holding on that issue because it concluded that the advertisements at issue were *not* the functional equivalent of express advocacy.

McConnell forecloses appellant's claim of entitlement to fund *Hillary* with corporate dollars, because *Hillary* is unmistakably an appeal to viewers to vote against Senator Clinton for President. Every element

of the film, including the narration, the visual images and audio track, and the selection of clips, advances the clear message that Senator Clinton lacked both the integrity and the qualifications to be President of the United States. The film focused not on legislative issues but on Senator Clinton's character, and it tied that message directly to her candidacy for President. Because *Hillary* cannot "reasonably be interpreted as something other than an appeal to vote * * * against" Senator Clinton, it is the "functional equivalent of express advocacy," and Section 203 validly regulates the use of corporate money to put it on the air. *WRTL*, 127 S. Ct. at 2670 (opinion of Roberts, C.J.).

Appellant's attempts to distinguish *McConnell* are unavailing. Appellant sought to have *Hillary* broadcast by purchasing time through a video-on-demand consortium, but that method of paid distribution is no different from buying an "infomercial" on a broadcast network, as political candidates have done for many years. Like any other television advertisement, *Hillary* uses the power of the visual medium to promote a message; broadcasting that message on the "Elections '08" video-on-demand channel rather than on Nickelodeon simply would increase the likelihood that the audience would be interested in the subject matter. Nor does *Hillary*'s 90-minute length have any constitutional significance once the film is found to be the functional equivalent of express advocacy. *McConnell*'s holding is not limited to 30-second advertisements.

Appellant also contends, without adequate record support, that it would have used many more individual donations than corporate donations to finance *Hillary*. But *any* use of corporate monies in this context would permit appellant to be used as a conduit to circumvent

the valid restrictions on corporate spending. Congress's bright-line rule against the use of corporate treasury funds is valid in this context.

Because *McConnell* is controlling, appellant asks this Court to take the avulsive step of overruling its previous holdings and ending *all* federal regulation of corporate-financed electioneering, including express advocacy. That contention is not properly presented and, in any event, provides no new basis for overturning holdings that this Court has repeatedly reaffirmed.

II. BCRA's reporting and disclaimer requirements may validly be applied to appellant's three advertisements. Appellant was permitted to use corporate funds to air the advertisements themselves, under the reasoning of the lead opinion in *WRTL*, because they are not the functional equivalent of express advocacy. Contrary to appellant's contention, however, the fact that appellant's advertisements are not unambiguously election-related does not mean that they are constitutionally exempt from *all* statutory provisions pertaining to the electoral process. The federal requirements that electioneering communications be reported to the Commission, and that they identify their sponsors to their viewers, are based on interests distinct from BCRA Section 203 and not considered in *WRTL*: the public interest in full information about participants in the electoral process, and the government's interest in enforcing other, independent provisions of the campaign finance laws. Those interests are directly implicated by broadcast communications that can reasonably be construed as either electoral or non-electoral advocacy. Under the standard that this Court has consistently applied to informational provisions of this sort—a standard more

permissive than strict scrutiny—these interests are fully sufficient to sustain Congress's chosen methods here.

Appellant identifies no burden that can outweigh these valid interests. As-applied challenges to disclosure requirements have been recognized for decades, based on genuine threats of harassment or reprisals, but appellant makes no effort to meet that standard. Instead, appellant contends (along with several amici) that disclosure *always* poses such a burden, or that disclosure *always* creates an unconstitutional chill on protected speech. This Court has repeatedly rejected such facial attacks on disclosure requirements, recognizing that disclosures of the sort at issue here serve rather than undermine First Amendment interests by increasing the amount of information available to the public.

Finally, appellant's challenge to the application of the disclaimer requirement is without merit. Appellant suffers no significant burden from identifying itself as the sponsor of *Hillary*; the film itself and the website promoting it make appellant's role clear. Appellant has offered no evidence to support the notion that the disclaimer will confuse viewers. And appellant does not have any constitutional entitlement to save money by *not* buying the four additional seconds of airtime necessary to air the disclaimer.

ARGUMENT

I. BCRA'S RESTRICTIONS ON CORPORATE FINANCING OF ELECTIONEERING COMMUNICATIONS ARE CONSTITUTIONAL AS APPLIED TO APPELLANT'S FILM

The district court correctly concluded that *Hillary*, taken as a whole, is the functional equivalent of express advocacy. Appellant therefore had no constitutional right to use its treasury funds, or treasury funds con-

tributed by other corporations, to broadcast *Hillary* during the 30-day period before a primary election in which Senator Clinton was a candidate.[3]

A. This Court Has Upheld Congress's Power To Restrict Corporations From Using Their Treasury Funds To Finance Express Advocacy Or Its Functional Equivalent

Corporations and labor unions have long been required to finance express electoral advocacy through a separate segregated fund rather than with general treasury monies. The constitutionality of that requirement has been "firmly embedded in our law" since this Court upheld FECA in *Buckley*, and it was common ground in the *McConnell* litigation. *McConnell* v. *FEC*, 540 U.S. 93, 203 (2003); see *id.* at 205. Section 203 of BCRA extended that requirement to a defined set of "electioneering communication[s]," and the Court in *McConnell* upheld Section 203 to the extent that the advertisements

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[3] *Hillary* is no longer subject to the restrictions on electioneering communications, and Senator Clinton now holds a Cabinet position that currently precludes her from seeking partisan political office. See 5 U.S.C. 7323(a)(3). Nonetheless, in our view the appeal is not moot, in light of this Court's holding in *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), that a comparable challenge remained justiciable. See Mot. to Dismiss or Affirm 11 n.1; *WRTL*, 127 S. Ct. at 2662-2663. Appellant averred in the district court that it planned to produce, and to promote, a film about then-Senator Barack Obama. J.A. 214a. That film apparently has since been released. See Citizens United, *Hype: The Obama Effect* (visited Feb. 17, 2009) <http://www.hypemovie.com>. If aired during the period preceding a future election in which President Obama is a candidate, that film would fall within BCRA's definition of "electioneering communication." Appellant also expressed the "intention to do materially similar advertising in materially similar situations in the future." J.A. 214a. Accordingly, as in *WRTL*, appellant's challenge appears to be "capable of repetition, yet evading review," and therefore not moot.

it regulates are express advocacy or its "functional equivalent." 540 U.S. at 206. Appellant therefore has no constitutional right to use corporate treasury dollars to purchase airtime for a communication that unmistakably advocates a particular vote.

1. Congress has a compelling interest in protecting the electoral process from both actual corruption and the appearance of corruption. This Court has repeatedly recognized both the validity and the importance of that interest, see, *e.g.*, *WRTL*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.); *Buckley* v. *Valeo*, 424 U.S. 1, 45 (1976) (per curiam), and it has further recognized that the corruptive potential of campaign-related largesse is greatest in the context of *candidate* elections, see *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978).

Congress has historically imposed particularly stringent limits on the electoral advocacy of corporations and labor unions. Those restrictions reflect a "'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation,'" and this Court has consistently "respect[ed]" that judgment. *FEC* v. *Beaumont*, 539 U.S. 146, 155 (2003) (quoting *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209-210 (1982)). In particular, because of the numerous advantages that the corporate form confers, a corporation's ability to pay for electoral advocacy has "little or no correlation to the public's support for the corporation's political ideas." *McConnell*, 540 U.S. at 205 (quoting *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990)).

2. The Court held in *McConnell* that those "unusually important interests" justify regulating corporations' use of treasury funds to influence elections directly, through either express advocacy *or* electioneering com-

munications that are the functional equivalent of express advocacy. 540 U.S. at 206 n.88; see *id.* at 205-207. The constitutionally valid justification for requiring corporations to fund express advocacy through PACs "appl[ies] equally" to corporate funding of "ads [that] are intended to influence the voters' decisions and have that effect," even if their electioneering message is less explicit than express advocacy. *Id.* at 206. In *WRTL*, the lead opinion recognized that the Court in *McConnell* had "already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent." 127 S. Ct. at 2664; see *ibid.* (explaining that, if the broadcast is "express advocacy or its functional equivalent," then "the FEC's burden is not onerous; all it need do is point to *McConnell* and explain why it applies here").

B. *Hillary* Is The Functional Equivalent Of Express Advocacy Because It Focuses On Senator Clinton's Candidacy And Character

As the term itself makes clear, a communication may be the "functional equivalent" of express advocacy even if it does not explicitly urge a vote for or against a candidate. See *McConnell*, 540 U.S. at 193 (noting the Court's "longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad"). Rather, as the lead opinion in *WRTL* explained, a broadcast should be treated as electioneering if the only "reasonable interpretation" of its content is "as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. Applying that standard, the three-judge district court correctly concluded that *Hillary* "is susceptible of no other interpretation than to inform the electorate that Senator

Clinton is unfit for office * * * and that viewers should vote against her." J.A. 204a.

The lead opinion in *WRTL* identified three reasons for its conclusion that the advertisements at issue there did not constitute the functional equivalent of express advocacy. First, the advertisements "focus[ed] on a legislative issue" and advocated specific congressional action; they did not simply "condemn[] [the target's] record on a particular issue." 127 S. Ct. at 2667 & n.6 (citation omitted). Second, they "d[id] not mention an election [or a] candidacy." *Id.* at 2667. Third, the advertisements "d[id] not take a position on a candidate's character, qualifications, or fitness for office." *Ibid.* The Commission has codified those criteria in implementing regulations, 11 C.F.R. 114.15. Under that analysis, *Hillary* is the functional equivalent of express advocacy.

1. Senator Clinton's candidacy for President is the central and unmistakable focus of the film. The narrator's first voiceover begins, "Hillary Rodham Clinton. Could she become the first female President in the history of the United States?" J.A. 35a. The final voiceover cautions that "before America decides on our next President, voters should need no reminders of * * * what's at stake—the well being and prosperity of our nation." J.A. 144a-145a. And throughout the film, Senator Clinton's candidacy is repeatedly brought up both by the narrator, see J.A. 35a, 37a-38a, 38a-39a, 39a-40a, 88a-89a, 94a-95a, 104a-105a, 112a, 115a, 125a, 142a, 143a-144a, and by a succession of featured commentators, all critical of Senator Clinton, see J.A. 30a-31a, 42a, 63a, 64a, 89a-90a, 100a, 146a, 147a, 148a-149a. The message is forthrightly stated in a clip from Tony Blankley: *Hillary* is intended to cover "things in the Clinton[s'] political history worth recalling *before you go in to po-*

tentially vote for a Clinton, in this case a Hillary Clinton." J.A. 42a (emphasis added).

The images and audio chosen by the film's editors evince a similar focus from beginning to end. As the film's title appears onscreen, the audio track plays Senator Clinton's message about starting her presidential campaign. J.A. 32a. And just before the film ends, the audio track plays Senator Clinton saying that "on January 20, 2009 . . . some one will stand on the steps of the [C]apitol . . . and raise his or her hand to take the oath of office as the 44th [P]resident." J.A. 149a.

2. *Hillary*'s unmistakable message is that Senator Clinton's character, beliefs, qualifications, and personal history make her unsuited to the office of President of the United States. That message is conveyed through the film's narration; through its choice of commentators and its selection of extracts from their interviews; and through its use of visual imagery. "And although the resulting [production] do[es] not urge the viewer to vote for or against a candidate in so many words, [it is] no less clearly intended to influence" voters' views of candidate Clinton. *McConnell*, 540 U.S. at 193.

Rather than examining issues that might be the subject of legislative votes or Executive Branch action, *Hillary* focuses on Senator Clinton's "character, qualifications, [and] fitness for office." *WRTL*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). The film repeatedly impugns Senator Clinton's honesty and character. See J.A. 39a ("She's deceitful. She'll make up any story; lie about anything."), 40a (narrator asking, "[I]s she ruthless, cunning, dishonest—willing to do anything for power?"), 41a ("the Clintons * * * speak dishonestly"), 64a (narrator's reference to Senator Clinton's "Machiavellian behavior" and "tendency to manipulate, deceive and de-

stroy for personal gain"), 68a (narrator's reference to her "hypocrisy and startling recklessness"), 86a ("congenital liar"), 111a ("[S]he's not flipping and flopping. [S]he's lying."), 112a (narrator stating, "The war on terror isn't the only issue where Hillary is trying to have it both ways."), 130a (narrator stating, "Character is defined as what we do when we think no one is looking. By that standard many critics say the Clintons are sorely lacking."). Those allegations are expressly tied to her fitness for elective office, and specifically for the office of President. *E.g.*, J.A. 62a ("I don't understand how any woman in this country * * * could vote for a woman who does that to other people."), 149a ("[T]he Hillary Clinton that I know is not equipped, not qualified to be our commander in chief.").

The images that appear onscreen reinforce the attack on Senator Clinton's character. For example, 37 seconds into the movie, after a montage of headlines containing the phrase "Mrs. Clinton," the visual zooms in and lingers on the word "perjury" (omitting the remainder of the headline). Four seconds later, after a montage of headlines referring to the "First Lady," the visual zooms in and lingers on the word "lies" (again omitting the remainder of the headline). Am. Compl. Exh. 2 (DVD version).

Appellant describes those manifestations of *Hillary*'s critical message as merely the opinion of "various commentators," offered only at the end of the movie. Br. 40; see Br. 37. That characterization is demonstrably inaccurate. As explained above, criticism of Senator Clinton's character and candidacy pervades the movie, beginning in the visual montages and statements in the *first minute* of the film and continuing throughout. That criticism comes in the filmmakers' own voice (and voice-

over) and cannot be dismissed as the opinions of the interviewees (who are in any event uniformly critical of Senator Clinton). And any potential ambiguity regarding the "focus" of the film as a whole, *WRTL*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.), is removed by the concluding section, which marshals all of the preceding evidence as support for the ultimate conclusion that Senator Clinton should not be elected president.[4]

3. Unlike a genuine issue advertisement, *Hillary* does not "focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, [or] urge the public to contact public officials with respect to

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[4] Appellant suggests (Br. 37-38) that BCRA Section 203 is infirm because similar criticisms of Senator Clinton might have been aired on *Meet the Press* without running afoul of BCRA's restrictions on corporate financing of electioneering communications. BCRA provides that the electioneering communication requirements and restrictions do not apply to communications that "appear[] in a news story, commentary, or editorial distributed through the facilities of any broadcasting station." 2 U.S.C. 434(f)(3)(B)(i); see 11 C.F.R. 100.29(c)(1); cf. 2 U.S.C. 431(9)(B)(i) (FECA's longstanding media exemption). This Court has repeatedly sustained such federal and state exemptions for media activity as "wholly consistent with First Amendment principles." *McConnell*, 540 U.S. at 208; see *Austin*, 494 U.S. at 668.

Appellant does not contend that *Hillary* falls within BCRA's media exemption, and it appears that the film would not qualify because appellant paid for it to be broadcast in the manner of an infomercial. Although appellant ordinarily receives payment for DVDs and theater showings of its movies unrelated to candidates, it sought to spend over $1 million to have *Hillary* available during the election season. J.A. 11a-13a, 213a, 256a, 260a. See FEC Advisory Op. 2004-30, at 7 (Sept. 10, 2004) <http://saos.nictusa.com/aodocs/2004-30.pdf> ("[T]he very act of paying a broadcaster to air a documentary on television, rather than receiving compensation from a broadcaster, is one of the 'considerations of form' that can help to distinguish an electioneering communication from exempted media activity."); cf. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986).

the matter." *WRTL*, 127 S. Ct. at 2667 (opinion of Roberts, C.J.). In the few short portions of the film that touch on legislative issues, the film consistently and explicitly ties those issues to further critiques of Senator Clinton's character and fitness for the presidency. See, *e.g.*, J.A. 105a-108a (discussing Senator Clinton's positions on driver's licenses for illegal immigrants and concluding that her performance failed to show "presidential stature or character"); J.A. 108a-112a (discussing Senator Clinton's positions on the war in Iraq and concluding that Senator Clinton was "not flipping and flopping. [S]he's lying."). The film does not express disagreement with any of Senator Clinton's stands on the relevant issues but rather urges that her handling of those issues shows that she lacks both the forthrightness and the experience to be President. See J.A. 105a-112a.

Even if one or more snippets of *Hillary* might in isolation be seen as issue advocacy, they are part of a larger work that, as a whole, unambiguously argues that Senator Clinton is unfit for the office for which she was a candidate.[5] Appellant cannot immunize such a communication from regulation simply by inserting some addi-

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[5] The district court's focus on the film as a whole (while quoting illustrative excerpts, see J.A. 204a & n.12) was compelled by this Court's direction to examine the "substance of the [electioneering] communication" itself. *WRTL*, 127 S. Ct. at 2666 (opinion of Roberts, C.J.). Appellant complains (Br. 34-35) that the entirety of *Hillary*, not just the electioneering portions, is subject to BCRA's financing rules. But that consequence occurs only because appellant has produced a movie that, taken as a whole, is the functional equivalent of express advocacy. If portions of the film would qualify as protected issue advocacy (or would not fall within the definition of "electioneering communication"), and if appellant wished to use treasury funds to broadcast only those portions, nothing in BCRA would prevent it from doing so.

tional issue discussion. Indeed, much *express* advocacy contains issue discussion.[6] In *MCFL*, for instance, the Court held that a newsletter that contained issue advocacy nevertheless was "squarely" regulated by FECA because it *also* went "beyond issue discussion to express electoral advocacy." 479 U.S. at 249-250.

4. Appellant observes (Br. 36-37) that *Hillary* does not urge viewers to undertake "the *specific* act of voting against Senator Clinton in a Democratic presidential primary." Appellant argues (Br. 37) that, "[i]n the absence of such an unambiguous call to action, it is difficult to envision any language or images, or mix of the two," that would satisfy the constitutional standard set forth in the lead opinion in *WRTL*. That contention is in substance an appeal for reinstatement of the "magic words" requirement that the Court in *McConnell* held was not constitutionally required. See 540 U.S. at 190-192. Acceptance of that argument would mean that BCRA Section 203 is unconstitutional in virtually all its applications, see *id.* at 127 & n.18, 193 & n.77 (explaining that modern campaign advertising, including advertisements run by candidates, rarely uses "magic words"), in contravention of *McConnell*'s holding that Section 203 is not facially overbroad because most of its applications are constitutional, see *id.* at 207; accord *WRTL*, 127 S. Ct. at 2683 (Scalia, J., concurring in part and concurring in the judgment).

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[6] Appellant asserts that "[t]he parties agree that *Hillary* is not express advocacy." Br. 34 (citing Def.'s Mot. for Summ. J. 37). The Commission has not expressed any opinion on that question, in the district court or elsewhere. Rather, the Commission has simply concluded that appellant's financing of *Hillary* may constitutionally be subject to BCRA Section 203 because the film is, "at a minimum, the functional equivalent of express advocacy." J.A. 236a.

C. There Is No Other Constitutional Basis For Exempting Appellant's Film From The Corporate Financing Restriction

In addition to arguing that *Hillary* is not the functional equivalent of express advocacy under the lead opinion in *WRTL*, appellant advances a variety of other arguments for finding BCRA's corporate financing restriction unconstitutional as applied to the film. Those arguments lack merit.

1. Video-on-demand has no special constitutional status

Appellant apparently wished to pay a consortium of cable television providers to show *Hillary* through the consortium's video-on-demand service. See J.A. 253a-260a. Appellant argues (Br. 24-29) that even if *Hillary* can be regulated as the functional equivalent of express advocacy when it is broadcast on television (including cable television), the film is constitutionally exempt from such regulation when it is distributed as a cable video-on-demand transmission. That newly raised contention lacks merit.

a. Appellant's argument was neither presented to nor ruled on by the court below.[7] Nor did appellant su-

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[7] To the contrary, the amended complaint alleged that appellant planned to televise the film both through video-on-demand and "by other means," and it did not suggest that video-on-demand placement had any special constitutional significance. J.A. 19a. Indeed, the offer for video-on-demand distribution did not come until after appellant filed this litigation. J.A. 230a-231a.

Appellant also alleged that *Hillary* would be "within the electioneering communication definition," including the requirement that the communication be "receivable by more than 50,000 persons." J.A. 19a-20a; see 11 C.F.R. 100.29(b)(3)(ii). Appellant now contends (Br. 26 n.2), however, that video-on-demand is categorically excluded from treatment as an electioneering communication because no single video-on-

gest in its jurisdictional statement that video-on-demand distribution might have constitutional significance. This Court generally "do[es] not decide in the first instance issues not decided below," *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999), and no exception should be made here. In particular, in opposing the Commission's summary-judgment motion, appellant never submitted any facts or argument to support its current contentions about the nature of video-on-demand.

b. In any event, appellant identifies no sound constitutional basis for exempting video-on-demand broadcasts from BCRA's restrictions on corporate financing of electioneering communications. As with a 30-second commercial or a 30-minute infomercial, the producer of a video-on-demand film pays the broadcaster to air the film without modification. See, *e.g.*, J.A. 253a (touting the "advanced advertising opportunities" of video-on-demand, which allows candidates and others to "craft[] and control[] [their] own long-form campaign message [and] reach voters with no media dilution or bias").

Appellant speculates (Br. 25, 26) that making *Hillary* available through video-on-demand would not change any voter's mind because only viewers who "want to learn what [appellant] has to say about Hillary Clinton"

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demand transmission can be received by 50,000 people. That argument was neither pressed nor passed upon below, see J.A. 199a n.6 (considering a different definitional question), and it is not fairly included within the questions presented in the jurisdictional statement. In any event, the argument lacks merit. The applicable FEC regulation, which is entitled to deference, provides that the number of people who can receive a cable transmission is determined by the number of cable subscribers in the relevant area. See 11 C.F.R. 100.29(b)(7)(i)(G) and (ii). Because the digital video-on-demand system that appellant wished to use had 34.5 million subscribers nationwide (J.A. 256a), the regulatory definition appears to have been satisfied.

would select *Hillary* from a video-on-demand menu. An interested audience, however, is a virtue to an advertiser. Indeed, the "Elections '08" video-on-demand channel on which *Hillary* purportedly would have run is marketed—to *campaigns* as well as issue-advocacy groups—as an effective way to reach voters, including swing voters. See J.A. 258a, 259a. A voter's decision to select "*Hillary: The Movie*" from an on-screen menu does not logically imply that the voter has decided how to cast his ballot.

The apparent premise of appellant's argument—*i.e.*, that typical voters with access to video-on-demand may select programs that they believe will reinforce their pre-existing beliefs, but will not choose programs that may inform them with respect to electoral choices as to which they are currently undecided—reflects a jaundiced view of American democracy. But even if everyone who would have watched *Hillary* through video-on-demand was already opposed to Senator Clinton's candidacy, it would not follow that the film lacked electoral influence. A significant amount of electoral advertising is intended not to sway undecided voters, but rather to motivate the advertiser's political "base." To the extent that *Hillary* would have induced viewers already opposed to Senator Clinton to become more active in their opposition to her candidacy, the film's electoral effect would have been comparable to that of any other communication directed at decided voters.

Longstanding federal restrictions on corporate and union electioneering, see 2 U.S.C. 441b(a), apply to *all* forms of express advocacy, including appellant's "free DVD by mail" hypothetical (Br. 27-28). It is true that the restrictions imposed by BCRA Section 203, which extend beyond express advocacy to its functional equiva-

lent, are limited to broadcast media and do not apply to newspaper advertising or the Internet. See 2 U.S.C. 434(f)(3)(A)(i). Based on an extensive factual record, this Court in *McConnell* upheld that legislative judgment, reiterating its statement in *Buckley* that "reform may take one step at a time, addressing itself to that phase of the problem which seems most acute to the legislative mind." 540 U.S. at 207-208 (quoting *Buckley*, 424 U.S. at 105).[8] Appellant identifies no sound basis for rejecting that conclusion now, and there are valid reasons to subject video-on-demand broadcasts to the same financing restrictions as other broadcast advertisements. Video-on-demand advertising has many of the strengths of the television medium, and it can target particular audiences. See J.A. 257a (regional targeting available); Brian Steinberg, *Custom National TV Spots Are Close: Verklin*, Advertising Age, Sept. 22, 2008, at 6, *available in* 2008 WLNR 18294102.

2. ***Hillary's 90-minute length gives it no special constitutional status***

Appellant also contends (Br. 13, 28) that the holdings of *McConnell* and *WRTL* do not apply to "feature-length films," even when those films are the functional equivalent of express advocacy. That argument lacks merit. As explained above, *Hillary* is a 90-minute advocacy piece whose unmistakable import is that Senator Clinton should not be elected President. Once that proposition

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[8] Although the FEC has broadly exempted electioneering activity on the Internet from regulation, see 11 C.F.R. 100.26, 100.155 (exempting from most regulation Internet electioneering other than the purchase of paid advertising on another's website), nothing in *McConnell* or any other decision suggests that this exemption is constitutionally compelled.

is established, there is no principled constitutional basis for distinguishing *Hillary* from the attack advertisements discussed in *McConnell* simply because the movie spends more time on its electioneering than the advertisements do.

In arguing that the rationale of *McConnell* does not extend to feature-length movies, appellant notes (*e.g.*, Br. 24, 28) the apparent absence of evidence that such films had been the subject of widespread abuse before BCRA was enacted. But the legislative record on which BCRA was based amply established the prevalence, during the periods directly before federal elections, of corporate-funded broadcast attacks that carefully avoided using the explicit words of electoral advocacy but nonetheless urged the election or defeat of clearly identified candidates. *McConnell*, 540 U.S. at 206. And the *McConnell* record contained evidence that advocacy groups used corporate money to broadcast lengthy "infomercials" that were much longer than the traditional 30-second advertisement. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 305-306, 316-317 (D.D.C. 2003) (opinion of Henderson, J.); *id.* at 547-548 (opinion of Kollar-Kotelly, J.); *id.* at 906 (opinion of Leon, J.).[9] As appellant notes

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[9] Appellant also contends (Br. 22-23) that the 30-second spot is the most effective form of advocacy and, therefore, the only form Congress was justified in regulating. But many politicians have used lengthy video segments (some with all the trappings of a studio release) to great political effect. Virtually every national political convention features a hagiographic film about the candidate (such as the Hollywood-produced *The Man from Hope*), and presidential candidates have bought infomercial-length blocks of advertising time for decades. See, *e.g.*, Frank Greve, *TV Ad Uses Flag, Prayers to Portray Reagan as Leader*, Miami Herald, Sept. 12, 1984, at 16A, *available in* 1984 WLNR 203856; William Safire, *Safire's Political Dictionary* 113 (2008) ("Checkers speech").

(Br. 26), video-on-demand technology is relatively new, and its advent has made buying a feature-length block of advertising time much easier. But nothing about the duration of *Hillary* separates it from the other pieces of broadcast advertising documented in the *McConnell* record.

3. The "overtly conservative" nature of Hillary's advocacy does not entitle appellant to use corporate treasury funds to broadcast the film

Appellant contends that despite its electioneering message, *Hillary* poses no risk of actual or apparent quid-pro-quo corruption because "[t]he self-selecting audience of an overtly conservative documentary like *Hillary* likely would not have included a significant number of Democratic primary voters." Br. 41. That contention fails for multiple reasons.

First, the lead opinion in *WRTL* made clear that the constitutional inquiry in this context does not turn on the sort of speculation in which appellant engages. Following *Buckley*, that opinion noted "the flaws of a test based on the actual effect speech will have on an election or on a particular segment of the target audience. Such a test 'puts the speaker . . . wholly at the mercy of the varied understanding of his hearers.'" 127 S. Ct. at 2666 (quoting *Buckley*, 424 U.S. at 43). The application and constitutionality of the longstanding restrictions on corporate *express advocacy* do not depend on a determination that specific advertisements will actually achieve their intended objective. (There is, in other words, no constitutional exemption for ineffective corporate electioneering.) If a particular electioneering communication is the functional equivalent of express advocacy—*i.e.*, if it "can only be reasonably be viewed as advocating

or opposing a candidate in a federal election," *id.* at 2669—the likelihood that the communication will ultimately affect voting behavior is irrelevant to the constitutional analysis.

Second, there is in any event no sound basis for appellant's contention that *Hillary*'s "overtly conservative" orientation would deprive the film of any potential effect on voters in a Democratic presidential primary. Some members of the Democratic Party hold conservative views. In addition, many Democratic presidential primaries are open to unaffiliated voters and members of other parties. See, *e.g.*, Calvin Woodward, *Open Primaries in Texas and Ohio Will Test Clinton*, Hous. Chron., Feb. 24, 2008, at A4, *available in* 2008 WLNR 3698542. And while the film featured criticisms of Senator Clinton by well-known conservative commentators, its predominant thrust was that Senator Clinton was unfit to be President because of a flawed character, not because of an unduly liberal political ideology. Such attacks might influence the voting behavior even of Democratic party members who did not share the interviewees' conservative political views.

4. Appellant's purported use of funds acquired from individuals to finance the film at issue here does not entitle it to a constitutional exemption from BCRA Section 203's restrictions

Appellant contends (Br. 29-34) that BCRA Section 203 is unconstitutional as applied to *Hillary* because the film was financed "overwhelmingly" by donations from individuals. That argument is not properly before the Court and in any event lacks merit.

Appellant has not previously contended, either in the district court or in its jurisdictional statement, that it is

entitled to distinct constitutional treatment because it relies primarily on individual donations. With respect to its sources of funding, appellant's complaint simply alleged that the organization "is not a 'qualified nonprofit corporation'" within the meaning of 11 C.F.R. 114.10 (which implements the *MCFL* exemption, see p. 3, *supra*) because appellant "receives corporate donations and engages in business activities." J.A. 11a.

Because appellant failed to raise its current line of argument in the district court, the evidentiary record is inadequate to determine whether *Hillary* was in fact financed "overwhelmingly" by individual donations. During discovery, appellant disclosed *only* those donations of $1000 or more that were made or pledged for the purpose of furthering the production or public distribution of appellant's films regarding then-Senators Clinton and Obama. See J.A. 225a, 244a; 11 C.F.R. 104.20(c)(9). The total amount of disclosable donations was approximately $200,000. J.A. 251a-252a. The record does not disclose the movie's production cost, but the cost of distributing the film, including through video-on-demand, would have greatly exceeded $200,000. See J.A. 256a (nationwide video-on-demand availability for four weeks would cost $1.2 million). It is therefore unclear from the record how appellant obtained (or intended to obtain) a substantial percentage of the funds needed to produce and distribute the film.

In any event, even if appellant's current representations about the film's funding sources were treated as established, they would not entitle it to a constitutional exemption from BCRA Section 203's restrictions. Appellant concedes that it does not qualify for the narrow as-applied exemption announced in *MCFL* because it both engages in business activities and receives corporate

donations.[10] See Br. 5, 30; J.A. 11a. Thus, as in *WRTL*, this case does not present the question (raised by amicus National Rifle Association) whether a corporation funded only by individuals can make out an as-applied challenge on that basis. See *WRTL*, 127 S. Ct. at 2673 n.10 (opinion of Roberts, C.J.) (declining to reach that question "because WRTL's funds for its ads were not derived solely from individual contributions").

In *McConnell*, the Court reaffirmed that its holding in *MCFL* "related to a carefully defined category of entities," and that each of the three features of the nonprofit corporation in that case was "central" to the Court's holding. *McConnell*, 540 U.S. at 210. In particular, by limiting the *MCFL* exception to entities that do not accept contributions from business corporations, the Court ensured that *MCFL* organizations cannot "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264; see *Beaumont*, 539 U.S. at 160 (noting that "[n]onprofit advocacy corporations are * * * no less susceptible than traditional business companies to misuse as conduits for circumventing * * * contribution limits").

Appellant's proposed constitutional exemption is in two respects a significant expansion of the *MCFL* exception beyond the boundaries previously recognized and reaffirmed by this Court. First, appellant would abandon an existing bright-line rule, see *MCFL*, 479 U.S. at 264 (noting that Massachusetts Citizens for Life had a "policy not to accept contributions from" business corporations or labor unions); *McConnell*, 540 U.S. at 210, for a more amorphous inquiry into whether *Hillary* was

[10] The corporate donors identified as contributing to *Hillary* were business corporations, not member-supported ideological entities like Massachusetts Citizens for Life. See J.A. 244a, 252a.

funded "predominantly" or "overwhelmingly" by individuals, Br. 31, 32. Cf. *WRTL*, 127 S. Ct. at 2666, 2669 n.7 (opinion of Roberts, C.J.) (agreeing with "the imperative for clarity in this area"); *id.* at 2680-2681 (Scalia, J., concurring in part and concurring in the judgment) (same).

Second, whereas the *MCFL* exception turns on an assessment of an organization's overall operations, appellant does not assert that the bulk of its *total resources* were acquired from individual donations, but only that *Hillary* itself was financed "predominantly" or "overwhelmingly" in that manner. It would appear that, under appellant's theory, even an advocacy corporation that obtains most of its funds from business corporations would be constitutionally exempt from BCRA's restrictions with respect to any particular electioneering communication that is financed (or mostly financed) through individual donations.

Finally, there is no logical reason to allow appellant's business-corporation donors, which could not spend their treasury funds to finance electioneering communications directly, to achieve the same result by using appellant as a conduit. The fact that funds provided by appellant's business-corporation contributors are commingled with other dollars does not eliminate the government's interest in preventing the use of those corporations' treasury funds for electoral advocacy. Appellant contends (Br. 32-33) that all of its advocacy accurately reflects the views of its individual donors. Even if that is so, it does not follow that appellant's electioneering necessarily reflects the views of the shareholders and customers of its business-corporation donors. See *McConnell*, 540 U.S. at 205 (citing *Austin*, 494 U.S. at 660).

D. Appellant Presents No Basis For Overruling This Court's Decision In *Austin*

In *Austin*, this Court held that corporations may constitutionally be barred from using their treasury funds to finance express advocacy for or against a candidate for elective office.[11] 494 U.S. at 660. Appellant contends (Br. 30-31) that this Court should overrule *Austin* and hold that *all* corporations are entitled to use their treasury funds to engage in *all* forms of electioneering, including express advocacy in candidate elections.[12]

Appellant's argument is not properly before the Court. Although appellant previously sought to have BCRA Section 203 declared facially unconstitutional, see J.A. 24a, it later abandoned that claim, and the district court ultimately ordered dismissal of the relevant count pursuant to the parties' stipulation. See p. 10, *supra*. In addition, appellant's jurisdictional statement presented only "an as-applied challenge to * * * BCRA § 203." J.S. 5. In setting out the substantial federal questions

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[11] The question had been a recurring one, but the Court had not previously needed to decide it. See *MCFL*, 479 U.S. at 257-259; *Bellotti*, 435 U.S. at 788 n.26; see also *National Right to Work Comm.*, 459 U.S. at 208-209; *United States* v. *International Union UAW*, 352 U.S. 567, 589-592 (1957) (union express advocacy).

[12] Acceptance of appellant's argument would effectively invalidate not only BCRA Section 203, but also 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for express advocacy, as well as any state-law analogues. Notably, appellant does *not* ask this Court to reconsider *McConnell*'s holding that, if corporate spending on express advocacy in candidate elections may be regulated, so may corporate spending that is the functional equivalent of express advocacy. Cf. *WRTL*, 127 S. Ct. at 2686 (Scalia, J., concurring in part and concurring in the judgment) (advocating, as "modest medicine," the overruling of only *McConnell*'s comparatively recent holding as to nonexpress advocacy). Rather, appellant seeks to invalidate *both* forms of regulation.

that it believed warranted plenary review, appellant identified a dispute over the application of *WRTL* and a question about whether Section 203 can be applied to a "feature-length documentary movie." J.S. i, 24-28. No issue as to the continuing vitality of *Austin* was either "set out" in the questions presented or "fairly included therein." Sup. Ct. R. 14.1(a) (rule for certiorari petitions), 18.3 (applying Rule 14 to jurisdictional statements).

In any event, this case presents none of the considerations that might support a departure from this Court's customary fidelity to precedent. *Austin* has been relied on by the other branches of the federal government, especially in crafting BCRA; by this Court, which applied *Austin* in upholding that statute, see *McConnell*, 540 U.S. at 203, 205 (explaining that none of the plaintiffs in that case, which included appellant, challenged the correctness of *Austin*'s holding); and by legislatures and courts considering state and local campaign-finance measures. In short, "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S. at 203.

Appellant makes virtually no effort to explain why *Austin* should be overruled under "the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall* v. *Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment). Appellant devotes less than two pages of its 58-page brief (Br. 30-31) to this issue, and it identifies no relevant new evidence or other intervening

development that was unavailable to the Court when *Austin* was decided. That "incomplete presentation" is "reason enough to refuse" appellant's extraordinary request to overrule *Austin*, and as a consequence the relevant holding of *McConnell* as well. *Randall*, 548 U.S. at 263 (Alito, J., concurring in part and concurring in the judgment).

In arguing that *Austin* was "wrongly decided" (Br. 30), appellant relies in part on this Court's subsequent decision in *Davis* v. *FEC*, 128 S. Ct. 2759 (2008). That ruling, however, invalidated statutory conditions placed on a wealthy *individual*'s expenditure of personal funds in support of his own candidacy. See *id.* at 2766-2767, 2770-2774. The case therefore did not implicate this Court's consistent "respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'" *McConnell*, 540 U.S. at 205 (quoting *National Right to Work Comm.*, 459 U.S. at 209-210). Indeed, neither the Court nor the dissenters in *Davis* suggested that there was any inconsistency between that decision and the prior ruling in *Austin*.

Appellant also relies (Br. 30) on *Bellotti*, which was decided 12 years *before Austin*. But the Court in *Bellotti*, while invalidating state-law restrictions on the use of corporate funds to influence ballot-question referenda, explained that its "consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." 435 U.S. at 788 n.26. The Court further observed that "Congress might well be able to demonstrate the existence of a danger or apparent corruption in independent expenditures by corporations to influence can-

didate elections." *Ibid.* Far from providing a basis for overruling *Austin*, the decision in *Bellotti* anticipated the rationale on which the *Austin* Court later relied.

II. BCRA'S REPORTING AND DISCLAIMER REQUIREMENTS ARE CONSTITUTIONAL AS APPLIED TO APPELLANT'S FILM AND ADVERTISEMENTS

Appellant contends (Br. 42-57) that BCRA's reporting and disclaimer requirements are unconstitutional as applied to *Hillary* and the advertisements promoting it. Because *Hillary* itself is the functional equivalent of express advocacy, see pp. 16-22, *supra*, the constitutionality of the reporting and disclaimer provisions as applied to the film is clearly established by this Court's decision in *McConnell*. See 540 U.S. at 196.[13] Although the advertisements are not the functional equivalent of express advocacy under the lead opinion in *WRTL*, they would fall within BCRA's definition of "electioneering communication" if they were broadcast during the periods immediately preceding federal elections in which Senator Clinton was a candidate, and their airing during those periods would implicate important governmental interests related to the federal electoral process. Application of BCRA's reporting and disclaimer requirements to those and similar advertisements is therefore constitutional.

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[13] If this Court holds that *Hillary* is not the functional equivalent of express advocacy, or that appellant's financing of the film is otherwise constitutionally exempt from the restrictions imposed by BCRA Section 203, application of the reporting and disclaimer requirements to the film would nevertheless be constitutional for the reasons set forth below.

A. Disclosure Requirements Are Subject To Intermediate Scrutiny

Because "disclosure requirements * * * do not prevent anyone from speaking," *McConnell*, 540 U.S. at 201 (citation and brackets omitted), they are not subject to strict scrutiny. Rather, First Amendment challenges to disclosure requirements are analyzed under a more permissive standard, which this Court has called "exacting scrutiny," and which requires that the disclosure requirement bear a "substantial relation" to a "sufficiently important" governmental interest. *Buckley*, 424 U.S. at 64, 66, 75 (citation omitted); accord *Davis*, 128 S. Ct. at 2775 (reiterating that "there must be 'a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed,' and the governmental interest 'must survive exacting scrutiny'") (quoting *Buckley*, 424 U.S. at 64); *McConnell*, 540 U.S. at 196, 231. That standard corresponds to *intermediate* scrutiny, not strict scrutiny. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996).

This Court in *Buckley* expressly distinguished the strict scrutiny applicable to statutes (such as expenditure limits) that impose "limitations on core First Amendment rights of political expression," 424 U.S. at 44-45, from the lesser scrutiny applicable to encroachments on the "privacy of association" by disclosure requirements, *id.* at 64. Neither *Buckley*, nor *McConnell*, nor any of the other cases that appellant cites applied strict scrutiny to an election-disclosure requirement. *E.g.*, *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (*ACLF*) (applying "exacting scrutiny" and requiring that disclosure requirements

be "substantially related to important governmental interests").[14]

Nor does *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334 (1995), support the application of strict scrutiny here. The Court in *McIntyre* explicitly distinguished the state law at issue, which prohibited the distribution of anonymous handbills addressing a variety of political issues, see *id.* at 338 n.3, from the disclosure requirements contained in federal campaign-finance laws. See *id.* at 355. BCRA's reporting requirements apply only to broadcast, cable, or satellite communications, materials far removed from the "personally crafted statement of a political viewpoint" involved in *McIntyre*. *Ibid.* And the required disclosure pertains in part to contributors, who often will have played no part in crafting the corporation's electioneering message beyond contributing financially.

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[14] Appellant's reliance (Br. 43) on *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995), and *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), is even more misplaced. In *Hurley*, this Court did not apply strict scrutiny. See 515 U.S. at 577-578 (holding that the state failed to identify any "legitimate interest" in the challenged application of the statute). And in *Riley*, the portion of the disclaimer statute at issue that was comparable to BCRA's electioneering communication disclaimer requirement—*i.e.*, the portion requiring the speaker to identify himself—was not challenged. 487 U.S. at 786; see *id.* at 800 (noting difference between challenged disclaimer and requiring "detailed financial disclosure forms"); see also *McConnell*, 540 U.S. at 140 (distinguishing *Riley* on other grounds).

B. As Applied To Advertisements That Fall Within BCRA's Definition Of "Electioneering Communication," But That Are Not The Functional Equivalent Of Express Advocacy, BCRA's Reporting And Disclaimer Requirements Are Substantially Related To Important Governmental Interests

The challenged disclosure provisions require the sponsor of an electioneering communication to identify itself to the Commission, disclose the amount spent on the advertisement and any large contributions earmarked to underwrite it, and identify itself in the advertisement itself. Important governmental interests support each of these requirements. First, disclosure serves the public interest in transparency in political activity. Second, disclosure permits the Commission to enforce the substantive requirements of the law. *Buckley*, 424 U.S. at 83; accord *McConnell*, 540 U.S. at 196. As this Court has held, these interests readily satisfy exacting scrutiny.

Nothing in *WRTL* casts doubt upon those holdings. In that case the government asserted a different interest, and the Court applied a more stringent standard of scrutiny. The Court concluded that the government's interest in protecting the political process from corruption was insufficiently compelling to justify a *ban* on corporate-treasury financing of advertisements that, like those at issue in this case, fell within the statutory definition of "electioneering communication" but were not the functional equivalent of express advocacy. The Court did not hold, however, and its decision does not logically suggest, that such advertisements are constitutionally exempt from *all* regulation. To the contrary, many categories of constitutionally protected political speech and related spending are properly subject to dis-

closure requirements. The government's informational and enforcement interests are distinct and substantial, and they amply justify the application of BCRA's reporting and disclaimer requirements under the exacting-scrutiny standard.

1. The government has an important interest in providing information to the public

a. In upholding the disclosure requirements at issue here against a facial challenge, this Court relied first on the important interest in securing the public's access to full information about the selection of their elected leaders. *McConnell*, 540 U.S. at 196, 200-201. The Court had long recognized the validity of that interest in upholding requirements to disclose contributions, express advocacy, and political committees' disbursements. *Buckley*, 424 U.S. at 66-68, 81-82. In *McConnell*, the Court confirmed that the same important interest "amply supports application of [BCRA's] disclosure requirements to the entire range of 'electioneering communications.'" *McConnell*, 540 U.S. at 196.

Promoting that interest through disclosure serves important First Amendment values. "[I]ndividual citizens seeking to make informed choices in the political marketplace" have "First Amendment interests" in learning how electoral advocacy is funded. *McConnell*, 540 U.S. at 197 (citation omitted); accord *Buckley*, 424 U.S. at 82 (disclosure "further[s] First Amendment values by opening the basic processes of our federal election system to public view"). And the practical efficacy of disclosure requirements in furthering that interest has been enhanced by technological advances that make it possible for groups to disclose expenditures quickly, with minimum effort, and for the public to review and

even search the data with ease. Cf. *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 408 (2000) (Kennedy, J., dissenting) (online disclosure now provides an "immediate way to assess the integrity and the performance of our leaders").

b. Appellant, joined by numerous amici, contends that, if a particular electioneering communication is not the functional equivalent of express advocacy under *WRTL*, then the communication must be treated as wholly unrelated to any federal election, and BCRA's reporting and disclaimer provisions for that reason cannot constitutionally be applied to that communication. See Br. 46-47, 51-52, 57; accord, *e.g.*, CCP Br. 21-22; FFE Br. 28-29. The lead opinion in *WRTL*, however, provides no support for that proposition. To the contrary, the guiding premise of that opinion is that some advertisements falling within the statutory definition of "electioneering communication" can reasonably be construed *either* as electoral appeals *or* as issue advocacy. See 127 S. Ct. at 2669. The lead opinion concluded that BCRA Section 203's financing restrictions cannot constitutionally be applied to such advertisements, on the ground that "the tie goes to the speaker, not the censor." *Ibid.* The necessary consequence of that holding is that particular electioneering communications may be constitutionally exempt from BCRA's corporate-financing prohibitions even though some reasonable observers will construe the advertisements as electoral advocacy and the advertisements will foreseeably affect electoral outcomes.

For that reason, the concession on which appellant relies—*i.e.*, that the advertisements at issue here were not the functional equivalent of express advocacy under *WRTL*—does not logically imply that the advertise-

ments were unrelated to any federal election. Appellant's "Questions" advertisement, for example, refers to Senator Clinton as a "European socialist." J.A. 197a n.4. Although the advertisement might be interpreted as simply promoting the film without unambiguously urging any particular electoral outcome, it could also reasonably be construed as electoral advocacy, and its airing within 30 days before a presidential primary would have an obvious potential to affect voting behavior.

Under *WRTL*, those potential consequences are an insufficient basis for barring the use of corporate treasury funds for advertisements that do not *unambiguously* appeal for a particular vote. Voters who perceive a connection between an advertisement and an upcoming election, however, retain a significant interest in identifying the advertisement's sponsor and underwriters, in order to assess the advertisement's credibility and the sponsor's motives. BCRA's reporting and disclaimer requirements help to vindicate that interest, and to ensure in particular that communications having potential electoral significance are not *mis*attributed to the identified candidate or her opponent. Cf. *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 565 (2005); *id.* at 568 (Thomas, J., concurring).

c. There is nothing incongruous in recognizing that particular communications may properly be subject to *disclosure* requirements even though they are constitutionally exempt from restrictions such as spending or financing limits. In *McConnell*, for example, the Court held that BCRA's disclosure requirements could be applied to the "entire range of 'electioneering communications,'" 540 U.S. at 196, even though it upheld the corporate-financing prohibition only as to express advocacy and communications that are the functional equivalent

of such advocacy, *id.* at 206. And three additional Justices voted to uphold BCRA's disclosure requirements (with one exception that is not implicated in this case) even as they voted to invalidate the corporate-funding restriction on electioneering communications. See *id.* at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part). Similarly, in *Buckley* the Court struck down FECA's dollar limits on independent expenditures but nevertheless sustained the statute's disclosure requirements applicable to such expenditures. See 424 U.S. at 75-82. While acknowledging that the disclosure requirements "would no longer serve any governmental purpose" if their sole function were to effectuate the invalid spending limits, *id.* at 76, the Court explained that the disclosure requirements served an additional "informational interest" by "increas[ing] the fund of information concerning those who support the candidates," *id.* at 81.[15]

Indeed, this Court has frequently explained, in invalidating particular spending or funding limits, that the relevant spending would still be subject to disclosure requirements. See, *e.g.*, *MCFL*, 479 U.S. at 262 (explaining that "MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures"); *ACLF*,

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[15] The sponsor of the electioneering communications in *WRTL* likewise affirmatively disavowed any challenge to BCRA's disclosure requirements and invoked the public's access to information about the sources of its funding to support its challenge to the funding limitation. Appellee Br. at 49, *WRTL*, *supra* (No. 06-969).

525 U.S. at 202-203, 205 (upholding requirement to disclose donations made to organizations to pay ballot-initiative petition circulators); see also *Shrink Mo. Gov't*, 528 U.S. at 428-429 (Thomas, J., dissenting). That is so even in the context of ballot-issue campaigns, in which unrestricted campaign spending creates little risk of *quid pro quo* corruption because the elections do not involve candidates who may become beholden to their financial supporters. See *Bellotti*, 435 U.S. at 792 n.32 ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."); *Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 294 n.4, 298-299 (1981) (noting that "contributors must make their identities known under * * * [an unchallenged provision of] the ordinance").

Similarly, although lobbying is protected by the First Amendment, this Court and several courts of appeals have upheld mandatory disclosure of lobbying expenditures on the basis of the government's interest in informing the public of who is attempting to sway the resolution of public issues and how they are attempting to do so. See *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954) (holding that "those who for hire attempt to influence legislation" may be required to disclose the sources and amounts of the funds they receive to undertake lobbying activities); accord, *e.g.*, *Florida League of Prof'l Lobbyists, Inc.* v. *Meggs*, 87 F.3d 457, 460 (11th Cir.) (upholding state lobbyist disclosure statutes in light of state interest in helping citizens "apprais[e] the integrity and performance of officeholders and candidates, in view of the pressures they face"), cert. denied, 519 U.S. 1010 (1996). The Court has thereby recognized

that legislatures may require the disclosure of information concerning the source of funds used to influence public policy, even when that influence occurs outside the election context.

Against this line of cases, appellant invokes the Court's determination in *Buckley* that a prior FECA disclosure provision was limited to spending that is "unambiguously related to the campaign of a particular federal candidate." Br. 47 (quoting *Buckley*, 424 U.S. at 80). Appellant's reliance on that aspect of *Buckley* is misplaced. *Buckley* announced the express-advocacy test (for which the reference to "unambiguously campaign related" spending, 424 U.S. at 81, was shorthand) as a construction of the *statutory* phrase "for the purpose of . . . influencing [federal elections]." *Id.* at 78, 79; see *id.* at 78-81. This Court has since held that *Buckley*'s "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." *McConnell*, 540 U.S. at 191-192; see *WRTL*, 127 S. Ct. at 2670 n.7 (opinion of Roberts, C.J.).[16] With respect to disclosure requirements in particular, this Court's precedents squarely refute appellant's contention that Congress's power is limited to communications that are "unambiguously related" to an identified federal candidate's campaign. The decisions discussed above make clear that compelled disclosure of financing information is permissible in a number of situations in

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[16] Appellant's reliance (Br. 52) on *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), is misplaced. In holding that legislatures' power to "establish campaign finance laws" is limited to regulating express advocacy and its functional equivalent, *id.* at 282-283, the Fourth Circuit was referring to regulation of expenditures, and did not consider reporting requirements standing alone, see *id.* at 280.

which the disbursements in question have *nothing* to do with a candidate election.

2. The government has an important interest in facilitating enforcement of funding regulations

In upholding BCRA's disclosure requirements, the Court in *McConnell* also relied on the government's interest in facilitating the enforcement of substantive regulation of contributions and funding sources. 540 U.S. at 196; see also *id.* at 200-201 (upholding compelled disclosure of executory contracts where to hold otherwise would "open a significant loophole" in disclosure requirements); *id.* at 237 (upholding broadcast station record-keeping provisions to "provide an independently compiled set of data for purposes of verifying candidates' compliance with the disclosure requirements and source limitations of BCRA and [FECA]"); *Buckley*, 424 U.S. at 67-68. Even in the context of independent campaign-related spending, the government's interest in disclosure "can be as strong as it is in coordinated spending." See *id.* at 81.

Contrary to appellant's contention (Br. 48, 52-53, 57), that interest can be implicated even where, as here, the spending in question is constitutionally exempt from statutory financing restrictions. The classic example is the *MCFL* organization, which is permitted to spend unlimited amounts on independent express advocacy. See *MCFL*, 479 U.S. at 262-263. This Court held that the government's anticorruption interest in limiting corporate express advocacy does not apply to corporations that possess the three essential characteristics of *MCFL* organizations. *Id.* at 263-264; see p. 3, *supra*. The Court observed, however, that an *MCFL* organization must report the amounts used for its constitutionally pro-

tected independent expenditures. 479 U.S. at 262. The Court explained that "MCFL will be required to identify all contributors who annually provide * * * funds intended to influence elections * * * [or] who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions." *Ibid.* The Court thus recognized that, although an *MCFL* organization is constitutionally entitled to finance independent expenditures with its general treasury funds, FECA's disclosure provisions advance an important governmental interest by enabling the Commission to determine whether a particular organization has crossed the line from exempt to regulable activity.

BCRA's reporting and disclaimer requirements serve an analogous anti-circumvention purpose. Even when a corporate speaker believes that a particular electioneering communication does not contain the functional equivalent of express advocacy, and therefore may be financed with corporate treasury funds under *WRTL*, the FEC is entitled to make its own assessment of the communication's content to determine whether the *WRTL* exemption applies. The Commission's ability to enforce BCRA Section 203's financing restrictions with respect to electioneering communications that *are* the functional equivalent of express advocacy would be impeded if the agency lacked knowledge that such communications had been aired, or if it could not readily determine whether particular advertisements were sponsored by corporations. Requiring disclosure of *all* corporate electioneering communications, even those that the corporate speaker believes should qualify for the *WRTL* exemption, thus furthers a valid governmental interest.

That continuing enforcement interest distinguishes this case from *Davis*, in which the Court invalidated both a contribution-limit provision and an associated disclosure requirement. In *Davis*, the Court invalidated the challenged contribution regulations *in their entirety*, leaving the government with no remaining enforcement interest in receiving the information contained in the associated reports. See 128 S. Ct. at 2775. Here, by contrast, Section 203 remains facially valid and enforceable. The government therefore retains a valid interest in obtaining the information necessary to enforce it, including disclosure reports filed by organizations whose as-applied exemption from the substantive regulation depends on whether they can qualify for "the benefit of the doubt" under *WRTL*.

C. Appellant Demonstrates No First Amendment Burden Arising From The Disclosure Provisions

1. Appellant presents no evidence that the disclosure requirements would cause appellant or its donors to suffer reprisals

At least since *Buckley*, this Court has recognized that in some rare cases, involvement in political activity can be so controversial that disclosing that involvement to the public can be a genuine burden. See *Buckley*, 424 U.S. at 69. But the existence and extent of such a burden requires substantiation, with the kind of evidence that can be presented in an as-applied challenge. For that reason, this Court upheld BCRA's disclosure requirements against a facial challenge, explaining that the plaintiffs (which included appellant) had not made a sufficient evidentiary showing as to the likelihood of reprisals. *McConnell*, 540 U.S. at 199.

The Court in *McConnell* made clear that its "rejection of plaintiffs' facial challenge to the requirement to disclose individual donors does not foreclose possible future challenges to particular applications of that requirement." 540 U.S. at 199. The Court further explained that, to succeed in such an as-applied challenge, a plaintiff must demonstrate a "reasonable probability" that the forced disclosures "would subject identified persons to 'threats, harassment, and reprisals.'" *Id.* at 198-199 (quoting *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 100 (1982)). As in *McConnell*, however, appellant has failed to present *any* evidence beyond "bald assertion" (J.A. 209a) that it, or any of its contributors, faces any particularized risk of "threats, harassment, and reprisals" if it is linked to electioneering communications.

Appellant asserts that disclosure "*can* have grave consequences" and "*can* expose contributors to harassment." Br. 53 (emphasis added and internal quotation marks omitted). Several amici similarly contend that disclosure can *sometimes* lead to reprisals. Appellant, however, points to no record evidence that *it* would reasonably fear reprisals.[17] And this Court has consistently rejected the proposition that the mere theoretical possibility of reprisals, unconnected to any particularized showing of likely harm to specific speakers or donors, is sufficient to render disclosure requirements unconstitu-

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[17] Indeed, appellant has disclosed the identity of approximately 1000 contributors during the 18 years it has maintained a PAC. See *FEC Disclosure Reports—Filer ID C00295527* (visited Feb. 17, 2009) <http://query.nictusa.com/cgi-bin/fecimg/?C00295527>; FEC, *Individuals Who Gave to This Committee: Citizens United Political Victory Fund* (visited Feb. 17, 2009) <http://query.nictusa.com/cgi-bin/com_ind/C00295527/>.

tional. See, *e.g.*, *Buckley*, 424 U.S. at 68 (holding disclosure requirements constitutional even though "[i]t is undoubtedly true that public disclosure of contributions * * * will deter some individuals who otherwise might contribute").

2. Appellant presents no evidence that the reporting requirements would chill speech

Appellant speculates (Br. 54) that the reporting requirements might cause donors not to contribute to appellant, which would reduce appellant's "ability to continue communicating" and "chill the constitutionally protected political speech of Citizens United's supporters." To the extent appellant argues that some potential donors would not contribute because of a fear of reprisal (or some other constitutionally cognizable fear), the argument fails for lack of evidence, as discussed above.

To the extent appellant claims that the disclosure requirements would chill its own speech directly, that argument has been explicitly rejected in *McConnell* and numerous other cases holding that financial reporting relating to speech is, as a matter of law, too removed in time and space from the speech act to constitute an unconstitutional hindrance. See *McConnell*, 540 U.S. at 197-199, 201 ("[FECA's] disclosure requirements are constitutional because they 'd[o] not prevent anyone from speaking.'") (quoting *McConnell*, 251 F. Supp. 2d at 241); see also *ACLF*, 525 U.S. at 198 (rejecting challenge to requirement that petition circulators file affidavits); cf. *Harriss*, 347 U.S. at 626 (rejecting First Amendment challenge to lobbyist-disclosure statute because "hazard" of speech being silenced by financial disclosure was "too remote" to outweigh government's interest in protecting legislative process). The Court's

decisions provide no support for the proposition that financial-disclosure requirements impose an unconstitutional chill on First Amendment activity. To the contrary, because disclosure increases the range of information available to citizens, it furthers First Amendment values. See pp. 40-41, *supra*.

3. The disclaimer requirements impose no constitutionally significant burdens

BCRA requires the following disclaimers to be included in televised electioneering communications: (1) an oral statement that the entity funding the communication "is responsible for the content of this advertising"; and (2) a written statement on the screen, with the name and contact information of the entity responsible for funding the communication, stating "that the communication is not authorized by any candidate or candidate's committee." See pp. 5-6, *supra*. Appellant argues that it should not be forced to disclose its identity (Br. 45, 47 (citing *McIntyre*, 514 U.S. at 348)), but appellant already discloses its identity at the website referred to in the advertisements and at the beginning and end of its film. See Citizens United, *Hillary: The Movie* (visited Feb. 17, 2009) <http://www.hillarythemovie.com>; J.A. 26a-27a; Am. Compl. Exh. 2 (DVD version). Truly anonymous speech therefore is not at issue in this case. In any event, *McIntyre*'s holding regarding in-person distribution of handbills unrelated to candidate elections is inapposite here. See p. 38, *supra*.

Because appellant is not seeking to keep its identity secret, it contends that the disclaimer requirement burdens it in two other ways. First, appellant argues that the disclaimer would "distort the message of [appellant's] advertisements by suggesting to viewers—most

of whom are undoubtedly familiar with the disclaimers from the ubiquitous campaign advertisements aired preceding every election—that those advertisements convey a campaign-related message." Br. 50. That argument lacks merit. Appellant has provided no evidence that any person has ever been misled or confused by an electioneering communication disclaimer. Cf. *Washington State Grange* v. *Washington State Republican Party*, 128 S. Ct. 1184, 1193-1194 (2008) (rejecting facial challenge to statute governing ballot listings where evidence did not show that any voter would be misled by listings). And the danger of such confusion is slight. The disclaimer requirements are precisely worded so that the advertiser need only take responsibility "for the content of *this advertising*," with no additional characterization or definition. 11 C.F.R. 110.11(c)(4)(i) (emphasis added). If a viewer does not otherwise regard the advertisements as campaign-related, a disclaimer that identifies the sponsor as someone other than a candidate or candidate committee is unlikely to produce that impression.[18]

Second, appellant also contends that the disclaimer requirements are unconstitutional because they are analogous to "restriction[s] on the *quantity* of political expression," such as expenditure limits. Br. 49 (quoting *Buckley*, 424 U.S. at 55) (brackets in original). Specifically, appellant argues that the oral disclaimer would preclude appellant from airing ten-second advertise-

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[18] Appellant further argues that BCRA's disclosure requirements are "fatally underinclusive because [they] do[ ] not reach advertisements in nonbroadcast formats." Br. 52; see *id.* at 47. The Court explicitly rejected an analogous argument in *McConnell*. See pp. 25-26, *supra* (citing *McConnell*, 540 U.S. at 208).

ments, thereby requiring it "to pay for a longer advertisement." Br. 50.[19]

The government is not aware of any authority—and appellant cites none—holding that an advertiser's constitutional rights are impermissibly burdened by a requirement to use some of the time in its commercial to convey important information relevant to that commercial. The Court in *McConnell* explained that similar disclaimer requirements had previously been imposed with respect to other campaign-related advertising, 540 U.S. at 230, and it upheld BCRA's "inclusion of electioneering communications in the [pre-existing] disclosure regime," *id.* at 231. More generally, federal and state governments often require extensive oral and written information to be included in various communications, such as advertising for pharmaceuticals, attorneys, securities, etc. As the Second Circuit stated in rejecting a First Amendment challenge to a state labeling law:

> [W]e note the potentially wide-ranging implications of [plaintiff's] First Amendment complaint. Innumerable federal and state regulatory programs require the disclosure of product and other commercial information. *See, e.g.*, 2 U.S.C. § 434 (reporting of federal election campaign contributions); 15 U.S.C. § 78*l* (securities disclosures); 15 U.S.C. § 1333 (tobacco labeling); 21 U.S.C. § 343(q)(1) (nutritional labeling); 33 U.S.C. § 1318 (reporting of pollutant concentrations in discharges to water); 42 U.S.C.

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[19] Although appellant challenges both the spoken and written disclaimer requirements, the latter has little effect on an advertiser's ability to use its time as it wishes, because the disclaimer may be as small as four percent of the television screen's vertical height. 11 C.F.R. 110.11(c)(4)(iii)(A).

> § 11023 (reporting of releases of toxic substances); 21 C.F.R. § 202.1 (disclosures in prescription drug advertisements); 29 C.F.R. § 1910.1200 (posting notification of workplace hazards); Cal. Health & Safety Code § 25249.6 ("Proposition 65"; warning of potential exposure to certain hazardous substances); N.Y. Envtl. Conserv. Law § 33-0707 (disclosure of pesticide formulas). To hold that the Vermont statute is insufficiently related to the state's interest in reducing mercury pollution would expose these long established programs to searching scrutiny by unelected courts. Such a result is neither wise nor constitutionally required.

National Elec. Mfrs. Ass'n v. *Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001), cert. denied, 536 U.S. 905 (2002).

In each of those areas, the advertiser undoubtedly would prefer to use its time and space for content other than a disclaimer. But that preference does not state a constitutional claim, for the disclaimer requirements do not prevent anyone from advertising. They simply may have the effect of causing appellant (like numerous other regulated advertisers) to devote a portion of an advertisement to the disclaimer or to purchase a few more seconds of broadcast time than its message would otherwise call for. There is no warrant in this Court's precedents for treating those seconds as a burden of constitutional dimension.[20]

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[20] Appellant's assertion (Br. 54) that BCRA's disclosure requirements are unconstitutional because they impose "substantial administrative costs" is similarly unsupported. The Court in *McConnell* upheld the disclosure requirements on their face, noting that they "are actually somewhat less intrusive than the comparable requirements that have long applied to persons making independent expenditures." 540 U.S. at 196 n.81; cf. *id.* at 235-237 (upholding BCRA's broadcaster record-

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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Deputy Solicitor General
WILLIAM M. JAY
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Attorney
Federal Election Commission

FEBRUARY 2009

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keeping requirement against administrative-burden challenge). Disclosure regarding independent expenditures, in turn, requires fewer resources than disclosure by a corporation's separate segregated fund. See *MCFL*, 479 U.S. at 252-254 (comparing requirements); *id.* at 262 (noting that MCFL was not exempt from independent-expenditure disclosures). Appellant presents no evidence to demonstrate that its $12 million budget would not permit the absorption of the administrative costs associated with filing the electioneering communications forms, or to distinguish the burdens at issue in this case from those advanced by appellant and others in the facial challenge rejected in *McConnell*. These costs do not rise to the level of a First Amendment burden, much less a burden sufficient to outweigh the important governmental interests that underlie BCRA's disclosure requirements.

MOTION

IN THE SUPREME COURT OF THE UNITED STATES

No. 08-205

CITIZENS UNITED, *Appellant*

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION FOR DIVIDED ARGUMENT

Pursuant to Rule 28.4 of the Rules of this Court, the Solicitor General, on behalf of the Federal Election Commission, and *amici curiae* Senators John McCain and Russell Feingold and former Representatives Christopher Shays and Martin Meehan, respectfully request that 10 minutes of Appellee's oral argument time be allocated to counsel for the named *amici*.

As appealed to this Court, this case presented the questions (1) whether the three-judge district court properly concluded that appellant's film about then-Senator Clinton was the functional equivalent of express advocacy under the test set forth in *FEC* v. *Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652 (2007), and (2) whether that court correctly held that the reporting, disclosure, and disclaimer requirements of federal campaign finance law may permissibly be applied to advertisements that are not the functional equivalent of express advocacy. Following briefing and oral argument, on June 29, 2009, the Court directed the parties, and invited *amici*, to file supplemental briefs addressing whether, "[f]or the proper disposition of this case, . . . the Court [should] overrule either or both *Austin* v. *Michigan*

Chamber of Commerce, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b."

The named *amici* were the principal sponsors of the Bipartisan Campaign Reform Act of 2002 (BCRA). Section 403(b) confers upon them a statutory right to intervene in "any action in which the constitutionality of any provision of [BCRA] . . . is raised."[1] The named *amici* have participated as intervenors in several challenges to the Act, both in this Court and before three-judge district courts convened under the Act.[2] In both *McConnell* and *Wisconsin Right To Life*, the named *amici* participated actively as intervenor-defendants at all stages of the litigation, including development and presentation of the factual record in the three-judge district court, and briefing and oral argument in this Court.

When this case was initiated, the named *amici* did not intervene, for resource-constraint reasons and in light of the plaintiff's emphasis on fact-specific, as-applied theories; they did, however, file a brief *amici curiae* in this Court. The question now posed by the Court raises profound issues directly implicating the constitutionality of both section 203 of BCRA and section 304 of the Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 136, 159-60 (current version at 2 U.S.C. § 441b), a cornerstone provision of federal campaign-finance legislation for over sixty years.

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[1] Section 403(b) provides: "In any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised . . . any member of the House of Representatives . . . or Senate shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment."

[2] *See Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006) (three-judge court) (all named *amici* except Sen. Feingold participated as intervenors), *aff'd*, 127 S. Ct. 2652 (2007); *Christian Civic League of Maine v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006) (three-judge court) (all named *amici* participated as intervenors), *vacated*, 127 S. Ct. 3052 (2007) (mem.); *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (three-judge court) (per curiam) (same), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

The named *amici* will file a supplemental brief addressing the question presented in this Court's June 29th Order. Had the question now presented by the Court been raised previously in this case, the named *amici* would certainly have sought to participate as intervenors in all phases of the litigation.

Because the named *amici* have been centrally involved in campaign-finance legislation and litigation for many years, they have a significant interest in the case and can offer the Court an additional perspective. The named *amici* participated in development of both the legislative record supporting BCRA and the "'elephantine'" litigation record supporting the judgment in *McConnell*, 251 F. Supp. 2d at 209 n.40. They have also litigated *against* the FEC on issues regarding the meaning and proper application of BCRA and the Federal Election Campaign Act.[3] We therefore respectfully suggest that the Court would find it helpful to hear oral argument on behalf of both the FEC and the named *amici*.

Respectfully submitted.

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July 23, 2009

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[3] *See Shays et al. v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (invalidating several regulations promulgated by the FEC to implement BCRA), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005) (*Shays I*); *Shays et al. v. FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006) (challenging the FEC's failure to promulgate regulations governing when Section 527 political organizations must register as political committees); *Shays et al. v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *aff'd in part and rev'd in part*, 528 F.3d 914 (D.C. Cir. 2008) (invalidating certain regulations implementing Title I of BCRA as revised in light of *Shays I*).

MOTION

Supreme Court, U.S.
MOTION FILED
JUL 31 2009
William K. Suter,
Clerk

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

— v. —

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

MOTION OF SENATOR MITCH MCCONNELL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR A DIVIDED ORAL ARGUMENT

Pursuant to Rules 21 and 28 of the Rules of this Court, Senator Mitch McConnell respectfully moves this Court for leave to participate in oral argument as *amicus curiae* and for divided oral argument.

The Court has directed the parties and *amici* to submit supplemental briefing in this case addressing the following question: "For the proper disposition of this case, should the Court overrule either or both *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the

facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002. 2 U.S.C. §441b." Order, June 29, 2009.

Senator McConnell respectfully submits that he is uniquely qualified to address the latter part of the Court's question, relating to *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93 (2003) ("*McConnell*"), in which he served as lead Plaintiff and Appellant in this Court. The Senator, a member of the Congress for more than 25 years, has been a leader in the United States Senate in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform. He is also the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. In *McConnell*, Senator McConnell brought suit against the Federal Election Commission, Appellee in the present matter, challenging the constitutionality of the same provisions of the Bipartisan Campaign Reform Act as to which the Court has requested additional briefing. Senator McConnell's distinct interests as a principal participant in that litigation and his interest and knowledge about the question the Court is considering would present the Court with a different viewpoint from that of Citizens United, a private corporation litigating over a video-on-demand telecast of a single documentary film.

In the *McConnell* case itself, this Court allocated four hours of oral argument time split among a large number of interested parties. *See McConnell* v. *FEC*, 539 U.S. 974 (2003). Divided argument and additional time for oral argument has been permitted by this Court in many important cases in the federal election area. *See FEC* v. *Wisconsin Right to Life, Inc.*, 549 U.S. 1320 (2007) (Solicitor General's motion for divided argument granted); *FEC* v. *NRA Political Victory Fund*, 512 U.S. 1285 (1994) (motion of Solicitor General for leave to participate in

oral argument as *amicus curiae* and for divided argument granted); *Federal Election Comm'n* v. *National Conservative Political Action Committee*, 469 U.S. 1015 (U.S. 1984) (motion of Democratic National Committee for divided argument granted); *Common Cause* v. *Schmitt*, 452 U.S. 913 (1981) ("Motions of appellants for divided argument and for additional time for oral argument granted. A total of one and one-half hours is allotted for oral argument to be divided as follows: 25 minutes for Federal Election Commission; 20 minutes for Common Cause et al.; and 45 minutes for appellees.")

On July 23, 2009, Senators John McCain and Russell Feingold and former Representatives Christopher Shays and Martin Meehan, together with the Solicitor General on behalf of Appellee, also sought divided argument. With the consent of the Solicitor General, those *amici* have requested 10 minutes of Appellee's allotted time for oral argument. *See* Motion for Divided Argument, filed July 23, 2009. Those *amici* argue that their participation in the *McConnell* case and their familiarity with its "elephantine record" would allow them to be of great assistance to the Court. *Id.* The grounds urged by those *amici* in support of their motion apply with equal force to Senator McConnell: (1) he has actively participated in the legislative debate concerning the passage of BCRA, (2) he has been an active participant in numerous legal challenges to the Act,[1] (3) BCRA Section 403 specifically provides for any member of the House or Senate to intervene in a challenge to its constitutionality, and (4) he has "a significant interest in the case and can offer the Court an additional perspective." *Id.*

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[1] Besides acting as the lead Plaintiff in *McConnell*, Senator McConnell has participated as an *amicus* in *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006), *FEC* v. *Wisconsin Right To*

Footnote continued on next page.

The Court has asked the parties and *amici* to address two distinct questions. Citizens United has submitted a brief which focuses almost exclusively on the Court's first question relating to *Austin* v. *Michigan Chamber of Commerce*, 494.U.S. 652 (1990). *See* Supplemental Brief for Appellant, submitted July 24, 2009. As to the issue raised by this Court concerning the *McConnell* case, the position taken by Citizens United is sparse and tentative at best, noting that the holding in *McConnell* would be "undermined, perhaps fatally" if this Court were to overrule *Austin*. Supplemental Brief of Appellant at 21. The Citizens United Brief does not ask this Court to overrule its ruling in *McConnell*. Senator McConnell, while joining in Appellants' arguments concerning *Austin*, has submitted his own brief, *amicus curiae*, which focuses almost exclusively on the continued vitality of the *McConnell* case insofar as it addressed the constitutionality of Section 203 of BCRA and which seeks reversal of the ruling in *McConnell* holding Section 203, on its face, to be constitutional. The brief is grounded in and supported by the record in the *McConnell* case. *See* Brief *Amicus Curiae* of Senator Mitch McConnell in Support of Appellant, filed July 31, 2009.

Appellant Citizens United has declined Senator McConnell's request to divide its oral argument time. Although it is not Senator McConnell's desire to deprive Citizens United of its full allotment of oral argument time, if that is the only solution consistent with the Court's rules that would permit Senator McConnell's views to be heard, he respectfully requests that his

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Footnote continued from previous page.

Life, Inc., 127 S. Ct. 2652 (2007) and *Randall* v. *Sorrell*, 548 U.S. 230 (2006).

motion for divided oral argument be granted and his counsel be allocated 10 minutes of Appellant's time.

In the alternative, Senator McConnell respectfully suggests that the Court consider extending the time for oral argument in this important case from 60 to 80 minutes, to permit counsel for the FEC and counsel for Citizens United 30 minutes each, to permit counsel for Senators McCain and Feingold and former Representatives Shays and Meehan to present argument for 10 minutes and to permit Senator McConnell's counsel to present 10 minutes of argument on his behalf. Citizens United consents to this request.

Respectfully submitted,

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OPPOSITION

Supreme Court, U.S.
FILED
AUG 3 _ 2009
OFFICE OF THE CLERK

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court
For The District Of Columbia

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RESPONSE TO MOTION OF SENATOR MITCH MCCONNELL FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND FOR A DIVIDED ARGUMENT

Appellant Citizens United opposes the motion of Senator Mitch McConnell for leave to participate in oral argument as *amicus curiae* and for a divided argument.[1]

Senator McConnell's motion states that "[t]he Court has asked the parties and *amici* to address two distinct questions." Mot. 4. He faults Citizens United for "submitt[ing] a

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[1] Senator McConnell states that "Citizens United consents" to his alternative request for an enlargement of the argument time and division of that enlarged time. This is incorrect. Senator McConnell's mistaken representation is apparently based upon a July 30 conversation Senator McConnell had with Citizens United's President, David Bossie, in which Mr. Bossie stated he would have no objection to Senator McConnell's presenting ten minutes of oral argument if the Court allotted him extra time to do so. Mr. Bossie, who is not a lawyer and not familiar with the procedures of this Court, did not understand that Senator McConnell was proposing to enlarge the Appellee's argument time as well.

brief which focuses almost exclusively on the Court's first question relating to *Austin*" and for taking a position he deems "sparse and tentative at best" with respect to the fate of *McConnell*. Mot. 4. Senator McConnell asserts that his status as "lead Plaintiff and Appellant" in *McConnell* makes him "uniquely qualified" to address the Court's question concerning *McConnell*, and would enable him to "present the Court with a different viewpoint from that of Citizens United." Mot. 2.

Citizens United respectfully submits that Senator McConnell's motion is predicated on three mistaken premises.

First, Senator McConnell incorrectly views the Court as having posed "two distinct questions." Mot. 4. In fact, the Court asked for supplemental briefing on *one* question: "For the proper disposition of this case, should the Court overrule either or both" *Austin* and that part of *McConnell* addressing the facial validity of Section 203 of BCRA. Citizens United has answered that single question as follows: For the proper disposition of this case, the Court should reject *Austin*'s anti-distortion rationale and overrule *Austin*, and because the relevant portion of *McConnell* is justified solely by *Austin*'s anti-distortion rationale, overrule that portion of *McConnell* as well, unless the government identifies some other compelling governmental interest that can justify its suppression of political speech. It is understandable that Senator McConnell wishes that Citizens United had urged the overruling of *McConnell* without regard to whether doing so is appropriate for the disposition of this case, but his dissatisfaction is neither a basis to enlarge oral argument nor to divide it.

Second, Senator McConnell apparently believes that the September 9, 2009 argument will consider only whether *Austin* or the pertinent portion of *McConnell* should be overruled. But as the order of June 29, 2009 itself makes clear, it is "the case" that has been set for reargument, not simply the question posed for supplemental briefing. While Senator McConnell doubtless has familiarity with the record of the case bearing his name, he does not have any special familiarity with the record of *this* case.

Third, while Senator McConnell's experience "in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform" is indisputably great, his "interest and knowledge" in the Court's supplemental question is not remotely "unique[]." Senator McConnell was not the only "principal participant" in the consolidated *McConnell* action; there were many other plaintiffs, including Citizens United. *See Paul v. FEC*, No. 02-1747, J.S. iii. Though it is true that Citizens United did not participate in the oral argument before this Court in *McConnell*, Senator McConnell could not fault Citizens United for that. Senator McConnell opposed Citizens United's motion to participate in that oral argument stating that "oral argument is not necessary on [Citizens United's] claims" because they "may readily be resolved on the briefs." *McConnell v. FEC*, No. 02-1674, Response to Mots. for Divided Argument at 3 (July 18, 2003). That statement could as readily be made concerning the various arguments of the many *amici curiae* who have, belatedly, shown an interest in this case.

Citizens United respectfully submits that there is no compelling circumstance that warrants the division of either Citizens United's or the government's argument. BCRA's congressional sponsors have no interest in this case not adequately represented by the

government. And the positions urged by Senator McConnell are adequately represented by Citizens United. Presumably because it perceives a tactical benefit in doing so, the government has consented to the participation of BCRA's congressional sponsors in oral argument. But that itself should not mandate the equally duplicative, unnecessary, and dilutive diminution of Citizens United's argument.

For the foregoing reasons, and because Senator McConnell's central contention that the "appeal to vote" standard set forth in *WRTL II* is unconstitutionally vague (McConnell Br. 15) may readily be resolved on the basis of the arguments set forth in his brief, Senator McConnell's motion for leave to participate in oral argument and for divided argument should be denied.

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August 3, 2009

MOTION

No. 08-205

IN THE
SUPREME COURT OF THE UNITED STATES

CITIZENS UNITED, *Appellant*,
v.
FEDERAL ELECTION COMMISSION, *Appellee*

On Appeal from the United States District Court
For the District of Columbia

MOTION OF THE WYOMING LIBERTY GROUP AND GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICI CURIAE* FOR AS LONG AS ONE MINUTE AND FOR DIVIDED ORAL ARGUMENT

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In accord with Rules 21 and 28 of this Court, the Wyoming Liberty Group and Goldwater Institute Scharf-Norton Center for Constitutional Litigation move for leave to participate in oral argument for as long as one minute as *amici curiae* and for divided oral argument.

1. Senators and Citizens Share Equal Rights to be Heard by This Court

Before this Court is a sizeable collection of Senators and former Representatives whom this Court has agreed may participate in oral argument. One Senator describes himself as "uniquely qualified" to educate this Court about the Bipartisan Campaign Reform Act ("BCRA"). McConnell Mot. 2. Senator McCain and others promised to

deliver a well touted, but vaguely referenced, "additional perspective." FEC Mot. 3. We, the people, wish to provide a counterpoise to the argument of these distinguished gentlemen.

The Wyoming Liberty Group and Goldwater Institute offer this Court a systematic and reasoned argument why Section 203 of the BCRA, upheld in *McConnell v. FEC*, 540 U.S. 93 (2003), cannot be applied in a manner protective of speech by the Federal Election Commission ("FEC"). As they have done in their earlier briefings, the Wyoming Liberty Group and Goldwater Institute provide extensive examples of how the Commission has misinterpreted the law and befuddled or contradicted itself on key free speech principles found in *McConnell* and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). *See* Opening Brief at 17, 24-25 (detailing the FEC's extensive areas of potentially banned speech in rulemaking notices), 28-33 (analyzing the National Right to Life advisory opinion request and open meeting transcript to illustrate the continued misapplication of the appeal to vote test). The perspectives offered by the Wyoming Liberty Group and Goldwater Institute prove exceptional and are rooted in norms conducive to free expression.

It should not go unnoticed that public officials, like those lined up for oral argument, would be subject to increased accountability were this Court to fundamentally alter its holdings in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell*. Should this Court open the floodgates of speech, citizens will be better able to organize and publicly discuss the qualifications of political candidates and incumbents. Reversing this Court's jurisprudential path in both cases ensures more public discussion about elected representatives – or what the *Buckley* Court described as "uninhibited,

robust, and wide-open" debate. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (internal citations and quotations omitted). No doubt, incumbents would find such a victory for the people quite aversive, as would members of the FEC, who, more often than not, experience their organization as something of a commissariat.

It is natural that those in power fear such oversight. As Alexis De Tocqueville explained, "Among democratic nations it is only by association that the resistance of the people to the government can ever display itself; hence the latter always looks with ill favor on those associations which are not in its power" and when those associations prove powerful, the exercise of their liberty is "almost regarded as a dangerous privilege." Alexis De Tocqueville, *Democracy in America* 384 (Francis Bowen, ed., University Press, Cambridge 1863). Without doubt, many of the elected representatives before this Court understand that citizens who speak freely exercise just such a dangerous privilege – establishing all the more reason why this Court should permit the Wyoming Liberty Group and Goldwater Institute to be heard since it has granted incumbents the same privilege. Allowing the powerful few to speak while denying citizens the same ability attenuates healthy debate that this Court so depends upon as a chamber of justice.

2. The Wyoming Liberty Group and Goldwater Institute Offer Unique Details About the Unworkable Nature of *McConnell's* Holding

The Wyoming Liberty Group and Goldwater Institute were the sole *amici curiae* to thoroughly describe how the Commission consistently errs in applying this Court's "appeal to vote" test. In addition, counsel to these *amici* served as an advisor to two chairmen of the FEC, affording more thorough insight about why this Court's holding in *McConnell* can never be expected to be applied by the Commission in a manner respectful of liberty. Replete with FEC advisory opinions, historical

Commission references, enforcement matters, split FEC votes, and open meeting transcripts, these briefs demonstrated why McConnell ought to be undone. See WLG Opening Brief at 17, 24-25, 28-33; Supplemental Brief at 9-10 (illustrating the Commission's inability to consistently apply its own regulations).

It was the Wyoming Liberty Group and Goldwater Institute's opening brief that illustrated a striking history of contradiction, abysmal misunderstanding, internal bickering, confusion, and complete constitutional chaos practiced by the Commission in implementing this Court's holding in McConnell and then WRTL. It was both groups who further developed this theme into their supplemental brief, illustrating more of the FEC's follies. Indeed, only these amici presented these arguments in painstaking detail to this Court and are best equipped to make them in a concise manner in oral argument.

In rare circumstances, this Court does permit divided oral arguments to assist its resolution of complex matters, especially where parties hold different interests. See Robert L. Stern, Eugene Gressman, Et al., Supreme Court Practice 680 (8th Ed. 2002). It remains true that Citizens United assails the electioneering communications ban, but only in the most reserved manner. Citizens United did articulate a compelling constitutional argument about the need to protect a limited form of communication, video-on-demand. It did a commendable job explaining why this Court's holding in *Austin* should be reversed in its supplemental briefing. It did not provide this Court with foundational and detailed reasons why this Court's holding in *McConnell* is inherently unworkable. It did not bring years of historical data, enforcement actions, and contradictory Commission analyses to this Court's attention. Likewise, Senator McConnell's brief recounted analyses put before this Court in the Senator's first challenge to the BCRA. *See*

McConnell *Amicus* Brief at 12-14 (repeating the Senator's examples previously before this Court in "Brief for the Appellants/Cross-Appellees Senator Mitch McConnell, et al." in No. 02-1674). It did not offer more current details and analysis of the Commission's haphazard application of *McConnell*. The Wyoming Liberty Group and Goldwater Institute did. It is precisely this sort of modern and exhaustive analysis that proves helpful in answering this Court's inquiry about whether the part of *McConnell* upholding the facial validity of Section 203 of the BCRA should be overruled.

The Wyoming Liberty Group and Goldwater Institute provided this Court with a systematic explanation and critique of the FEC's fabrication of a misplaced and virulent appeal to vote test. They illustrated, with specific reference to FEC practices, that *McConnell*'s appeal to vote test is inherently flawed, giving inevitable rise to Commission speech standards that include two-prong, eleven-factor analyses. Opening Brief at 18, 23. Similarly, they demonstrated to this Court that even the Commission does not apply it consistently. *Id.* at 28-33 (discussing haphazard approaches). It remains the place of these *amici* to bring these details to the Court's attention for further clarification and explanation.

This Court has granted leave to *amici curiae* for oral argument when they present divergent views, expert and detailed analysis, or special knowledge in the matter at hand. *See, e.g., Citizens United v. FEC*, 08-205 (2009) (Order, August 17, 2009, granting motions to participate in oral argument). *Alabama v. Shelton*, 535 U.S. 654 (2002) (National Association of Criminal Defense Lawyers permitted to participate in oral argument as *amicus curiae*). *Concrete Pipe & Products v. Construction Laborers*

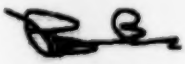
Pension Trust, 508 U.S. 602 (1993) (Pension Benefit Guaranty Corporation permitted to participate in oral argument as *amicus curiae*).

Because this Court has already granted leave to the Senators and former Representatives to participate in oral argument, it should grant the Wyoming Liberty Group and Goldwater Institute's motion for leave due to the exclusive research and analysis they provided concerning this Court's holding in *McConnell*, as well as current evidence addressing the Commission's inconsistent application of it.

3. Conclusion

Appellant Citizens United has declined the Wyoming Liberty Group and Goldwater Institute's request to participate in oral argument. The Wyoming Liberty Group and Goldwater Institute respectfully request that their motion for leave to participate in oral argument and for divided oral argument be granted and counsel given as long as one minute to present oral argument, either allocated from Citizens United's allotment or from this Court's extension of oral argument time limits.

Respectfully submitted,



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REPLY BRIEF

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IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal
From The United States District Court
For The District Of Columbia

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Appellant remains accurate.

TABLE OF CONTENTS

Page

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iii

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT 1

I. THE GOVERNMENT'S CRIMINALIZATION OF CORPORATE POLITICAL SPEECH CANNOT SURVIVE STRICT SCRUTINY 3

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR REVISITING AND OVERRULING *AUSTIN* 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) 1, 11

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 1, 3, 4

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) 6

Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996) 5, 7

FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986) 5

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 3, 5, 6

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 1, 5, 7

McConnell v. FEC, 540 U.S. 93 (2003) 1, 6

Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) 11

N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791 (2008) 8

Payne v. Tennessee, 501 U.S. 808 (1991) 10

Republican Party v. White, 536 U.S. 765 (2002) 11

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 7

W. Va. Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 11

REGULATIONS

11 C.F.R. § 114.10 2

OTHER AUTHORITIES

Campaign Finance Institute, Individual Donors of $75,000 or More to Federal 527s, *at* http://www.cfinst.org/interest_groups/pdf/np527/527_08_24M_Table3.pdf 5

Center for Political Accountability, Political Disclosure Hits 60 Companies (Mar. 24, 2009), *at* http://www.politicalaccountability.net/index.php?ht=display/ArticleDetails/i/1890/pid/1883 8

SUPPLEMENTAL REPLY BRIEF FOR APPELLANT

The government's supplemental brief is tantamount to a confession of error.

The government banned Citizens United's Video On Demand distribution of *Hillary* on the strength of its asserted interest in preventing corporations from deploying "immense aggregations of wealth" to "influence unfairly the outcome of elections." *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660, 669 (1990).

But now that the Court has expressed a willingness to reexamine that rationale, the government, astoundingly, has abandoned it. *Nowhere* in the government's supplemental brief will the Court find any mention of the "different type of corruption"—"the corrosive and distorting effects" purportedly accompanying any corporate or union participation in electoral politics—on which both *Austin* and *McConnell* relied. 494 U.S. at 660; 540 U.S. 93, 205 (2003). Indeed, the very word "distortion"—so prominent in *Austin*—now seems to have fallen out of the government's vocabulary altogether; it appears not once in the government's supplemental brief.

The government now attempts to reinvent *Austin* and the pertinent portion of *McConnell* as supported by two different governmental interests—prevention of actual or apparent *quid pro quo* corruption and protection of dissenting shareholders—that this Court already has rejected as insufficient to justify suppression of electoral expenditures. *See Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976) (per curiam); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 794 n.34 (1978).

This is an insupportable reading of those decisions. And the government concedes as much when it argues that "[t]he Court did not decide in *Austin* or *McConnell*" whether "preventing actual or apparent corruption provides a constitutionally sufficient justification for prohibiting" corporate electioneering. FEC Supp. Br. 11.

Moreover, the interests the government seeks to substitute for its anti-distortion rationale are manifestly inapplicable to the government's suppression of *Hillary*. Citizens United has no shareholders, and neither the government nor its *amici* have advanced any remotely plausible theory as to how Video On Demand distribution of *Hillary* actually or apparently corrupted President Obama or Vice President Biden. Even to articulate a theory of *quid pro quo* corruption arising out of *Hillary* is to deride it.

Why would the government abandon the anti-distortion rationale in favor of two rationales that cannot apply to Citizens United and its speech? Why, after resisting *any* enlargement of the *MCFL* exception (*see* FEC Br. 30-32), would the government now, upon reflection, suggest that its one-corporate-dollar-and-you're-in-prison rule (11 C.F.R. § 114.10) violates the First Amendment as applied to entities that receive "*de minimis* sums from corporate donations or business revenue" and even offer that Citizens United "would appear to be" such an entity? FEC Supp. Br. 3 n.1.

The answer is obvious and disturbing: The government will surrender Citizens United's as-applied challenge if doing so will shield *Austin* and *McConnell* from scrutiny and enable the FEC to invoke those decisions to suppress political speech another day.

This Court should not take the bait. As the government's failure even to articulate (much less defend) it vividly illustrates, *Austin*'s anti-distortion rationale is bankrupt. And the interests the government has rushed into the breach are equally infirm. In the absence of a "constitutionally sufficient justification for prohibiting . . . corporate . . . independent electioneering" (FEC Supp. Br. 11), *Austin* and the pertinent portion of *McConnell* should be overruled.

I. THE GOVERNMENT'S CRIMINALIZATION OF CORPORATE POLITICAL SPEECH CANNOT SURVIVE STRICT SCRUTINY.

A. The government acknowledges—as it must in view of *Buckley* and *NCPAC*—that independent political speech generally does not create a material risk of actual or apparent *quid pro quo* corruption. *See Buckley*, 424 U.S. at 47-48; *FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 497 (1985). The government contends, however, that "electoral advocacy by for-profit corporations poses distinct risks" of *quid pro quo* corruption. FEC Supp. Br. 6. It claims that the "nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption" and that the *McConnell* record "indicated" that, indeed, "corporate spending on candidate-related speech, even if conducted independently of candidates, had come to be used as a means of currying favor with and attempting to influence federal office-holders." FEC Br. 9, 11.

The government's epiphany that it is only the political speech of "for-profit corporations" that poses "distinct risks" of corruption surely comes as welcome news to America's labor unions, whose political

speech has been criminalized for nearly as long as that of America's corporations. But in seeking to hobble only for-profit corporations in the competition of political ideas, the government merely compounds its error, transmogrifying both BCRA § 203 and 2 U.S.C. § 441b into measures the authoring Congresses would not conceivably have enacted. *See Buckley*, 424 U.S. at 108 (statute should be facially invalidated where it is "evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not").

But this Court need not decide whether the government's apparent admission that it lacks a basis for suppressing union political speech overcomes the normal presumption of severability of unconstitutional applications, because the distinguishing features of for-profit corporations asserted by the government are not, in fact, distinct at all.

1. The government alleges that for-profit corporations are uniquely likely to seek to corrupt officeholders with independent expenditures because "[t]he economic stake of corporations" in legislation "generally dwarfs that of any set of individuals" and because, where the game is "pay to play," for-profit corporations are more likely than others to be able to afford the "ante." FEC Supp. Br. 9. But it is hardly just for-profit corporations that have significant stakes in pending legislation: Consider, for example, the interest of a multi-millionaire in estate tax reform, or the interest of an author in a proposed extension of the copyright term.

And while it is true that some for-profit corporations have great amounts of wealth at their disposal, most of the several million corporations in the

United States lack the financial wherewithal to corrupt officeholders. In that sense, corporations are reflective of America's individuals: While the government is doubtless correct that most individuals cannot afford officeholders' "ante," the 2008 election cycle demonstrates that many can. *See* Campaign Finance Institute, Individual Donors of $75,000 or More to Federal 527s, *at* http://www.cfinst.org/interest_groups/pdf/np527/527_08_24M_Table3.pdf (the 139 largest individual donors to federal 527s contributed more than $62 million).

The government also argues that for-profit corporations are uniquely likely to corrupt legislators because they are "artificial persons" who can use their perpetual life to "amass great wealth" that can be deployed in the form of corruption-inducing independent expenditures. FEC Supp. Br. 9. But *MCFL* entities and PACs are no less "artificial" and their lives are no less perpetual, yet this Court has held—and the government accepts—that independent expenditures by such entities pose no threat of *quid pro quo* corruption. *See FEC v. Mass. Citizens for Life* ("*MCFL*"), 479 U.S. 238, 256 (1986); *NCPAC*, 470 U.S. at 497. If, as the government seems to assume, the First Amendment protects only a "natural person's ideas," then it is not just the speech of for-profit corporations that is at risk (*but see Bellotti*, 435 U.S. at 795), but also that of *MCFL* entities (*but see MCFL*, 479 U.S. at 263), PACs (*but see NCPAC*, 470 U.S. at 501), and, indeed, political parties (*but see Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (plurality opinion of Breyer, J.)).

2. The government's efforts to backstop its assertions with "indicat[ions]" from the *McConnell* record are equally flawed. Even on the government's

telling, the *McConnell* record "indicated" not *quid pro quo* corruption, but rather that "federal officeholders and candidates were aware of and felt indebted to corporations . . . that financed electioneering advertisements on their behalf." FEC Supp. Br. 8. But *McConnell* itself recognized that "mere political favoritism or opportunity for influence alone is insufficient to justify regulation" of electoral speech. 540 U.S. at 153. Indeed, the "fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [campaign supporters] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *NCPAC*, 470 U.S. at 498.[1]

Perhaps sensing that "indications" of "influence" might be an insufficient basis upon which to criminalize political speech, the government argues that it is entitled to a remand for additional "evidentiary proceedings" so that it might convince members of Congress to admit that they made *quid pro quo* exchanges with corporate campaign supporters—or perhaps extorted "protection" payments from corporations in the form of electoral expenditures. Yet, if *Austin* and *McConnell* are still controlling, the remand would be meaningless; the government would seek and obtain summary judgment as it did below.

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[1] *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), says nothing to the contrary. While "mere . . . favoritism" toward a campaign supporter is perfectly acceptable in legislative and executive branch settings (*McConnell*, 540 U.S. at 153), comparable "favoritism" toward a judicial campaign supporter is constitutionally intolerable in light of the due process guarantee of judicial "neutrality." *Caperton*, 129 S. Ct. at 2260.

But the government is not entitled to a remand in any event. It is axiomatic that "'[w]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured'"; it must "point to record evidence of legislative findings" supporting its proffered compelling interest. *Colo. Republican*, 518 U.S. at 618 (plurality opinion of Breyer, J.) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (ellipses in original)). Perhaps unsurprisingly, the government is unable to point to any congressional finding that corporate expenditures result in the corruption of legislators. And the experience of the 26 States that currently permit corporations to make unlimited independent expenditures in state elections (*see* U.S. Chamber Supp. Br. 8 & n.5) suggests strongly that no such finding is in the offing: The government is unable to point to a *single* incident in any of those jurisdictions where a corporation used independent expenditures to solicit *quid pro quo* favors.

B. Alternatively, the government contends that prohibiting corporate independent expenditures is necessary to "protect the individuals who have paid money into a corporation . . . for purposes other than the support of candidates." FEC Supp. Br. 12. The government points to no congressional finding that even remotely suggests that this was actually one of Congress's objectives in enacting FECA or BCRA. *But see Colo. Republican*, 518 U.S. at 618 (plurality opinion of Breyer, J.) (strict scrutiny requires analysis of the government's actual objective, not *post hoc* rationales). In any event, *Bellotti* explicitly rejected protecting a "dissenting shareholder's wishes" as a justification for suppressing corporate political speech. 435 U.S. at 794 n.34.

Thus, just as dissenting party members must "protect" their own views either through the procedures afforded by party by-laws, or by leaving the party (*see N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 799 (2008)), dissenting shareholders must "protect" their own views, either by invoking the "procedures of corporate democracy" (*Bellotti*, 435 U.S. at 794), or by selling their shares. And, in fact, forty members of the S&P 100 allow shareholders to do just that through policies that require full disclosure of the corporations' political activities in order to facilitate shareholder oversight. Center for Political Accountability, Political Disclosure Hits 60 Companies (Mar. 24, 2009), *at* http://www.politicalaccountability.net/index.php?ht=display/ArticleDetails/i/1890/pid/1883.

C. The government also fails utterly to show that restrictions on corporate independent expenditures are narrowly tailored to its asserted objectives. Restricting the speech of *all corporations* (except *MCFL* entities and members of the institutional media) is not remotely necessary to mitigate the "distinct risks" assertedly inherent in the electoral advocacy of *for-profit corporations*.

Certainly, the "protection" of dissenting shareholders does not require prohibiting the speech of corporations like Citizens United that have no shareholders, or the speech of the vast majority of U.S. corporations that have only one shareholder (who presumably does not dissent from her own views). And likewise, banning *all* corporations from making independent expenditures is not remotely necessary to address the "distinct risks" supposedly posed by "[t]he nature of business corporations." FEC Supp. Br. 6, 9.

The government cites its fear that nonprofit corporations could become "conduits" for the speech of business corporations. But the government's speculation that some nonprofits might be used in this manner is hardly an adequate justification for banning nonprofit corporations funded predominantly by individuals from engaging in political speech (as the government now—quite belatedly—seems ready to admit). If business corporations are the concern, the narrowly tailored response would be legislation that prohibits those entities alone from directly or indirectly funding campaign expenditures.

D. Tellingly, the principal defenders of the anti-distortion rationale are those who have the most to gain by corporations' continued silence: incumbent politicians. *See generally* DNC Supp. Br.; McCain Supp. Br.; Van Hollen Supp. Br. According to the DNC, for example, it would be inappropriate to reject *Austin*'s anti-distortion rationale because the "relationship of corporation to government" is currently "an all-consuming topic in American politics" and overruling *Austin* "would alter, much to the favor of one class of participants, the very terms on which this great national debate is being conducted." DNC Supp. Br. 2. The irony in this argument is impossible to miss: The anti-distortion rationale—which is nominally premised on *equalizing* the relative voice of participants in the political process—is now being invoked as a basis for completely *excluding* corporations from a political debate about their future place in society. Far from equalizing political speech, it is *Austin* itself that has distorted political discourse by silencing some of the Nation's most important economic actors and ideological activists.

Moreover, there is absolutely no indication that permitting corporations to participate in this politi-

cal dialogue would overwhelm the voices of other participants. The government is unable to point to any evidence that corporations dominate or otherwise "distort" the political process in the 26 States that permit corporate independent expenditures. *See supra* pg. 7. And, on the federal level, it is telling that in 2008—after this Court had held that corporations may spend unlimited funds on electioneering communications authorized under *WRTL II*—political parties and PACs still spent *25 times* more than corporations on electoral advocacy. *Compare* FEC Supp. Br. 17, *with id.* at 22.

* * *

Ultimately, the government's refusal to defend *Austin*'s anti-distortion rationale is tantamount to a concession that the decision was "badly reasoned" and is in need of reconsideration. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Because the government has failed in its effort to shore up that decision by proposing alternative grounds for prohibiting corporate independent expenditures, *Austin* should be overruled. And because the government has pinned the fate of *McConnell*'s facial validation of BCRA § 203 on its defense of *Austin* (FEC Supp. Br. 19), *McConnell* too must fall.

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR REVISITING AND OVERRULING *AUSTIN*.

Unable to formulate a persuasive—let alone compelling—justification for the criminalization of corporations' core political speech, the government ultimately retreats to a series of prudential considerations that purportedly militate in favor of leaving *Austin* and *McConnell* on the books. None of those

purely discretionary factors is a sufficient basis for allowing those wrongly decided cases to stand.

The government and its *amici* resort repeatedly to the fact that the federal government has regulated corporate campaign contributions since 1907 and corporate independent expenditures since 1947. *See, e.g.*, FEC Supp. Br. 7, 16. But, when it comes to restrictions on core political speech, longevity is no substitute for a compelling governmental interest. *See, e.g., Republican Party v. White*, 536 U.S. 765 (2002).

Moreover, the reliance interests identified by the government and its *amici* are decidedly overblown. Many of the States that currently restrict corporate independent expenditures had enacted their restrictions *before* this Court held for the first time in *Austin* that the anti-distortion rationale is a sufficient basis for prohibiting corporate independent expenditures. *See* J.S. at 16 n.13, *Austin* (No. 88-1569). Similarly, the fact that Congress, in reliance on *Austin*, may have expended legislative resources when enacting BCRA cannot itself insulate that decision's unconstitutional holding from re-examination. *See, e.g., W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), even though States had explicitly relied on that decision to enact classroom pledge-of-allegiance requirements).

The government contends that this case is an inappropriate one in which to undertake that re-examination because Citizens United is an ideologically oriented organization funded almost exclusively by individuals and thus a "distinctly atypical corporation." FEC Supp. Br. 2. It is the *government*, however, that has placed *Austin* squarely at issue by sub-

jecting Citizens United to the same speech restrictions as those applicable to more "typical," for-profit corporations.

Finally, it is sheer hyperbole for the government's *amici* to suggest that a decision overruling *Austin* or *McConnell* "could threaten the Court's legitimacy." McCain Supp. Br. 12. As the government itself emphasizes (at 5), *Austin*'s anti-distortion rationale was not challenged in *McConnell*. This Court has therefore never had occasion to examine whether *Austin* was correct to depart from this Court's prior campaign finance jurisprudence. Rejecting that decision's utterly inadequate rationale for impairing corporations' fundamental First Amendment freedoms—and the unworkable campaign finance framework it has generated—could only bolster this Court's standing as the final bulwark against governmental abridgment of constitutional rights.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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TABLE OF CONTENTS

Page

A. Appellant has failed to preserve a challenge to *Austin* 1

B. *Austin* is not an outlier but rather reflects a core principle of campaign-finance law, and it is entitled to full *stare decisis* effect 2

C. The Court in *Austin* correctly held that electoral advocacy by for-profit corporations raises special concerns 6

D. The Court in *Austin* correctly held that non-profit corporations may be regulated if they are potential conduits for electoral spending by business corporations 10

E. If *Austin* remains good law, there is no sound basis for overruling *McConnell* 11

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Austin v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) 1, 7, 10

Board of Trs. v. *Fox*, 492 U.S. 469 (1989) 2

Buckley v. *Valeo*, 424 U.S. 1 (1976) 3, 8, 9

Davis v. *FEC*, 128 S. Ct. 2759 (2008) 3

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 3, 4, 7

FEC v. *National Conservative PAC*, 470 U.S. 480 (1985) 3, 8

FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 4, 7

Cases—Continued: Page

FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 4, 9
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 3, 8
McConnell v. *FEC*, 540 U.S. 93 (2003) 2, 4, 5, 6, 10, 11
Mills v. *Alabama*, 384 U.S. 214 (1966) 10

Constitution, statutes and regulations:

U.S. Const. Amend. I 2, 4, 9
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 91 ..... *passim*
Tillman Act of 1907, ch. 420, 34 Stat. 864 3
2 U.S.C. 441b 4, 9
2 U.S.C. 441b(b)(2)(C) 6
11 C.F.R.:
Section 114.5(b) 6
Section 114.10 10
Section 114.15(b) 11
Section 114.15(c) 11

Miscellaneous:

FEC, *Number of Federal PACs Increases* (Mar. 9, 2009) <http://www.fec.gov/press/press2009/20090309PACcount.shtml> 6

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SUPPLEMENTAL REPLY BRIEF FOR THE APPELLEE

A. Appellant Has Failed To Preserve A Challenge To *Austin*

Appellant expressly abandoned its facial challenge to BCRA Section 203 in the district court; its jurisdictional statement did not cite *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); and its merits brief contained only a two-paragraph argument that *Austin* should be overruled. Appellant nevertheless contends (Supp. Br. 20) that it preserved its current challenge to *Austin* by including in its jurisdictional statement a question as to whether *Hillary: The Movie* was "subject to regulation" under BCRA. Read in its entirety, however, that question did not suggest any assault on *Austin*. See J.S. i (fourth question presented). Rather, appellant asked—and in the corresponding portion of the body of its jurisdictional statement discussed—whether BCRA could constitutionally be applied to a full-length documentary film as distinct "from

the broadcast 'ads' at issue in" *McConnell* v. *FEC*, 540 U.S. 93 (2003). J.S. 26.

Appellant also suggests (Supp. Br. 19) that, because this case falls within the Court's mandatory appellate jurisdiction, appellant was not obliged to comply with the ordinary requirement that it preserve its argument. But the courts of appeals also have mandatory appellate jurisdiction, and they routinely—and appropriately—decline to consider arguments that were waived below or inadequately presented on appeal.

Appellant's extraordinary contention (Supp. Br. 3) that the Court should reach its facial challenge *first*, "even if" appellant could prevail on narrower grounds, is particularly unsound. That course of action would invert this Court's usual practice, which it follows in First Amendment cases as in others: to adjudicate non-constitutional claims before constitutional ones and as-applied challenges before facial ones. *Board of Trs.* v. *Fox*, 492 U.S. 469, 484-485 (1989).

B. *Austin* Is Not An Outlier But Rather Reflects A Core Principle Of Campaign-Finance Law, And It Is Entitled To Full *Stare Decisis* Effect

Appellant characterizes *Austin* as a "jurisprudential outlier" that reflected a "precipitous break with prior precedent" and is in "unmistakable tension with later decisions." Supp. Br. 10. Appellant further suggests (*id.* at 14-15) that *Austin*'s "aberrational" nature deprives it of full *stare decisis* effect. Those arguments are fundamentally wrong.

1. Since 1947, Congress has barred the use of corporate-treasury funds for independent expenditures in federal election campaigns. FEC Supp. Br. 7-8, 16. Far from breaking new ground, the *Austin* Court's recognition that corporate electioneering poses distinctive and serious concerns simply confirmed a congressional judgment incorpo-

rated in federal law for more than 40 years prior to the decision. Indeed, the different treatment of corporations in federal election law has its roots in legislation enacted more than a century ago, the Tillman Act of 1907. In asserting (Supp. Br. 15) that "no considerations of 'antiquity'" weigh against overruling *Austin*, appellant ignores Congress's longstanding efforts to restrict corporate influence in elections.

2. In arguing that *Austin* is inconsistent with the bulk of this Court's campaign-finance jurisprudence, appellant principally relies on decisions that either did not specifically consider *corporate* electioneering, see *Davis* v. *FEC*, 128 S. Ct. 2759 (2008); *FEC* v. *National Conservative PAC*, 470 U.S. 480 (1985) (*NCPAC*); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), or did not involve the election of *candidates* to public office, see *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978). Appellant's reliance on *Bellotti* is particularly misplaced because the Court there explained that its "consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office." *Id.* at 788 n.26. The Court further observed that various federal statutes addressed "the problem of corruption of elected representatives through the creation of political debts," and that "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Ibid.*; see FEC Supp. Br. 8-9. The state statute struck down in *Bellotti* is further distinguishable from BCRA Section 203 because it offered no PAC option and therefore imposed a true *ban* on corporate speech concerning referenda. See 435 U.S. at 768 n.2; *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 n.12 (1986)

(*MCFL*) (explaining that the PAC-financing requirement imposed by 2 U.S.C. 441b "is of course distinguishable from the complete foreclosure of any opportunity for political speech that [the Court] invalidated in the state referendum context in" *Bellotti*); pp. 6, 7-8, *infra*.

When this Court has specifically focused on *corporate* participation in *candidate* elections, it has recognized that Congress's longstanding effort "to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982). In *MCFL*, the Court held that a narrow class of nonprofit corporations is entitled to a constitutional exemption from the restrictions imposed by 2 U.S.C. 441b, see 479 U.S. at 259-265, but did not otherwise question Section 441b's constitutionality, see *id.* at 259, 263. In sustaining BCRA Section 203 against a facial First Amendment challenge, the Court in *McConnell* stated that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law." 540 U.S. at 203. And the controlling opinion in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), while holding BCRA Section 203 unconstitutional as applied to the particular corporation-funded advertisements at issue, cast no doubt on Congress's authority to bar the use of corporate-treasury funds for express electoral advocacy or its functional equivalent. See *id.* at 464-481 (opinion of Roberts, C.J.). The Court's decision in *Austin* is thus fully consistent with this Court's other precedents addressing the constitutionality of restrictions on corporate spending in candidate elections.

3. In arguing that *Austin* is entitled to reduced *stare decisis* effect, appellant suggests that the underlying First

Amendment question has somehow remained unsettled because "BCRA § 203 has been subject to repeated constitutional challenges since its enactment in 2002." Supp. Br. 14 (citing *McConnell* and *WRTL*). But even if regulated entities' resistance to a decision of this Court could reduce its precedential force, *this* constitutional challenge to BCRA Section 203—the argument that for-profit corporations' electioneering cannot be regulated at all and that *Austin* was wrongly decided—has never been made to the Court until the two-paragraph discussion appeared in appellant's merits brief. In *McConnell*, the plaintiffs did not dispute that corporations may be barred from using their treasury funds for express electoral advocacy; they asserted only a right to use treasury funds for everything *except* express advocacy. See 540 U.S. at 189-194, 203-209. One nonprofit plaintiff (WRTL) subsequently prevailed in an as-applied challenge to BCRA Section 203, but it likewise did not advocate the overruling of *Austin*.

Thus, until this case reached the Court, the regulated community—while continuing to litigate questions concerning the appropriate test for identifying electoral advocacy and the precise scope of the constitutional exemption granted to certain nonprofit corporations—had acquiesced in *Austin*'s core holding.[1] In short, the principle that corporations may be barred from using treasury funds for independent electoral advocacy is just as settled as the different principle on which appellant relies, that individuals' independent electioneering cannot be restricted.

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[1] Amicus CED's brief suggests (at 11-15) one reason: many CEOs view the current restrictions on corporate electoral spending as preventing a wasteful arms race, in which corporations would have to spend ever more money to compete for influence over public officeholders.

C. The Court In *Austin* Correctly Held That Electoral Advocacy By For-Profit Corporations Raises Special Concerns

For-profit corporations have attributes that no natural person shares. Three characteristics of the state-created business corporation justify the special rule that Congress has applied to those entities for more than 60 years.

1. Corporate speech is speech by proxy, and the individuals who own, fund, or manage a corporation remain free to engage in their own advocacy no matter what restrictions are placed on the corporation. Indeed, they can even band together to do so under the corporate name: business corporations can and do engage in electoral advocacy through their PACs, which ensure that the advocacy is funded only by stockholders and employees who choose to take part.[2] Appellant is therefore simply wrong in characterizing BCRA Section 203 as a "ban" or "prohibition" (Supp. Br. 1, 10) on corporate electoral speech.

2. A business corporation's use of treasury funds for electoral advocacy distorts the political process because the communication does not correspond to the electoral preferences of the individuals whose money is used to fund it. Dissenting in *McConnell*, Justice Scalia alluded to the signers of the Declaration of Independence, who pledged their "*Fortunes*" alongside their "sacred Honor." 540 U.S. at

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[2] More than 1500 business corporations maintain their own PACs, and many more are represented by trade-association PACs. See FEC, *Number of Federal PACs Increases* (Mar. 9, 2009) <http://www.fec.gov/press/press2009/20090309PACcount.shtml>. Various amici suggest that requiring corporations to finance electioneering with PAC rather than treasury funds is unconstitutional because maintaining a PAC is difficult and expensive. But for-profit corporations can use their treasury funds to set up and administer their PACs, see 2 U.S.C. 441b(b)(2)(C); 11 C.F.R. 114.5(b), thereby ensuring that all funds raised for political advocacy can be spent on political advocacy.

255. But John Hancock pledged his *own* fortune; when the CEO of John Hancock Financial uses corporate-treasury funds for electoral advertising, he pledges someone else's. Corporate electoral spending is thus distortive because it converts the resources of individuals into political expression with which they may well disagree—or, otherwise said, because such spending fails to "reflect actual public support for the political ideas espoused by corporations." *Austin*, 494 U.S. at 660.[3]

Even before *Austin*, this Court had recognized the government's interest in protecting corporate shareholders "from having [their] money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208; accord *MCFL*, 479 U.S. at 260. A union member's analogous interest has constitutional stature, see FEC Supp. Br. 13, and the shareholder-protection interest is properly viewed as compelling here. Appellant's conclusory assertion that the interest "is *not* * * * compelling" (Supp. Br. 13) is supported only by a reference to *NCPAC*, but that decision says nothing about the shareholder question, either on the cited page or elsewhere. The PAC option both furthers the shareholder-protection interest and facilitates voluntary advocacy. Willing individuals associated with the corporation can pool their resources for effective electoral advocacy under the corporation's auspices, while unwilling shareholders are protected against the diversion to electoral advocacy of funds they invested for a different

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[3] *Austin*'s reference to "public support" is best understood to refer, not to popularity within the community at large (see U.S. Chamber Supp. Br. 13-14), but to support among those in whose name the message is propagated—*i.e.*, the shareholders whose resources are funding the electioneering.

purpose. The result is both fairer to individual shareholders and less distortive of the political process.[4]

3. For-profit corporations are inherently more likely than individuals to engage in electioneering behavior that poses a risk of actual or apparent corruption of office-holders. See FEC Supp. Br. 9; CPA Supp. Br. 12-14; *NCPAC*, 470 U.S. at 500. The *Buckley* Court's observation that independent expenditures "may prove counterproductive" to the candidate they support, 424 U.S. at 47, has no meaningful application to modern business corporations. An individual may simply wish to add his own views to the debate, and those views may be idiosyncratic or "off message." Business corporations, by contrast, have no beliefs to express, but rather engage in electoral advocacy for purely instrumental reasons. See FEC Supp. Br. 10 n.2; CED Br. 10.

For an independent expenditure to incur a candidate's gratitude (or temper the candidate's hostility, see CED Br. 11-13; Justice at Stake Br. 17), it need only be known to the candidate and perceived to be effective in assisting her

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[4] As appellant emphasizes (Supp. Br. 10, 13-14), the *Bellotti* Court found shareholder protection to be an insufficient justification for the Massachusetts statute at issue there. Public advocacy concerning ballot measures, however, is directed at the "lawmakers" themselves (the citizens) and thus resembles lobbying, a traditional business activity in which shareholders would expect their corporations to engage. Moreover, the likelihood that a shareholder would disapprove of corporate officers' electoral preferences is greater in candidate elections than in referenda, because legislators vote on a variety of measures that have no discernible impact on a particular corporation. The *Bellotti* Court also emphasized the "overinclusiveness" of the Massachusetts statute, noting that it would prohibit even corporate electioneering that shareholders "unanimously" approved. 435 U.S. at 794. By contrast, BCRA Section 203's PAC option ensures that willing shareholders can pool their resources for electioneering under the corporation's auspices.

campaign. Since *Buckley*, both ends have become much easier for an independent-expenditure sponsor to achieve. Now that virtually every campaign advertisement is available online, along with data showing how it is targeted, a sophisticated business corporation can easily make well-publicized efforts that harmonize neatly with a candidate's message, without the need for overt coordination. CPA Supp. Br. 15. The mammoth record compiled in *McConnell* confirmed that, before BCRA, corporations had repeatedly used electioneering advertisements to curry favor with, and gain influence over, federal office-holders. See FEC Supp. Br. 8.[5]

4. Appellant contends (Supp. Br. 11-12) that the restrictions on corporate spending at issue here and in *Austin* are "dramatically underinclusive" because they do not apply to wealthy individuals or media commentary. Corporations, however, reap special state-created advantages that are unavailable to natural persons, and restrictions on individual advocacy comparable to 2 U.S.C. 441b or BCRA Section 203 would impose far greater burdens on First Amendment interests because they would prevent natural persons from spending their own money to disseminate their own ideas. See FEC Supp. Br. 9-10. At the same time, as stated above, the dangers of actual and apparent corruption from corporate electioneering dwarf those arising from individual expenditures.

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[5] Appellant's contention (Supp. Br. 22) that the government must prove a likelihood of corruption with respect to each corporate communication misreads this Court's cases. When the Court has upheld campaign-finance regulation on an anti-corruption rationale, it has never required proof of likely harm at the level of specificity that appellant now demands. See *Buckley*, 424 U.S. at 27-28; accord *WRTL*, 551 U.S. at 464-465, 469 (opinion of Roberts, C.J.).

This Court has previously upheld federal and state electioneering restrictions that distinguish between media commentary and other corporate electoral advocacy. See *McConnell*, 540 U.S. at 208-209; *Austin*, 494 U.S. at 666-668. In so doing, the Court has recognized the special role the press plays in maintaining a vibrant sphere of free expression. See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966). And investors in media corporations presumably understand that their company's business is disseminating content, including electoral and other political commentary, to the viewing public.

D. The Court In *Austin* Correctly Held That Nonprofit Corporations May Be Regulated If They Are Potential Conduits For Electoral Spending By Business Corporations

Appellant asserts (Supp. Br. 12) that, under current law, "individuals of modest means are barred * * * from pooling their resources to fund the political speech of ideologically oriented nonprofit corporations." But if appellant raised its money wholly from individual donations, it would be free under *MCFL* to use those funds for electoral advocacy. FEC Br. 29-32; 11 C.F.R. 114.10. Instead, appellant raised funds to produce *Hillary* from for-profit corporations. J.A. 244a, 251a-252a. Those corporations cannot be allowed to evade the government's compelling interests by funneling their monies through ideological nonprofits like appellant. FEC Supp. Br. 13-15.[6]

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[6] Various amici contend that the *MCFL* exemption should be extended to nonprofits that accept only small amounts of corporate funding. Whatever force that contention might have in particular cases, see FEC Supp. Br. 3 n.1, it is irrelevant to the facial challenge on which this Court requested supplemental briefing. And appellant has neither preserved nor adequately documented an argument that *its* overall corporate funding is so small as to qualify for an as-applied exemption. See FEC Br. 29-30.

Appellant contends (Supp. Br. 11) that Congress cannot prevent nonprofit corporations from being used as conduits for business-corporation electoral spending because it could not preclude *individuals* who receive corporate money from spending it on electoral advocacy. There is ample reason, however, to distinguish between the two situations. A nonprofit corporation can be created quickly and relatively cheaply; given an appealing name, see *McConnell*, 540 U.S. at 197; operated for a single purpose; easily controlled by donors; and terminated when the task is done. Individuals share none of those attributes.

E. If *Austin* Remains Good Law, There Is No Sound Basis For Overruling *McConnell*

Appellant does not contend that *McConnell* should be overruled if *Austin* remains good law. Supp. Br. 21. That reticence is well-advised, because there is no sound basis for drawing a constitutional distinction between express advocacy and its functional equivalent. See FEC Supp. Br. 21.

Some amici contend that *McConnell*—or, more precisely, the two-year-old lead opinion in *WRTL*—has already proved unworkable.[7] Those contentions are unfounded. The FEC has faithfully implemented *WRTL* by adopting easy-to-apply safe harbors, 11 C.F.R. 114.15(b), and by making clear that even advertisements outside the safe harbors are exempt if there is any reasonable doubt about their electioneering nature, 11 C.F.R. 114.15(c). And while appellant asserts (Supp. Br. 17) that "no corporation or labor union would dare opine on a candidate's qualifications without checking with the FEC first," in the short time

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[7] No one contends that *Austin*, which involved an advertisement containing "magic words" of express advocacy, has proved difficult to apply in practice.

since *WRTL*, corporations and other groups using corporate money have spent well over $100 million on electioneering communications claiming exemption under *WRTL*. FEC Supp. Br. 22-23.

CONCLUSION

For the foregoing reasons, as well as those stated in our previous briefs and at oral argument, the judgment of the district court should be affirmed.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

65

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Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court
For The District Of Columbia

Supplemental Brief *Amicus Curiae* of The Reporters Committee for Freedom of the Press in Support of Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The government has interpreted the Constitution as allowing for expansive regulation of corporate and union spending on express advocacy, without regard for First Amendment protections of the press 3

II. This Court's jurisprudence must be interpreted as requiring a constitutionally compelled media exemption from campaign finance laws 6

III. The constitutionally compelled media exemption must be defined based on the intent of the entity to gather and disseminate news 10

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 2, 3, 11, 13

Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998) 15

Fed. Elections Comm'n v. Phillips Publ'g., 517 F.Supp. 1308 (D.D.C. 1981). 12

Grosjean v. American Press Co., Inc. 297 U.S. 233 (1936) 4

In re Madden, 151 F.3d 125 (3d Cir. 1998) 16

McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003) ..... passim

Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 10

Mills v. Alabama, 384 U.S. 214 (1966) 8, 9, 13

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 10

Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993) 16

The Readers Digest Ass'n. v. Fed. Elections Comm'n., 509 F.Supp. 1210 (S.D.N.Y. 1981); 12

United States v. CIO, 335 U.S. 106 (1948) 7, 8, 9

von Bulow v. von Bulow, 811 F.2d 136, 144-45 (2d Cir. 1987) 15

Statutes

Bipartisan Campaign Reform Act of 2002 ..... 2, 3, 5, 7

Other Authorities

151 Cong.Rec. H9478-01 (Nov. 2, 2005) 11

Brief Amicus Curiae of Reporters Committee for Freedom of the Press, *Citizens United v. Federal Election Comm'n,* No. 08-205 11

In re ABC, CBS, NBC, New York Times, Los Angeles Times and Washington Post, et al. Matter Under Review 4929, 5006, 5090 and 5117 at 4 (Fed. Elections Comm'n Dec. 20, 2000) 13

In the Matter of Robert K. Dornan, et. al, Matter Under Review 4689, addt'l statement of Comm'r Mason, (Fed. Elections Comm'n Feb. 14, 2000) 16

Richard Hasen, *Lessons from the clash between campaign finance laws and the blogosphere*, 11 NEXUS 23 (2006) 14

STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

As stated in the initial brief filed by the Reporters Committee in this case, the Reporters Committee has an interest in ensuring that the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 431 *et seq.*, is not used to suppress this feature-length political documentary, as it would be an "obvious and flagrant abridgement of the constitutionally guaranteed freedom of the press." *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

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[1] Pursuant to Sup. Ct. R. 37, counsel for the Reporters Committee declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amicus curiae* has previously been filed with the Clerk.

SUMMARY OF ARGUMENT

Amicus curiae The Reporters Committee for Freedom of the Press (the "Reporters Committee") urges the Court to clarify its precedent in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003) to hold that these rulings are constitutional only if they allow the news media to engage in what would otherwise be regulated as "express advocacy" by a corporation.

The Bipartisan Campaign Reform Act of 2002 can survive constitutional scrutiny if this Court recognizes a broadly defined exemption for the news media consistent with the First Amendment's protection of the press.

The government's reading of *Austin* and *McConnell*, as articulated during the initial oral argument in this case, suggest those rulings do not stand for this proposition. However, this Court's precedent, prior to *Austin*, supports such an interpretation.

Moreover, the broadly defined exemption for the news media must be based on the intent of the news organization to disseminate news to the public, rather than a definition directed at protecting only at the traditional, or "institutional," press.

The original, laudable intent of Congress presumably was to limit speech by corporations that seek to promote their own interests by influencing elections, while continuing to allow all other commentary (either non-corporate entities or by the news

media) on political issues. But by crafting campaign finance reform legislation with such attention to corporate form in a world in which so much public communication is conducted through such means, far too much speech is either barred, chilled, or subject to government approval through regulation by the FEC.

ARGUMENT

I. The government has interpreted the Constitution as allowing for expansive regulation of corporate and union spending on express advocacy, without regard for First Amendment protections of the press.

This Court directed supplemental briefing on whether its precedent in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and the portion of *McConnell v. Federal Election Comm'n,* 540 U.S. 93 (2003) which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b, should be overruled.

The cases should be clarified, given the government's assertions at oral argument that under these two decisions, Congress has broad power to restrict corporate and union spending on the "functional equivalent of express advocacy" via a wide variety of media, including books and the Internet, without a required exemption for the news media.

During a lengthy exchange over the breadth of Congress' power to regulate speech in this area, Jus-

tice Alito asked whether the Constitution required Congress to limit its regulation to electioneering communications on broadcast and cable rather than extending the statute to books, DVDs, or the Internet. The government's counsel replied, "The Constitution would have permitted Congress to apply the electioneering communication restrictions. . . . Those could have applied to additional media as well." Tr. Oral Argument at 27:6, *Citizens United v. Federal Election Comm'n,* No. 08-205. The government continued to state that Congress could stop the use of corporate treasury funds to publish a book that was express advocacy. *Id.* at 28:1, *Id.* at 29:10 ("It – it can't be prohibited, but a corporation could be barred from using its general treasury funds to publish the book and could be required to use – to raise funds to publish the book using its PAC.").[2]

The government conceded only that there is a "potential argument" that the "institutional press" would have some First Amendment rights in this situation. *Id.* at 28:7. It was also the government's contention that the Court had not addressed whether "restrictions on the use of corporate treasury funds for electioneering can constitutionally be applied to media corporations." *Id.* at 34:14.

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[2] While the government seems content with requiring corporate speakers to create FEC-registered political action committees, Tr. Oral Argument at 27:19, such a restriction is nothing short of a licensure requirement on the news media of a type that has long been held repugnant to the principles underlying the First Amendment. *See Grosjean v. American Press Co., Inc.* 297 U.S. 233 (1936).

These statements indicate both confusion and a misunderstanding of this Court's precedent with regard to campaign finance regulations and the media.

On re-argument, these statements must be taken by the Court as the passing of the fears Justice Thomas warned against in *McConnell.* 540 U.S. at 284 (Thomas, J., concurring in part and dissenting in part) ("What is to stop a future Congress from determining that the press is 'too influential,' and that the 'appearance of corruption' is significant when media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties?").

The First Amendment's protections of the press and speech do not allow Congress to validly pass such far-reaching statutes.[3] Yet, there is clearly an interest in Congress in expanding campaign finance regulation. *See McConnell* at 185 (Op. of Scalia, J. citing 148 Cong. Rec. S2101 (Mar. 20, 2002) (statement of Sen. Feingold)) ("This is a modest step, it is a

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[3] In fact, Congress could broaden the scope of what types of communications are covered by BCRA simply by modifying the definition of "electioneering communication," 2 U.S.C. 434(f)(3)(A)(i), which presently contains the modifier that limits BCRA to broadcasts only. A change of definition that eliminates this qualifier might seem like a mere "legislative fix" to Congress — after all, communications about elections are not inherently limited to those that are broadcast, but would logically cover communications in print, over the Internet, and even by oral exposition at a public event. Such a change in definition would then leave much political commentary out of the rather narrow media exemption in the statute, which only discusses news programs on broadcasts.

first step, it is an essential step, but it does not even begin to address, in some ways, the fundamental problems that exist with the hard money aspect of the system."). Before the situation is further complicated, the Court should take this opportunity to clarify the First Amendment protections for news media, broadly defined, as they exist with respect to campaign finance laws. If it does not, there will be nothing to stop Congress, as Justice Thomas pointed out, from regulating campaign endorsements and editorials by the news media.

II. This Court's jurisprudence must be interpreted as requiring a constitutionally compelled media exemption from campaign finance laws.

The government's interpretation of this Court's precedent incorrectly focuses on only its relatively recent holdings in *Austin* and *McConnell*. In fact, regulation of campaign finance has a long history in the United States, one that has always heeded the First Amendment's protection of a free press. This constitutional protection for the news media has become so ingrained within the consciousness of lawmakers that in the campaign finance legislative debates that led to BCRA, there was little discussion of the need to exempt the press from these statutes. BCRA includes this long-standing exemption. 2 U.S.C. § 434 (f)(3)(B)(i). It excludes from regulation, among other things, speech that, "[a]ppears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities

are owned or controlled by any political party, political committee, or candidate." *Id.*

This Court first extensively dealt with the question of press activity in conflict with a campaign finance law in *United States v. CIO*, 335 U.S. 106 (1948). There, this Court considered whether the Federal Corrupt Practices Act, a campaign finance law from 1925, prohibited the publication and distribution of a weekly periodical by a labor union that urged union members to vote for a congressional candidate. Debates on the Senate floor over the legislation indicated that the statute had not been intended to reach such activities of the press. *Id.* at 120 ("[I]t is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment."). Given such history, the Court found that if the statute,

> were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality.

Id. at 121. Such language indicates a requirement arising from the First Amendment's protection of press freedom that campaign finance laws — tar-

geted at either labor unions or corporations — not constrict the press. This is true regardless of whether it was the print-based press that existed in 1948 or the broadcast and online news media that exist today.

The holding in *CIO* was reiterated by the Court in *Mills v. Alabama*, 384 U.S. 214 (1966) when this Court struck down Alabama's campaign finance statute. "The Alabama Corrupt Practices Act by providing criminal penalties for publishing editorials such as the one here silences the press at a time when it can be most effective. It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." *Id.* at 219. The statute prohibited newspaper editorials published on election day urging readers to vote for a candidate. *Id.* at 218.

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to

> play an important role in the discussion of public affairs.

Id. (citations omitted).

Thus, it cannot be only by legislative grace that the press is exempted from campaign finance statutes, as the government suggested in the initial oral argument in this case. Tr. at 27. The First Amendment and this Court's jurisprudence compel a press exemption from these laws. Where campaign finance statutes have not clearly exempted the media, this Court's decisions have prohibited their application to the press so that they may be saved. *See CIO*, 335 U.S. at 121. Yet, the government in oral argument said Congress could, by statute, prohibit a book endorsing a candidate from being published by a corporation prior to an election. Tr. at 27. This Court has never tolerated such an infringement on freedom of the press. Indeed, where the press has been the vehicle by which public discourse of items of political importance has occurred, First Amendment protections have been strengthened. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (constitutionalizing protections for certain potentially libelous speech); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a "right of access" statute that interfered with the editorial judgment of news editors).

The Court should take this opportunity to reiterate the essence of previous holdings in its campaign finance cases dating back more than half a century. If its statements at oral argument are to be believed, the government has lost sight of a fundamental pur-

pose of First Amendment jurisprudence. The press, as a constitutional matter, must be and has always been exempt from campaign finance laws that infringe on the news media's ability to exercise editorial discretion. Publishers cannot be stopped from publishing books endorsing candidates before an election, as the government contended, if Congress so deems. To do so would violate the First Amendment and the spirit of freedom in political discourse through which this country was established.

III. The constitutionally compelled media exemption must be defined based on the intent of the entity to gather and disseminate news.

The media exemption must be defined broadly by this Court in order to prevent future regulation of the media. This Court should craft the press exemption based on the intent of the news organization to gather and disseminate news to the public, rather than a mere description of its mode of transmission.

In *Austin* and *McConnell*, the Court barely touched on the media exemption. In *Austin*, the majority briefly recognized that the institutional press should be exempted from campaign finance restrictions because "a valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Austin*, 494 U.S. at 669. In *McConnell*, the majority did not touch on the exemption. Thus, in the wake of these cases, the test for what types of media entities may be regulated under the BCRA remains murky and

unclear. *See* 151 Cong.Rec. H9478-01 (Nov. 2, 2005) (statement of Rep. Miller) ("When Congress passed the Bipartisan Campaign Finance Reform Act in 2002, the law apparently was unclear on what impact it would have on political speech on the Internet.").

The law is especially unclear because of the constantly evolving world of media. Before *Austin* and *McConnell*, and before many of the latest advancements in technology, it was relatively simple to define the media. Newspapers, magazines, and broadcast and cable newscasts were all considered journalism and were all easily granted an exemption from campaign finance regulation. *See generally The Readers Digest Ass'n. v. Fed. Elections Comm'n.*, 509 F.Supp. 1210 (S.D.N.Y. 1981); *Fed. Elections Comm'n v. Phillips Publ'g.*, 517 F.Supp. 1308 (D.D.C. 1981). But as technological advancements change the mode in which news is transmitted, it is no longer so easy to discern who is a member of the news media and who is not. *See generally* Brief *Amicus Curiae* of Reporters Committee for Freedom of the Press, *Citizens United v. Federal Election Comm'n,* No. 08-205. And the distinction will be even murkier in the future as the practices, methods and modes of journalism continue to evolve. Thus, the media exemption must be broadened so as to include not only traditional institutional media corporations, but also organizations like Citizens United that are distributing pertinent political news to the public.

As Justice Scalia foreshadowed in his dissent in *Austin*, the majority opinion left the door open for regulation of the press.

> Members of the institutional press, despite the Court's approval of their illogical exemption from the Michigan law, will find little reason for comfort in today's decision. The theory of New Corruption it espouses is a dagger at their throats. The Court today holds merely that media corporations may be excluded from the Michigan law, not that they must be.

Austin, 494 U.S. at 691.

Without a clearly enunciated and broad standard announced by this Court, the likelihood of media regulation and censorship is high. As the government stated during oral arguments, *McConnell* and *Austin* allow the FEC to impose campaign finance regulations on a variety of media organizations, including book authors. *Supra* Part I. *Amicus* urges the Court to clarify the standard that has emerged after *Austin* and *McConnell* and to adopt a broadly defined standard that exempts entities that have the intent to gather and disseminate news, commentary and other information.

Broadening the standard would help preserve valuable public debate about elections and campaigns. The news media is exempted from campaign finance regulation in order to preserve its critically important role in covering elections. The exemption exists, not for the journalists themselves, but so that the public has access to and can participate in important political discussions. *See generally Mills*, 384 U.S.

214. Broadening the exemption to include not just traditional press organizations but also non-traditional news organizations and information gatherers furthers the goals of the original intent of the media exemption. As the FEC recognized in response to a complaint that ABC, CBS, NBC, *The New York Times*, *The Washington Post* and the *Los Angeles Times* were making illegal corporate campaign contributions because of their commentary about political candidates, the media exemption allows the press to continue to serve the important role of election coverage.

> It is clearly a part of the normal press function to attend to the competing claims of parties, campaigns and interest groups and to choose which to feature, investigate or address in news, editorial and opinion coverage of political campaigns. The question of whether a news organization may have credulously or recklessly accepted and reported the claims of one political party or candidate is the type of inquiry which the courts have held to be foreclosed by the [Federal Election Campaign Act]'s media exemption.

In re ABC, CBS, NBC, New York Times, Los Angeles Times and Washington Post, et al. Matter Under Review 4929, 5006, 5090 and 5117 at 4 (Fed. Elections Comm'n Dec. 20, 2000) (*available at* http://eqs.sdrdc.com/eqsdocs/000011BC.pdf).

When it is clear that the entity is a traditional media organization, the Court should continue to ap-

ply the media exemption as it historically has. But, when there is a question about whether or not the entity is a news organization, the Court should look to the function of organization and its intent to distribute news to the public. *See generally* Richard Hasen, *Lessons from the clash between campaign finance laws and the blogosphere*, 11 NEXUS 23 (2006).

In a related area of law, federal courts have already adopted an intent-based functional definition in determining what types of entities are news organizations. When determining whether to apply a reporter's privilege to a non-traditional news gatherer, courts have adopted a test that applies a privilege to those entities that can show they had "the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *von Bulow v. von Bulow*, 811 F.2d 136, 144-45 (2d Cir. 1987). In *von Bulow*, the court refused to apply a reporter's privilege because a woman who said she was an author did not have the intent to gather news and disseminate it to the public from the beginning. *Id.*

The same test has been adopted in other circuits. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (authors were independent and had the intent to gather and disseminate news to the public and could avail themselves of a reporter's privilege); *In re Madden*, 151 F.3d 125 (3d Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

In these cases, the courts have recognized that there is a line between those types of organizations

and individuals who are legitimately acting as the press and those who are not. When there is no question about whether an entity is a news organization, courts do not apply this test. But when it is unclear whether the privilege should apply, this test helps courts to determine if the organization or journalist can invoke the same constitutional protections as the traditional press. Under this test, only those people and organizations who are independent and who have the intent to disseminate news to the public can avail themselves of constitutional protection.

Similarly, the reasoning applied in these cases is appropriate in the campaign finance context. As mentioned above, the intent-based function need only come into play when there is a question whether the entity is a media organization. If the Court applies a similar test, that exempts all organizations which are independent from political parties and which have the intent to disseminate news to the public, the Court can ensure that all legitimate press entities are constitutionally exempt from regulation and censorship.

In the reporter's privilege context, this is a practical and workable test that draws a distinct line. It could serve the same purpose in the campaign finance context as well. It would also serve the government's interest in regulating campaign activities so as to avoid the appearance of corruption, while also preserving the First Amendment right to discuss and debate matters of political concern. It is not a strict standard and will not undermine the important policies and concerns behind campaign finance regulations. By looking at the intent of the organization

to disseminate news, a standard such as this will further important debate and discussion about elections. Also, by exempting organizations which are independent of any political party, this standard will allow the FEC to continue to regulate true campaign speech.

The press plays an important role in covering campaigns and elections, and it has played that role since this country was founded. It is vital that this Court does not step on that constitutionally protected role by censoring the media based on its content or mode of distribution. "It is difficult to imagine an assertion more contrary to the First Amendment than the claim that the FEC, a federal agency, has the authority to control the news media's choice of formats, hosts, commentators and editorial policies in addressing public policy issues."[4] *Amicus* thus urges this court to adopt a broadly-defined intent based test that will exempt press organizations that are disseminating news to the public. A broad test will preserve the media's ability to provide independent coverage of elections and campaigns.

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[4] *In the Matter of Robert K. Dornan, et. al,* Matter Under Review 4689 at 6 (additional statement of Comm'r Mason, Fed. Elections Comm'n Feb. 14, 2000) (*available at* http://eqs.sdrdc.com/eqsdocs/000038E2.pdf) (involving complaints about a congressman serving as a guest host for radio talk shows).

CONCLUSION

The Court should take this opportunity to make clear that the press, broadly defined by its intent to gather and disseminate information, must be exempt from campaign finance regulations if the statutes are to survive a First Amendment review. Such a ruling reinforces the early holdings of this Court with regard to campaign finance regulation and would protect the interests of the press as it existed in 1789, as it existed in the 20th century, and as it exists now. Whatever the aims of campaign finance regulations and statutes, they must be aligned with the protections the First Amendment provides for the press. A free, robust, and invigorated news media — one that is not afraid its speech will fall under the specter of government regulation — furthers the democratic goals of campaign finance reform and should be protected as the Framers intended when the First Amendment was adopted.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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No. 08-205

In the Supreme Court of the United States

CITIZENS UNITED, APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether, for the proper disposition of this case, the Court should overrule either or both *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell* v. *FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002.

TABLE OF CONTENTS

Page

A. This case is an unsuitable vehicle for re-examination of *Austin* and *McConnell* 2
B. The Court's decision in *Austin* was correct and should not be overruled 5
1. The Court in *Austin* correctly held that business corporations may be barred from using treasury funds for electioneering, either directly or through conduits 6
2. The decision in *Austin* ratified a longstanding principle of federal and state election law on which Congress has subsequently relied and that should not now be abandoned 16
C. The relevant holdings of *McConnell* were correct and should not be overruled 19
1. The Court in *McConnell* correctly held that express advocacy and its functional equivalent may be treated alike, and that BCRA's definition of "electioneering communication" is not facially overbroad 20
2. No sound justification exists for overruling the relevant holdings in *McConnell* 22
Conclusion 23

TABLE OF AUTHORITIES

Cases:

Abood v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) 13
Austin v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) ..... *passim*

Cases—Continued: Page

Buckley v. *Valeo*, 424 U.S. 1 (1976) 11
Caperton v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) 14
Colorado Right to Life Comm., Inc. v. *Coffman*, 498 F.3d 1137 (10th Cir. 2007) 3
FEC v. *Beaumont*, 539 U.S. 146 (2003) 15
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 3, 7, 9, 12, 13, 14
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982) 8, 9, 12, 15
FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 4, 22
Grojean v. *Commissioner*, 248 F.3d 572 (7th Cir. 2001) 10
McConnell v. *FEC*:
251 F. Supp. 2d 176 (D.D.C.), aff'd in part and rev'd in part, 540 U.S. 93 (2003) 8, 9, 10, 14, 20
540 U.S. 93 (2003) 1, 14, 15, 19, 20, 21
Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972) 8
Randall v. *Sorrell*, 548 U.S. 230 (2006) 4
State v. *Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000) 18
United States v. *IBM Corp.*, 517 U.S. 843 (1996) 5, 19
United States v. *International Union UAW*, 352 U.S. 567 (1957) 7
United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) 13

Constitution, statutes and regulation: Page

U.S. Const. Amend. I 10
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81:
§ 203, 116 Stat. 91 ..... 4, 15, 19, 20
§ 403(a), 116 Stat. 113 23
Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159 7
2 U.S.C. 434(f)(3) 20
2 U.S.C. 441b 8, 11, 14, 15, 16, 20
2 U.S.C. 441b(b)(2) 20
2 U.S.C. 441b(b)(2)(C) 20
Ariz. Rev. Stat. Ann. (2006):
§ 16-917(C) 18
§ 16-919 18
§ 16-920 18
11 C.F.R. 114.15 22

Miscellaneous:

147 Cong. Rec. (2001):
p. 4895 18
p. 4899 18
pp. 4905-4907 18
p. 5003 18
Alicia D. Evans, *A Requiem for the Retail Investor?*, 95 Va. L. Rev. 1105 (2009) 13

Miscellaneous—Continued: Page

FEC:

Electioneering Communication Summary (visited July 23, 2009) <http://www.fec.gov/finance/disclosure/ECSummary.shtml> 23

FEC Form 9 (2007) <http://www.fec.gov/pdf/forms/fecfrm9.pdf> 22

Summary of PAC Activity (Apr. 24, 2009) <http://www.fec.gov/press/press2009/20090415PAC/documents/4sumhistory 2008_000.pdf> 16

63 Fed. Reg. 29,359-29,360 (1998) 3

Dee J. Hall, *High Court Races as Barroom Brawls*, Wis. State J., Apr. 6, 2008, at A1 10

Thomas R. Phillips, *The Merits of Merit Selection*, 32 Harv. J.L. & Pub. Pol'y 67 (2009) 10

Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871 (2004) 12

In the Supreme Court of the United States

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CITIZENS UNITED, APPELLANT

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SUPPLEMENTAL BRIEF FOR THE APPELLEE

The Federal Election Commission (FEC) respectfully submits this supplemental brief in response to this Court's order of June 29, 2009. For the reasons set forth below, this case is an unsuitable vehicle in which to re-examine either *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), or the relevant portion of *McConnell* v. *FEC*, 540 U.S. 93 (2003). If the Court reaches those questions, however, it should not overrule either decision. The decisions in *Austin* and *McConnell* were correct; a reversal of those decisions would likely invalidate federal legislation that has restricted corporate electioneering for over 60 years, as well as similar legislation enacted by many States; and basic principles of *stare decisis*, including most notably concern with reliance interests, demand adherence to precedent in this case.

A. This Case Is An Unsuitable Vehicle For Re-Examination Of *Austin* And *McConnell*

A decision overruling *Austin* and the relevant portion of *McConnell* would call into question the constitutionality of all federal and state regulation of all independent corporate electoral advocacy, including a federal law dating back to 1947 and the laws of dozens of States. Overruling *Austin* and *McConnell* would fundamentally alter the legal rules governing participation of corporations—including the Nation's largest for-profit corporations—in electoral campaigns, and would make vast sums of corporate money available for overt electioneering. At least three idiosyncratic features of this case make it a particularly unsuitable vehicle for considering a course of action that would have such far-reaching consequences.

1. Appellant is a nonprofit corporation whose stated purpose is expressly ideological: "to promote the social welfare through informing and educating the public on conservative ideas and positions on issues." J.A. 11a. In addition, appellant has represented to this Court that the funds used to finance *Hillary: The Movie* were raised "overwhelmingly" from individual donations. Appellant's Br. 29-34. For those reasons, appellant is, according to its own self-description, a distinctly atypical corporation.

These special features of appellant make it an inappropriate prism through which to view the world of corporate electioneering. A decision recognizing a constitutional right for large for-profit corporations to use their general treasuries, as opposed to segregated funds (*i.e.*, PACs), to advocate the election or defeat of candidates for public office would have potentially avulsive consequences. And because most such corporations engage in

businesses that are essentially unrelated to the dissemination of political ideas, restrictions on their electioneering intrude less significantly on their performance of core functions than is true of a nonprofit advocacy corporation like appellant. Even many nonprofit corporations, including the plaintiff in *Austin*, see 494 U.S. at 664, receive much more substantial funding from business corporations than appellant claims to receive (at least for the financing of *Hillary*). Any re-examination of the constitutional rules governing electoral advocacy by for-profit corporations, or by nonprofit corporations that are substantially financed by for-profit businesses, should occur in a case to which such a corporation is a party.[1]

2. The question the Court has set to the parties is not appropriately raised in this case. Early in this litigation, appellant asserted a facial challenge to BCRA

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[1] This Court has held that certain small, ideologically-oriented corporations are constitutionally entitled to use their treasury funds for independent electoral advocacy if, *inter alia*, they have a policy against accepting contributions from business corporations or labor unions. See *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986) (*MCFL*); FEC Br. 3. Thus, corporations having the attributes that appellant says it possesses—*i.e.*, corporations that rely principally on individual donations but that nevertheless fail to qualify for the *MCFL* exception—are likely to be both rare and unrepresentative of the corporations that would be most substantially affected by a decision overruling *Austin* and *McConnell*. Some courts before *McConnell*, and one court afterward, have held that a corporation may claim the *MCFL* exemption even if it raises *de minimis* sums from corporate donations or business revenue. See, *e.g.*, *Colorado Right to Life Comm., Inc.* v. *Coffman*, 498 F.3d 1137, 1148-1151 (10th Cir. 2007); see also 63 Fed. Reg. 29,359-29,360 (1998) (discussing disagreement among lower courts). If appellant's overall operations are financed "overwhelmingly" by individual donations, as it asserts is true of the financing of *Hillary*, appellant would appear to be covered by these decisions.

Section 203, of the kind decided in *McConnell*. J.A. 23a-24a. Appellant subsequently announced, however, that it "inten[ded] to abandon th[at] count," 07-CV-2240 Docket entry No. 52, at 1-2 (D.D.C. May 16, 2008), and the parties stipulated to dismiss the facial challenge. See *id.* Nos. 53 (May 22, 2008), 54 (May 23, 2008). Appellant's jurisdictional statement did not urge that either *Austin* or *McConnell* should be overruled. See FEC Br. 33-34.

Appellant's merits briefs contained, in total, only two paragraphs and a footnote arguing that *Austin* should be overruled. See Appellant's Br. 30-31; Appellant's Reply Br. 16 n.7. Those briefs did not discuss considerations of *stare decisis*, and they did not urge the Court to overrule the relevant portion of *McConnell*. That is an even more "incomplete presentation" than the "afterthought" assault on another campaign-finance principle that this Court rejected three Terms ago. *Randall* v. *Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring in part and concurring in the judgment); see FEC Br. 34-35. At oral argument, moreover, appellant effectively abandoned its challenge to *Austin* by (a) acknowledging that General Motors can constitutionally be banned from broadcasting express electoral advocacy and (b) expressly "accept[ing] the Court's decision in" *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), under which a corporation may use treasury funds for candidate-related broadcast advertising only when the advertising is not the functional equivalent of express electoral advocacy. Tr. of Oral Arg. 9, 55.

Rather than mounting any sustained challenge to *Austin* or the relevant portion of *McConnell*, appellant argued (1) that it received insubstantial funding from business corporations to produce *Hillary*, (2) that *Hil-*

lary is a feature-length film meant to be distributed through video-on-demand, and (3) that *Hillary* does not contain express advocacy or its functional equivalent. Appellant's own litigation choices make this case an unsuitable vehicle for reconsidering *Austin* and *McConnell*, particularly given the far-reaching consequences that overruling those decisions would entail. Cf., *e.g.*, *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996). When a plaintiff asserts only as-applied challenges to a statute, the usual course is to consider only those challenges. If one or more has merit, the Court should reverse the judgment on that ground. If, as here, those challenges lack merit or are procedurally barred, the proper disposition is to affirm—not to question the statute's facial constitutionality.

3. Appellant was a plaintiff in *McConnell*, joining with other parties to challenge BCRA's restrictions on the use of corporate treasury funds for electioneering communications. Br. for Appellants Paul *et al.* at 5, *McConnell*, *supra* (No. 02-1747). Appellant's brief cited *Austin* only in a single footnote, which did not urge that the decision be overruled. *Id.* at 26 n.9. Appellant's party status in *McConnell*, combined with its failure to urge the overruling of *Austin* during that massive litigation conducted to resolve facial constitutional challenges to BCRA, would render particularly inappropriate a decision by the Court to reverse either of those decisions in this litigation.

B. The Court's Decision In *Austin* Was Correct And Should Not Be Overruled

The Court in *Austin* held that corporations may constitutionally be prohibited from financing electoral advocacy with funds derived from business activities. That

holding was correct when issued and should not be overturned now. Use of corporate treasury funds for electoral advocacy is inherently likely to corrode the political system, both by actually corrupting public officeholders and by creating the appearance of corruption. Moreover, such use of corporate funds diverts shareholders' money to the support of candidates whom the shareholders may oppose.

Congress's interest in preventing these pernicious consequences is compelling, and Congress has chosen a valid means of achieving it—requiring a corporation to fund its electoral advocacy through the voluntary contributions of officers and shareholders who agree with its political statements. For the Court to overrule *Austin* now would open the political system, at every level of our representative democracy, to a form of corporate influence that federal law has proscribed since 1947. And it would do so in direct affront to Congress, which conducted years of factfinding and debate in reliance on *Austin*'s holding that corporations may constitutionally be required to finance electoral advocacy with funds donated specifically for political purposes.

1. The Court in Austin *correctly held that business corporations may be barred from using treasury funds for electioneering, either directly or through conduits*

The Court in *Austin* rested its decision on three basic propositions. *First*, electoral advocacy by for-profit corporations poses distinct risks, both to the public interest and to the corporation's shareholders, that are not implicated by individual electioneering. 494 U.S. at 658-660. *Second*, electoral advocacy by non-profit, non-stock corporations poses similar dangers if such corporations are allowed to serve as conduits for spending by

for-profit corporations. *Id.* at 664. *Third*, the option of engaging in electoral advocacy through a separate segregated fund is for most corporations a constitutionally sufficient alternative to the use of general treasury monies. *Id.* at 660-661. In endorsing those propositions, *Austin* is scarcely an outlier. Rather, those holdings are consistent with decades of federal legislation, as well as with this Court's case law both before and after *Austin* was decided.

a. i. Congress first recognized the special problem of corporate money in electoral politics more than a century ago, in 1907, when it banned corporate contributions to federal election campaigns. Congress similarly banned union contributions during World War II. In the wake of that ban, a dispute arose over whether the statutory term "contributions" encompassed independent expenditures. Extensive study of the efficacy of those prohibitions on corporations and unions led Congress to conclude that independent expenditures had frequently been used to evade the contribution bans. See *United States* v. *International Union UAW*, 352 U.S. 567, 579-584 (1957) (*UAW*).

Accordingly, in the Taft-Hartley Act, Congress barred both corporations and unions from using their treasury funds for "expenditure[s]" on federal elections. Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159; see *UAW*, 352 U.S. at 589 (prohibition applies to "the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party"); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-249 (1986) (*MCFL*) (construing the term "expenditure," in the context of regulating independent candidate-related communications, to require "express advocacy" of the candidate's election

or defeat). Congress has since re-enacted the expenditure prohibition, while expressly authorizing corporations and unions to establish and administer separate segregated funds for election-related spending. See *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 409-412 (1972) (discussing 1971 revision); 2 U.S.C. 441b. "This careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 209 (1982) (*NRWC*) (citation and internal quotation marks omitted).

ii. Corporate participation in candidate elections creates a substantial risk of corruption or the appearance thereof. Corporations can use electoral spending to curry favor with particular candidates and thus to acquire undue influence over the candidates' behavior once in office. See *Austin*, 494 U.S. at 678 (Stevens, J., concurring) (concluding, with respect to "corporate participation in candidate elections," that "the danger of either the fact, or the appearance, of *quid pro quo* relationships provides an adequate justification for state regulation of both expenditures and contributions"). The record in *McConnell*—which is by far the most extensive body of evidence ever compiled on these issues—indicated that, during the period leading up to BCRA's enactment, federal office-holders and candidates were aware of and felt indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 623-624 (D.D.C. 2003) (Kollar-Kotelly, J.); see also *id.* at 555-560 (discussing evidence).

The nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance of such corruption. Even minor modifications in complex legislation have great potential to benefit or burden particular companies, industries, or sectors. The economic stake of corporations in the nuances of such matters as industry-specific tax credits, subsidies, or tariffs generally dwarfs that of any set of individuals. And when those benefits can be obtained through a game of "pay to play," corporations are better suited than individuals to afford the ante. Corporate managers need not assemble a coalition of the like-minded; they can draw on the firm's entire capitalization without seeking the approval of shareholders. If only businesses can afford the investment necessary to pursue rents in this way, only businesses can reap the (even larger) reward. See, *e.g.*, *McConnell*, 251 F. Supp. 2d at 491, 511-512 (Kollar-Kotelly, J.). And the public perception that businesses reap such rewards from legislators whom they supported in campaigns creates an appearance of corruption that corrodes popular confidence in our democracy. *Id.* at 517.

Corporations, moreover, are artificial persons endowed by government with significant "special advantages" that no natural person possesses. *NRWC*, 459 U.S. at 207. Well before *Austin*, this Court recognized the need for "particularly careful regulation" to limit the effect of those corporate special advantages on the political process. *Id.* at 209-210; see *id.* at 207; *MCFL*, 479 U.S. at 256-257. Because corporations do not age, retire, or die, they can amass great wealth from their business activities even while changing owners, directors, and officers as needed. Corporations also benefit from lim-

ited liability; by permitting investors to contribute without taking responsibility for the corporations' actions, state law promotes corporations' accumulation of investment capital. See, *e.g.*, *Grojean* v. *Commissioner*, 248 F.3d 572, 575 (7th Cir. 2001) (Posner, J.). The government may take into account in its regulatory framework these state-created "advantages unique to the corporate form." *Austin*, 494 U.S. at 665.

A restriction on individuals' independent election-related spending, moreover, would intrude far more deeply on First Amendment values because it would prevent individuals from spending their own money to express their own electoral preferences. That is not the case with corporate spending, which does not reflect the personal views of the officers (who cannot appropriately spend corporate money for purposes of personal self-expression), the customers or shareholders (whose political preferences officers do not and generally cannot ascertain), or the corporation itself (which is an artificial entity that has no "beliefs" to express). Thus, while restrictions on the use of treasury funds for electioneering may prevent corporate officers from utilizing one effective means to further the corporations' economic interests, those restrictions do not hinder the expression of any natural person's ideas.[2]

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[2] As Judge Kollar-Kotelly explained in her opinion in *McConnell*, corporations during the pre-BCRA period frequently financed advertisements that praised or criticized candidates based on issues unrelated to the mission of the financing corporation. 251 F. Supp. 2d at 613-614. A similar phenomenon has been observed in state judicial elections, where business and union advertising often focuses on candidates' records on crime rather than on issues of special concern to the corporate or union speaker. See, *e.g.*, Thomas R. Phillips, *The Merits of Merit Selection*, 32 Harv. J.L. & Pub. Pol'y 67, 81 & n.63 (2009); Dee J. Hall, *High Court Races as Barroom Brawls*, Wis. State J., Apr. 6, 2008,

iii. The Court did not decide in *Austin* or *McConnell* whether the compelling interest in preventing actual or apparent corruption provides a constitutionally sufficient justification for prohibiting the use of corporate treasury funds for independent electioneering. Nor did the Court's previous decisions resolve that question. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court struck down an independent-expenditure limit that applied to all persons, concluding that "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 46. Whatever the accuracy of that assessment with respect to *individual* independent expenditures as of 1976, the record compiled in *McConnell* indicated that *corporate* spending on candidate-related speech, even if conducted independently of candidates, had come to be used as a means of currying favor with and attempting to influence federal office-holders. If for-profit corporations were permitted to use treasury funds to finance all forms of candidate-related expression—both everything permissible before BCRA *and* the express advocacy that has long been forbidden by 2 U.S.C. 441b—the risk of corruption and the appearance of corruption would only increase.

If the Court regards the fact or extent of that risk as uncertain, that doubt provides no ground for overruling *Austin*. Nor does the conclusion of the *Buckley* Court, offered 33 years ago without specific consideration of the distinct risks posed by *corporate* electioneering, pro-

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at A1 (describing corporate-funded advertisement calling state judge "Loophole Louie"). That pattern of behavior reinforces the understanding that, for corporations and unions, electoral advocacy is a means to an end rather than an expression of political conviction.

vide a sound basis for discounting the import of the massive and much more recent *McConnell* record. Rather, if the Court concludes that the proper disposition of this case turns on the likelihood that unrestricted corporate electoral advocacy would lead to actual or apparent corruption, the Court should remand the case for evidentiary proceedings in the district court.

iv. Restrictions on the use of treasury funds for corporate or union electioneering also "protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208. Even before *Austin*, this Court had recognized the legitimacy of that interest. See *ibid.*; *MCFL*, 479 U.S. at 260. See generally Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L.J. 871, 928-930 (2004) (explaining that support for the Taft-Hartley expenditure limitation was based in large part on the need to protect dissenting union members and shareholders). Persons who buy shares in for-profit corporations entrust money to the corporations' managers because of their business acumen, not their political ideology, and the purchase of corporate stock does not imply any intent to subsidize electoral advocacy.

If *Austin* were overruled, investors could not practicably divest from or avoid acquiring interests in corporations that engage in electioneering. Investors in mutual funds and beneficiaries of pension funds cannot easily monitor election-related expenditures by the various corporations in which the funds invest over time. And an individual's decision to eschew all mutual funds that might invest in a particular corporation's shares could

substantially limit his investment options. Even for the shrinking minority of investors who own shares directly, see Alicia D. Evans, *A Requiem for the Retail Investor?*, 95 Va. L. Rev. 1105, 1105 (2009) (noting that "retail investors own less than 30%" of the stock of U.S. corporations), keeping track of the corporation's electioneering may be difficult, see *Austin*, 494 U.S. at 674 n.5 (Brennan, J., concurring), and the capital-gains tax will often impose a financial disincentive to divestment.

This Court has approved protections against the use of investors' money without their consent to finance speech with which they disagree, as well as protections against the use of compulsory union dues for political purposes. *MCFL*, 479 U.S. at 260 (noting the Court's "acknowledg[ment of] the legitimacy of this concern" in both corporate and union contexts). Indeed, in the union context, the Court has recognized that the use of funds exacted from an individual for political or ideological messages with which that individual disagrees can itself be a First Amendment injury. *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 235-236 (1977); cf. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 410-411 (2001). Although an investor in corporate stock has no similar constitutional *right* to insist that the funds he contributes not be used for electoral advocacy, Congress and state governments may appropriately act to protect shareholders' interests in avoiding unwanted subsidization of electioneering.

b. For the foregoing reasons, Congress and state legislatures may constitutionally prohibit for-profit corporations from using their general treasuries (as opposed to segregated funds, or PACs) for electoral advocacy. In order to prevent those corporations from accomplishing the same purpose indirectly, Congress and

the States may also forbid nonprofit corporations from engaging in electoral advocacy with funds received from for-profit corporations. See *Austin*, 494 U.S. at 664; *id.* at 673-674 (Brennan, J., concurring); *MCFL*, 479 U.S. at 262, 264.

In *MCFL*, the Court identified a limited class of corporations that are constitutionally exempt from Section 441b's prohibition on the use of corporate treasury funds for express advocacy because their political spending does not raise the dangers at which the prohibition is directed. 479 U.S. at 256-265. That exemption is available only to nonprofit corporations that, *inter alia*, decline to accept contributions from business corporations or labor unions. *Id.* at 264; see *McConnell*, 540 U.S. at 211; *Austin*, 494 U.S. at 664; note 1, *supra*. The Court in *MCFL* explained that this limitation on the scope of the exemption "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." 479 U.S. at 264.

To extend a constitutional exemption to *all* nonprofit corporations, including those (like the plaintiff in *Austin*, see 494 U.S. at 664) that accept substantial funding from business corporations, would provide a ready means for business corporations to circumvent the ban on their use of treasury funds for direct electoral advocacy. The record compiled in *McConnell* revealed that, even when business corporations could lawfully finance candidate-related advertisements (without express advocacy) in their own names, they often chose instead to do so "while hiding behind dubious and misleading names" and straw organizations. *McConnell*, 540 U.S. at 196-197 (quoting *McConnell*, 251 F. Supp. 2d at 237); cf. *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2257 (2009) ("And For The Sake Of The Kids"). If this

Court were to hold that the challenged restrictions on corporate electioneering are constitutional as applied to for-profit corporations, but that nonprofit corporations are categorically exempt from those restrictions, the incentive to use nonprofits as conduits would be substantially increased.

c. "[U]nder BCRA," as under the pre-existing limits on corporate electoral advocacy imposed by 2 U.S.C. 441b, "corporations and unions may not use their general treasury funds" for electioneering, but they may "organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204; see *NRWC*, 459 U.S. at 201. Any shareholder or executive can voluntarily contribute to a corporation's PAC. BCRA Section 203, like Section 441b in its pre-BCRA form, thus restricts the manner in which funds for electioneering may be raised rather than the speech in which the corporation may engage. It is therefore "'simply wrong' to view" those provisions "as a 'complete ban' on expression rather than a regulation." *McConnell*, 540 U.S. at 204 (quoting *FEC* v. *Beaumont*, 539 U.S. 146, 162 (2003)).

The requirement that corporations and unions conduct their electioneering through PACs furthers the compelling government interests described above while allowing meaningful corporate and union participation in electoral campaigns. By ensuring that corporate electioneering is funded solely by willing donors, the PAC-financing requirement prevents corporations from acquiring undue electoral influence—with all its potential for actual or apparent corruption of office-holders—through the special state-created advantages of the corporate structure. The requirement also ensures that individuals may invest in shares of business corporations

without subsidizing electoral communications with which they disagree.

The PAC option has proved to be a workable and effective mechanism by which individuals (including individuals affiliated with corporations and unions) who wish to contribute to political activity can pool their resources for effective electoral advocacy. During the 2007-2008 election cycle, federal PACs raised $1.2 billion, of which $840 million was raised by corporations' and unions' separate segregated funds. See FEC, *Summary of PAC Activity* (Apr. 24, 2009) <http://www.fec.gov/press/press2009/20090415PAC/documents/4sumhistory2008_000.pdf>. And although the formation of a PAC does entail some administrative burden, appellant has already chosen to incur that burden: it has maintained a PAC for 15 years. J.A. 226a.

2. The decision in* Austin *ratified a longstanding principle of federal and state election law on which Congress has subsequently relied and that should not now be abandoned

a. As explained above (see p. 7, *supra*), Congress has prohibited corporate treasury contributions to federal candidates since 1907, and since 1947 it has barred the use of corporate treasury funds for independent expenditures in federal election campaigns. That longstanding congressional judgment, on a matter (the conduct of federal elections) as to which federal legislators have particular expertise, is entitled to this Court's respect. At the time *Austin* was decided, moreover, 20 States already barred electioneering expenditures by corporations. J.S. at 16 n.13, *Austin*, *supra* (No. 88-1569). Like 2 U.S.C. 441b, many of those state regimes (including the Michigan law at issue in *Austin*) forbade

the use of corporate treasury funds for electioneering but authorized corporations and unions to create and administer segregated funds to finance election-related spending. Because overruling *Austin* would negate a longstanding and central principle of federal and state campaign-finance law, concerns of *stare decisis* have especial force.

Precisely because federal restrictions on corporate electioneering have been in place for so long, the consequences of a decision recognizing a constitutional right for all corporations to use general treasury funds for electoral advocacy are difficult to predict. During the 2007-2008 election cycle, however, FEC-registered political parties spent $1.5 billion, and federal PACs spent $1.2 billion, while the *Fortune* 100 companies had combined revenues of $13.1 trillion and profits of $605 billion. If those 100 companies alone had devoted just one percent of their profits (or one-twentieth of one percent of their revenues) to electoral advocacy, such spending would have more than doubled the federally-reported disbursements of all American political parties and PACs combined. Cf. *Austin*, 494 U.S. at 659 (noting concern about "corporate domination of the political process"). That amount of corporate cash pouring into the political system, as earlier suggested, could dramatically increase the reality and appearance of *quid pro quo* corruption. Even the possibility of such a result counsels restraint in reversing prior decisions.

b. Particularly once *Austin* was decided, Congress and state legislatures were entitled to take as given that corporations could constitutionally be barred from using treasury funds for at least some forms of electoral advocacy. Based on that understanding, Congress devoted extraordinary time and energy to the consideration of

potential refinements to the federal campaign-finance regime. The bills that culminated in BCRA were debated for weeks and amended dozens of times during the seven years between initial introduction and BCRA's ultimate enactment. Those legislative debates reflected individual Members' understanding of, and careful attention to, this Court's decision in *Austin*. See, *e.g.*, 147 Cong. Rec. 4895 (2001) (statement of Sen. Snowe, co-sponsor of Section 203); *id.* at 4899, 4905-4907 (views of legal scholars); *id.* at 5003 (statement of Sen. Feingold).[3]

Austin itself involved express electoral advocacy, see 494 U.S. at 714 (appendix to opinion of Kennedy, J., dissenting) ("Elect Richard Bandstra"), and the Court did not delineate precisely which corporate-funded communications can properly be treated as electioneering. But given this Court's decision in *Austin*, Congress was entitled to conclude that it had *some* authority to act in this area. Overruling *Austin* now would tell Congress, long after the fact, that its extraordinary effort to craft a constitutionally acceptable standard was a pointless endeavor.

c. Numerous provisions of BCRA, including its definition of "electioneering communication" and its ban on the use of corporate treasury funds for communications falling within that definition, were promptly challenged by a broad range of plaintiffs, including appellant. The parties compiled a voluminous record, and the proceedings in this Court included an extraordinary four-hour

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[3] On the state level, use of corporate treasury funds for electioneering is currently prohibited by at least 22 States (and strictly limited by two more), including some that have adopted their statutes since *Austin* and in reliance on it. See, *e.g.*, *State* v. *Alaska Civil Liberties Union*, 978 P.2d 597, 608-610 (Alaska 1999), cert. denied, 528 U.S. 1153 (2000); Ariz. Rev. Stat. Ann. §§ 16-917(C), 16-919, 16-920 (2006).

oral argument. The plaintiffs who challenged Title II of BCRA, however, did not urge the overruling of *Austin*, and they did not dispute the government's general authority to prohibit the use of corporate treasury funds for express electoral advocacy. Rather, they contended that the challenged BCRA provisions unduly burdened corporate speech that mentions federal candidates but is *not* calculated to influence federal elections. See *McConnell*, 540 U.S. at 205-206. The *McConnell* plaintiffs' acceptance of *Austin* as controlling precedent, during the expedited proceeding authorized by Congress to facilitate prompt clarification of the rules that govern in this area, underscores the absence of any "special justification," *e.g.*, *IBM Corp.*, 517 U.S. at 856 (citation omitted), for overruling *Austin* now.

C. The Relevant Holdings Of *McConnell* Were Correct And Should Not Be Overruled

Over the many decades that Congress required corporations to fund express advocacy using voluntary PAC contributions, corporations increasingly came to use their treasuries to fund advertisements that omitted "magic words" of express advocacy but that functioned no differently. Voluminous evidence confirmed that the interests recognized in *Austin* extend to election-eve communications that are the functional equivalent of express advocacy. The facts have not changed, and there is no sound basis for rejecting the *McConnell* Court's determination that BCRA Section 203 is constitutional.

1. *The Court in* McConnell *correctly held that express advocacy and its functional equivalent may be treated alike, and that BCRA's definition of "electioneering communication" is not facially overbroad*

After extensive study and evidence-gathering over several sessions, Congress concluded that the existing restriction on corporation- and union-funded express advocacy had become ineffective. "Corporations and unions spent hundreds of millions of dollars" on advertising "specifically intended to affect election results." *McConnell*, 540 U.S. at 127. Those advertisements overtly attacked the character, qualifications, and fitness for office of federal candidates, but they were not subject to Section 441b under then-prevailing law because they did not include "magic words" of express advocacy. The record of the *McConnell* litigation amply bore out Congress's conclusions. See *id.* at 126, 193; *McConnell*, 251 F. Supp. 2d at 526-568 (Kollar-Kotelly, J.) (collecting advertisements); *id.* at 875-889 (Leon, J.) (same).

BCRA Section 203 was a targeted response. Consistent with the Court's recognition in *Austin* of the compelling governmental interests that justify barring corporations and unions from spending their general treasury funds on electioneering, Section 203 applied the same financing restriction to "electioneering communications," a term defined (and temporally limited) to capture advertisements that were electoral advocacy in substance if not in form. 2 U.S.C. 434(f)(3), 441b(b)(2). If corporations or unions wish to finance electioneering communications, they may do so through their separate segregated funds. 2 U.S.C. 441b(b)(2)(C).

As explained above, the plaintiffs in *McConnell* argued that BCRA's definition of "electioneering communi-

cation" encompasses an unduly broad range of speech that mentions federal candidates but is not intended to influence electoral outcomes. The Court rejected that facial challenge. Based on a voluminous record, the Court concluded that "the vast majority" of advertisements encompassed by the electioneering communication provision had no functional difference from advertisements regulated as express advocacy, and that the previously existing statutory dividing line had proved to be a "functionally meaningless" set of magic words. *McConnell*, 540 U.S. at 193, 206; see *id.* at 126-127, 131-132, 193-194, 206-207.

The relevant holdings in *McConnell* rest on two subsidiary conclusions. First, the Court held that the former "express advocacy" test was not constitutionally compelled, and that Congress could permissibly restrict the use of corporate treasury funds for communications that do not contain "magic words" but that are calculated to affect electoral outcomes. Second, the Court held that BCRA's definition of "electioneering communication" is a sufficiently accurate proxy for this kind of electoral intent to withstand a facial challenge. No sound basis exists for reversing either of those conclusions now. If, under *Austin*, corporations may constitutionally be forbidden from using treasury funds to finance advertisements that expressly urge the election or defeat of federal candidates, then they likewise have no constitutional right to use treasury funds for the "functional equivalent" of express advocacy. And appellant has offered no new empirical evidence casting doubt on the *McConnell* Court's conclusion that "the vast majority" of "electioneering communications," as defined by the statute, were indeed calculated to influence electoral outcomes.

2. No sound justification exists for overruling the relevant holdings in McConnell

Even if the relevant portion of *McConnell* were open to more substantial question, there are at least three reasons—in addition to the general importance of *stare decisis* and appellant's previous failure to urge overruling of that decision—for the Court to decline to overrule *McConnell* now.

a. This Court's intervening decision in *WRTL* has eliminated any significant risk that BCRA's restrictions on corporate financing of "electioneering communications" will be applied to speech that is not actually calculated to influence federal elections. In *WRTL*, the Court concluded that BCRA's PAC-financing requirement is constitutional as applied to particular communications if, but only if, a communication is the "functional equivalent" of express advocacy, 551 U.S. at 465 (opinion of Roberts, C.J.)—*i.e.*, if the communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.* at 470. Thus, if some number of "electioneering communications" are *not* the functional equivalent of express advocacy, the as-applied constitutional exemption recognized in *WRTL* (and subsequently codified by the FEC, see 11 C.F.R. 114.15) ensures that BCRA Section 203 does not apply to those communications.

b. The FEC has provided a simple mechanism for corporations and unions to claim that a particular electioneering communication is permissible under *WRTL*. See *FEC Form 9* (2007) <http://www.fec.gov/pdf/forms/fecfrm9.pdf>. In the short time between the FEC's implementation of *WRTL* and the 2008 election, corporations and unions reported spending *$108.5 million* on electioneering communications that fell within

the *WRTL* exemption. See FEC, *Electioneering Communication Summary* (visited July 23, 2009) <http://www.fec.gov/finance/disclosure/ECSummary.shtml>. That experience suggests that the standard articulated in *WRTL* has not chilled the use of corporate treasury funds for speech that falls within BCRA's definition of "electioneering communication" but is not the functional equivalent of express advocacy.

c. Congress anticipated that constitutional challenges to BCRA would be brought, and it established a mechanism for expedited review of such challenges, including a right of direct appeal to this Court. See BCRA § 403(a), 116 Stat. 113. In *McConnell*, the parties compiled a massive record, and the district court and this Court issued voluminous opinions resolving a variety of constitutional challenges to the statute. Congress's evident intent to provide prompt clarification of the rules that apply in the campaign-finance context, and the extraordinary resources devoted by the courts and the parties to the *McConnell* litigation, weigh heavily against overruling a significant aspect of that decision now.

CONCLUSION

For the foregoing reasons, as well as those stated in the answering brief and at oral argument, the judgment of the district court should be affirmed.

Respectfully submitted.

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SUPPLEMENTAL BRIEF

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CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal
From The United States District Court
For The District Of Columbia

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QUESTION PRESENTED

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?

RULE 29.6 STATEMENT

The corporate disclosure statement included in the Brief for Appellant remains accurate.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

SUPPLEMENTAL BRIEF FOR APPELLANT 1

I. *AUSTIN* WAS WRONGLY DECIDED AND ITS SPEECH-SUPPRESSING ANTI-DISTORTION RATIONALE SHOULD BE ABANDONED 4

A. *Austin* Was A Poorly Reasoned Departure From *Buckley* And Other First Amendment Precedent 5

B. There Are No Reliance Interests Or Other Prudential Considerations That Militate Against Overruling *Austin* 14

II. A REEXAMINATION OF *AUSTIN*'S ANTI-DISTORTION RATIONALE IS ESSENTIAL TO THE PROPER DISPOSITION OF THIS CASE 15

III. BCRA § 203 IS UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) 20

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 6, 7, 9, 11, 21

Davis v. FEC, 128 S. Ct. 2759 (2008) 3, 8, 9

FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986) 8

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 2, 7, 13, 21

FEC v. Wisc. Right to Life, Inc., 127 S. Ct. 2652 (2007) ..... *passim*

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 3, 8, 9, 10, 12, 14

Hicks v. Miranda, 422 U.S. 332 (1975) 19

Jones v. United States, 362 U.S. 257 (1960) 15

McConnell v. FEC, 540 U.S. 93 (2003) 14, 15, 19, 21

Michigan v. Jackson, 475 U.S. 625 (1986) 15

Montejo v. Louisiana,
129 S. Ct. 2079 (2009) 5, 15

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 20

Morey v. Doud,
354 U.S. 457 (1957) 15

NAACP v. Button,
371 U.S. 415 (1963) 4

New Orleans v. Dukes,
427 U.S. 297 (1976) (per curiam) 15

Payne v. Tennessee,
501 U.S. 808 (1991) 4, 14

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 21

Thomas v. Chicago Park Dist.,
534 U.S. 316 (2002) 17

United States v. Grubbs,
547 U.S. 90 (2006) 20

United States v. Salvucci,
448 U.S. 83 (1980) 15

Vance v. Terrazas,
444 U.S. 252 (1980) 20

Virginia v. Hicks,
539 U.S. 113 (2003) 18

Wisc. Right to Life, Inc. v. FEC,
546 U.S. 410 (2006) 14

STATUTES

Mo. Rev. Stat. § 130.029 10

2 U.S.C. § 431(h) (1975) 6

2 U.S.C. § 434(f)(3)(B) 12

2 U.S.C. § 437g(d) 16

2 U.S.C. § 437h note 17

2 U.S.C. § 441a-1 8

2 U.S.C. § 441a(a)(7)(B)(i) 22

18 U.S.C. § 608(e)(1) (1975) 6

REGULATIONS

11 C.F.R. § 114.15(b)(2) 17

OTHER AUTHORITIES

David N. Bossie, *Hillary: The Politics of Personal Destruction* (2008) 2

148 Cong. Rec. S2142 (2002) 16

FEC Advisory Op. 2008-15 (Nov. 24, 2008) 18

SUPPLEMENTAL BRIEF FOR APPELLANT

For the proper disposition of this case, the Court should reject the anti-distortion rationale for suppressing corporate political speech formulated in *Austin* and relied upon in *McConnell*—which is the only justification the government has advanced for prohibiting Video On Demand distribution of *Hillary*.

To answer Citizens United's argument that Section 203 of BCRA could not be constitutionally applied to a feature-length documentary film distributed through Video On Demand, the government has uncloaked an arresting conception of its own power to suppress the political speech of corporations and labor unions: The government contends that, once a communication's content has been determined by the FEC to constitute the functional equivalent of express advocacy, the First Amendment permits the government to ban any corporation or union from engaging in that speech—unless the government has qualified the organization as an "*MCFL*" or a member of the "institutional media." *See* Tr. 27. The communication's format, medium, and audience have "no constitutional significance." *Id.* at 41.

Thus, the government reasons, the First Amendment permits Congress to criminalize not just Citizens United's proposed Video On Demand distribution of *Hillary*, but also "putting [the movie] on its Web site or putting it on YouTube," or even "providing DVDs . . . in a public library." Tr. 27, 39. And if Congress wishes to enlarge its superintendence of printed political speech, there would be no First Amendment impediment to making it a felony for a corporation or union to self-publish "a campaign biography that was the functional equivalent of ex-

press advocacy" or otherwise participate in "the overall enterprise of writing then publishing the book" (*id.* at 27, 37)—such as the compendium book that Citizens United authored to accompany *Hillary*. David N. Bossie, *Hillary: The Politics of Personal Destruction* (2008); *see also* J.A. 13a. Indeed, it would be anomalous, according to the government, if it did *not* have the power to prohibit *all* corporate and union communications that constitute the functional equivalent of express advocacy because the government already makes it a felony for corporations and unions to make *any* communication that includes express advocacy—even "a newsletter," "a sign held up in Lafayette Park," or a "500-page book" that includes "vote for X" as its last three words. Tr. 29, 33. This much, the government contends, is "absolutely clear under *Austin*, under *McConnell*." *Id.* at 33.

"Enough is enough." *FEC v. Wisc. Right to Life, Inc.* ("*WRTL II*"), 127 S. Ct. 2652, 2672 (2007) (opinion of Roberts, C.J.). When the government of the United States of America claims the authority to *ban books* because of their *political speech*, something has gone terribly wrong and it is as sure a sign as any that a return to first principles is in order.

The First Amendment provides "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I. Because Section 203 of BCRA abridges speech based on its content, each of its applications is subject to strict scrutiny. *WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.). While the Court has long recognized the "compelling government interest[ ]" in "preventing corruption or the appearance of corruption" (*FEC v. Nat'l Conservative Political Action Comm.* ("*NCPAC*"), 470 U.S. 480, 496-97 (1985)), the government pointedly has not

even attempted to justify its prohibition of the Video On Demand distribution of *Hillary* as necessary to prevent "actual or apparent *quid pro quo* arrangements." *WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.). Nor could it.

The government instead seeks to justify its suppression of Citizens United's political speech as necessary to stamp out a "different type of corruption" identified for the first time in *Austin*: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. Citizens United's film must be suppressed, the government urges, so its "huge corporate treasur[y]" does not "influence unfairly the outcome of elections." *Id.* at 669.

Austin's anti-distortion rationale is antithetical to the First Amendment and incompatible with this Court's precedents. The government does not have any legitimate interest—much less a compelling one—in policing the marketplace of ideas for signs of "distortion," equalizing the relative voice of participants in political discourse, or preventing corporations from influencing the outcome of elections. *See Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776-77 (1978). *Austin* was wrong when it was decided, and this Court's subsequent decisions have further undermined its First Amendment analysis. It should be overruled.

And it should be overruled now, even if this Court concludes (as we have urged) that *Hillary* is *not* the functional equivalent of express advocacy. "First Amendment freedoms need breathing space to

survive" (*NAACP v. Button*, 371 U.S. 415, 433 (1963)), and Citizens United's experience amply demonstrates that whatever "breathing space" the "functional equivalent of express advocacy" framework provides is inadequate. Although, in *WRTL II*, the Court sought to provide a test that "allow[s] parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation" (127 S. Ct. at 2666 (opinion of Roberts, C.J.)), by the time this Court renders its decision, the moment for Citizens United's political message—January 2008—will have long since passed. The FEC's stubborn refusal to "give the benefit of any doubt to protecting rather than stifling speech" (*id.* at 2667) has rendered the existing framework unworkable and requires the Court to examine the antecedent question whether the government's underlying rationale for suppressing Citizens United's documentary film—a rationale that is rooted only in this Court's decision in *Austin*—is sustainable. And, without *Austin*, the government's attempt to suppress Citizens United's political speech collapses.

I. *AUSTIN* WAS WRONGLY DECIDED AND ITS SPEECH-SUPPRESSING ANTI-DISTORTION RATIONALE SHOULD BE ABANDONED.

"[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (internal quotation marks omitted). "This is particularly true in constitutional cases." *Id.* at 828; *see also id.* at 828 n.1 (listing 33 constitutional decisions overruled between 1971 and 1991).

"[T]he relevant factors in deciding whether to adhere to the principle of *stare decisis* include the

antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). Each of these factors weighs strongly in favor of overruling *Austin*.

A. *Austin* Was A Poorly Reasoned Departure From *Buckley* And Other First Amendment Precedent.

Austin effected a dramatic break with this Court's earlier First Amendment jurisprudence. Austin was the *first* case—and, until *McConnell*, the *only* case—to hold that the government has a compelling anti-corruption interest in prohibiting corporations and unions from making independent expenditures to fund candidate-related speech. *Austin*'s holding was a poorly reasoned and jurisprudentially insupportable departure from *Buckley* and this Court's other campaign finance precedent.

1. In *Austin*, the Court upheld a Michigan campaign finance statute that prohibited corporations—including nonprofits, such as the Michigan State Chamber of Commerce—from using their general treasury funds "for independent expenditures in support of, or in opposition to, any candidate in elections for state office." 494 U.S. at 654. The Court reasoned that Michigan had a compelling interest in prohibiting corporate independent expenditures in order to minimize "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. According to the Court, "corporations . . . enjoy legal advantages enhancing their ability to accumulate wealth," and "[t]he desire to counterbalance those

advantages unique to the corporate form is the State's compelling interest." *Id.* at 665 (internal quotation marks omitted). And even though the Chamber's members could withhold their membership fees in response to political activities with which they disagreed, the Court equated the Chamber's members with the "shareholders of a business corporation" and held that the prohibition on independent expenditures was appropriate to protect members who may have an "'economic disincentive'" to withdraw from the organization. *Id.* at 663.

Austin's anti-distortion rationale—suppressing the speech of some speakers to diminish their impact on the marketplace of ideas—is fundamentally inconsistent with this Court's earlier campaign finance jurisprudence. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court held that "independent expenditure ceiling[s] . . . fail[ ] to serve *any* substantial governmental interest in stemming the reality or appearance of corruption in the electoral process," while "heavily burden[ing] core First Amendment expression." *Id.* at 47-48. The Court therefore struck down Section 608(e)(1) of the Federal Election Campaign Act ("FECA"), which prohibited any "person"—including a *corporation*—from spending more than $1,000 per year on "expenditure[s] . . . relative to a clearly identified candidate" for federal office. 18 U.S.C. § 608(e)(1) (1975); *see also* 2 U.S.C. § 431(h) (1975).

In concluding that Section 608(e)(1) did not serve any "substantial"—let alone, compelling—governmental interest, the Court rejected the government's reliance on its interest in preventing *quid pro quo* corruption. The Court explained that the "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only

undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47; *see also NCPAC*, 470 U.S. at 496-97 (there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign").

The Court also dismissed out of hand the government's asserted interest "in equalizing the relative ability of individuals *and groups* to influence the outcome of elections." *Buckley*, 424 U.S. at 48 (emphasis added). The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," the Court explained, "is wholly foreign to the First Amendment." *Id.* at 48-49. "The First Amendment's protection against government abridgment of free expression," the Court continued, "cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49.

2. *Austin*'s three fundamental premises—that (1) the government has a compelling interest in equalizing the relative voices of participants in political discourse, that (2) the First Amendment affords fewer rights to corporations than to individuals, and that (3) prohibitions on corporate expenditures are necessary to protect shareholders—are also impossible to reconcile with a number of post-*Buckley* precedents.

The Court has repeatedly reaffirmed—both before and after *Austin* was decided—that the protections afforded by the First Amendment do not diminish as a speaker's "financial ability to engage in pub-

lic discussion" increases. *See, e.g., FEC v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986) ("Political 'free trade' does not necessarily require that all who participate in the political marketplace do so with exactly equal resources."). Indeed, just last Term, the Court reiterated *Buckley*'s holding that "the interest in equalizing the relative ability of individuals and groups to influence the outcome of elections cannot support a cap on expenditures for express advocacy of the election or defeat of candidates." *Davis*, 128 S. Ct. at 2771 (internal quotation marks omitted). For the same reasons that Congress cannot use expenditure limits to "equaliz[e]" "relative ability . . . to influence" elections, it cannot use differential contribution limits to "level electoral opportunities for candidates of different personal wealth." *Id.* at 2773 (internal quotation marks omitted). The Court therefore invalidated the so-called Millionaire's Amendment of BCRA, 2 U.S.C. § 441a-1, which sought to counteract the "immense aggregations of wealth" at the disposal of self-funded candidates by increasing the limits on contributions to their opponents' campaigns. *See Davis*, 128 S. Ct. at 2774.

And, in *Bellotti*, the Court struck down a Massachusetts statute that severely restricted the right of corporations to make independent expenditures for the purpose of influencing a referendum vote. 435 U.S. at 795. The Court explained that this "type of speech [is] indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." *Id.* at 777. In unequivocal language, the Court concluded that the "inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its sources, whether corporation, association, union, or individual." *Id.*

In addition to reaffirming the absence of a compelling governmental interest in regulating corporate independent expenditures, the Court in *Bellotti* also concluded that the Massachusetts statute was overbroad in relation to the Commonwealth's asserted interest in protecting shareholders from funding political speech with which they disagreed. 435 U.S. at 794. The Court observed that the statute would prohibit corporate speech even where the shareholders had unanimously approved the speech and where the government's purported shareholder-protection rationale was therefore manifestly inapposite. *Id.* The better approach, the Court concluded, was for the "shareholders" to "decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues." *Id.*

Thus, every element of *Austin*'s reasoning is hopelessly at odds with well-settled tenets of this Court's First Amendment jurisprudence. *Austin* concluded that the "State ha[d] articulated a sufficiently compelling rationale to support its restriction on independent expenditures" because "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures." 494 U.S. at 660. But, at the time *Austin* was decided, this Court had already held that speech equalization is *not* a compelling governmental interest (*Buckley*, 424 U.S. at 48-49)—a conclusion that was reaffirmed last Term (*Davis*, 128 S. Ct. at 2771)—and that "the inherent worth of . . . speech" does not depend on whether it is funded by an individual, corporation, or other person. *Bellotti*, 435 U.S. at 777. And to support its novel distinction between the First Amendment rights of individuals and corporations, *Austin* relied on the purported need to protect shareholders from funding speech with which they disagree. 494

U.S. at 663. *Bellotti*, however, had explicitly rejected that shareholder-protection rationale in favor of shareholders' reliance on "the procedures of corporate democracy" to control a corporation's political activities. 435 U.S. at 794.

Austin is simply a jurisprudential outlier.

3. Even setting aside *Austin*'s precipitous break with prior precedent and its unmistakable tension with later decisions, its anti-distortion rationale is flawed on its own terms.

As an initial matter, there is simply no evidence that corporate and union independent expenditures have a "corrosive and distorting effect[ ]" on the election process. In fact, many States place no limits at all on the right of corporations and unions to make independent expenditures in elections for state offices. *See, e.g.*, Mo. Rev. Stat. § 130.029. The government—which bears the burden of defending the constitutionality of restrictions on political speech (*WRTL II*, 127 S. Ct. at 2664 (opinion of Roberts, C.J.))—has never demonstrated that the election process in these States functions less efficiently, effectively, or fairly than the election process in States that prohibit independent expenditures by corporations and unions.

In any event, a blanket prohibition on broad categories of corporate independent expenditures—such as that imposed by the Michigan law in *Austin* or by BCRA § 203—is an immensely overbroad means of combating the allegedly deleterious effects of corporate wealth on the election process. Indeed, it certainly is not the case that most for-profit corporations—let alone, most nonprofit corporations, such as the Michigan State Chamber of Commerce and Citizens United—possess treasuries laden with "im-

mense aggregations of wealth." While a small number of for-profit corporations achieve great financial success, an undifferentiated prohibition on all corporate independent expenditures that ascribes the same financial power to mega-corporations such as ExxonMobil, mom-and-pop grocery stores, and ideologically oriented nonprofits prohibits vast swaths of corporate speech that are not conceivably funded by the immense corporate warchests that animated *Austin*'s reasoning.

Austin suggested that it is nevertheless appropriate to prohibit independent expenditures by nonprofit corporations that accept donations from for-profit corporations because, in the absence of such a prohibition, nonprofits could serve as a "conduit" for the political expenditures of for-profit corporations. 494 U.S. at 664. This "conduit" argument fails because *Austin*'s anti-distortion rationale is flawed as to both for-profit and nonprofit corporations. But even if that were not the case, the First Amendment simply does not permit the government to suppress a person's speech as a prophylaxis against the possibility that the speaker might utter another person's assertedly harmful ideas. If that were the case, the government would be authorized to prohibit the independent expenditures of *individuals* because an individual could theoretically be used as an intermediary to funnel corporate money into the political process. *Buckley*, however, leaves no doubt that such a prohibition on individuals' independent expenditures would be unconstitutional. 424 U.S. at 46.

Austin also failed to recognize that prohibitions on corporate independent expenditures are a dramatically underinclusive means of removing "immense aggregations of wealth" from the political process because such prohibitions do not apply to

wealthy *individuals* or the "institutional media," which encompasses some of the largest and most financially successful corporations in the United States, including General Electric, Microsoft, and TimeWarner. 2 U.S.C. § 434(f)(3)(B). Indeed, BCRA § 203 and similar prohibitions on corporate political speech "concentrate more political power in the hands of the country's wealthiest individuals"—as well as in the hands of those for-profit corporations that control media outlets—who have come to dominate political discourse as a result of the restrictions on the political activity of nonprofit ideological corporations. *WRTL II*, 127 S. Ct. at 2686 (opinion of Scalia, J.); *see also id.* ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to 527s"). Thus, while multimillionaires and media corporations are free to exercise their First Amendment right to devote unlimited funds to independent expenditures, individuals of modest means are barred by state and federal prohibitions on corporate independent expenditures from pooling their resources to fund the political speech of ideologically oriented nonprofit corporations, and are thus denied their most effective tool for challenging the political primacy of the super-rich and the "institutional media."

No less flawed is *Austin*'s contention that state law grants corporations "special advantages" that allegedly facilitate the accumulation of wealth and that distinguish corporations from individuals and other noncorporate persons. Whatever "special advantages" state law may afford a corporation, it is well settled that the "inherent worth" of speech is not diminished by "its source[ ], whether corporation, association, union, or individual." *Bellotti*, 435 U.S. at 777. Moreover, *Austin* overlooks the fact that state

and federal law grants "special advantages" to many persons—including individuals—that assist in the accumulation of wealth. For example, the federal government offers several tax-advantaged retirement savings plans and government-guaranteed loans for education, and many States additionally subsidize tuition at public universities. These benefits undoubtedly assist those individuals who receive them in amassing wealth that may be spent on independent expenditures that "distort[ ]" the political dialogue in favor of wealthier, college-educated individuals at the expense of less wealthy individuals without a college education. Yet, it surely would be unconstitutional for the government to prohibit retirees and college graduates from speaking based on their receipt of these "benefits." *Austin* nevertheless rests on the premise that corporations that benefit from "special advantages" forfeit their fundamental First Amendment right to participate in the political process.

As a final basis for upholding Michigan's campaign finance law, *Austin* concluded that the prohibition on corporate independent expenditures was necessary to protect shareholders from providing compulsory support for ideological messages with which they disagree. 494 U.S. at 663. But shareholder protection is *not* a compelling state interest, and thus cannot justify restrictions on core political speech. *NCPAC*, 470 U.S. at 497. In any event, *Austin*'s shareholder-protection rationale is categorically inapplicable to ideologically oriented nonprofit corporations whose supporters may freely resign their membership or withhold donations if the corporations engage in political activity with which they disagree. Moreover, the shareholder-protection rationale fails even when applied to for-profit corporations because,

as the Court recognized in *Bellotti*, shareholders have at their disposal the "procedures of corporate democracy" to decide whether their corporations should engage in political activity at all and whether the corporation should continue to disseminate a political message with which they disagree. 435 U.S. at 795. Imposing restrictions on corporations' First Amendment rights is thus manifestly unnecessary to protect the interests of a corporation's shareholders or members.

B. There Are No Reliance Interests Or Other Prudential Considerations That Militate Against Overruling *Austin*.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne*, 501 U.S. at 828. No such interests—or other prudential considerations—weigh against overruling *Austin*.

BCRA § 203 has been subject to repeated constitutional challenges since its enactment in 2002. *See McConnell*, 540 U.S. 93; *Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006); *WRTL II*, 127 S. Ct. 2652. This constant stream of litigation has provided ample notice both to regulators and to the regulated community that the constitutionality of BCRA § 203 is open to substantial doubt. Indeed, the possibility that this Court would eventually reject *Austin*'s anti-distortion rationale as applied to some or all corporations—and thereby invalidate BCRA § 203 in some or all of its applications—was foreshadowed by the vigorous dissents in *Austin* itself and by the persistent criticism that the decision has received from Members of this Court in later cases, including repeated, explicit exhortations that the decision be

overruled. *See McConnell*, 540 U.S. at 257 (opinion of Scalia J.); *id.* at 274 (opinion of Thomas, J.); *id.* at 323 (opinion of Kennedy, J., joined by Rehnquist, C.J.); *WRTL II*, 127 S. Ct. at 2674 (opinion of Scalia, J., joined by Kennedy and Thomas, JJ.).

Nor are there any other prudential reasons for declining to overrule *Austin*. For example, there are no considerations of "antiquity" that weigh in favor of retaining *Austin*'s flawed anti-distortion rationale. The decision is less than twenty years old, and has been on the books four years *less* than *Michigan v. Jackson*, 475 U.S. 625 (1986), which the Court overruled this Term. *See Montejo*, 129 S. Ct. at 2091; *see also United States v. Salvucci*, 448 U.S. 83, 95 (1980) (overruling *Jones v. United States*, 362 U.S. 257 (1960)); *New Orleans v. Dukes*, 427 U.S. 297, 306 (1976) (per curiam) (overruling *Morey v. Doud*, 354 U.S. 457 (1957)). Moreover, the question whether to overrule *Austin* has been extensively briefed and argued in this case, which squarely presents the Court with the opportunity to rectify *Austin*'s aberrational departure from established First Amendment principles.

II. A REEXAMINATION OF *AUSTIN*'S ANTI-DISTORTION RATIONALE IS ESSENTIAL TO THE PROPER DISPOSITION OF THIS CASE.

A "proper disposition" of a case is one that grants to the prevailing party all the relief to which it is entitled under the law. To grant Citizens United meaningful and effective relief from the government's efforts to suppress its political speech, the Court should reexamine and reject *Austin*'s anti-distortion rationale.

A. Although the FEC no longer seeks to restrict the distribution of *Hillary*—the litigation delay was

sufficient to suppress the film for the entire duration of Senator Clinton's candidacy—Citizens United's as-applied challenge is not moot because "there exists a reasonable expectation that the same controversy involving the same party will recur." *WRTL II*, 127 S. Ct. at 2663; *see also* FEC Br. 14 n.9 (conceding case is not moot). And, in fact, while the litigation over *Hillary* was pending, Citizens United produced and released a film about then-Senator Obama, and averred that it wished "to broadcast the Obama documentary on television." J.A. 214a. This litigation outlived Senator Obama's candidacy as well, but Citizens United will, if permitted, engage in similar acts of political speech in the future. *Id.*

To grant Citizens United effective relief—which is to say, relief that would enable Citizens United to disseminate its constitutionally protected political speech in the future without first checking with FEC minders or otherwise risking imprisonment—the Court should decide the case in a way that safeguards from FEC suppression not just *Hillary*, but also any similar documentary film that Citizens United might wish to distribute in the future.

To accomplish this objective, the lines separating protected political speech from criminal conduct must be clear and must leave ample "breathing space" between the two zones. The "imperative for clarity" (*WRTL II*, 127 S. Ct. at 2669 n.7 (opinion of Roberts, C.J.)) is amplified by the fact that Congress has chosen to punish transgressions with substantial fines and up to five years' imprisonment. 2 U.S.C. § 437g(d). Indeed, even BCRA's sponsors acknowledged the need for a "certain and sure" set of campaign finance regulations (148 Cong. Rec. S2142 (2002) (statement of Sen. Feingold)), and accordingly provided for expedited judicial review of any consti-

tutional challenge to BCRA's provisions, including mandatory appellate jurisdiction in this Court. 2 U.S.C. § 437h note.

Further tinkering with the definition of "functional equivalent of express advocacy" will offer neither the clarity nor the breathing space that the First Amendment requires. The FEC has demonstrated that. Even after this Court warned that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor" (*WRTL II*, 127 S. Ct. at 2669 (opinion of Roberts, C.J.)), the FEC took the *WRTL II* lead opinion's "susceptible of no interpretation other than as an appeal to vote" standard, and enacted a multi-factored test that excludes from its safe harbor any speech that "take[s] a position on any candidate's or officeholder's character, qualifications, or fitness for office." 11 C.F.R. § 114.15(b)(2). Whether a discussion of a "candidate's or officeholder's character, qualifications, or fitness for office"—core political speech, if the term means anything at all—is a felony thus now turns on whether the FEC views the speaker as "tak[ing] a position" on the topic in a manner that the FEC would characterize as an "appeal to vote." *Id.*

Facing the prospect of felony prosecution and imprisonment for its officers, no corporation or labor union would dare opine on a candidate's qualifications without checking with the FEC first. This burden on political speech, effectively placing the FEC in the role of licensor, in and of itself violates the First Amendment. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002) ("a scheme conditioning expression on a licensing body's prior approval of content presents peculiar dangers to constitutionally protected speech") (internal quotation marks omitted). But even those would-be speakers that seek pre-

clearance from the FEC can scarcely hope to obtain the needed advice before the moment for the political speech has passed. It took the FEC more than two months, three draft opinions, and a series of unsuccessful votes to issue its only advisory opinion on the application of the appeal-to-vote test. *See* App. to Wyoming Liberty Group Merits *Amicus* Br. 11 (transcript of FEC hearing); *see also* FEC Advisory Op. 2008-15 (Nov. 24, 2008).

That leaves the courts as a would-be speaker's only option. But as this Court observed in *Virginia v. Hicks*, 539 U.S. 113 (2003), "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech." *Id.* at 119. And this case demonstrates that, even when a speaker is willing to undertake that "considerable burden," litigation often enough will fail to provide timely relief.

A decision that leaves the FEC in the role of licensing Citizens United's political speech will not afford Citizens United meaningful relief. Such a decision would leave Citizens United in substantially the same position as it is today—litigating against the FEC for the right to distribute its movies. If BCRA § 203 is unconstitutional as applied to *Hillary*, Citizens United is entitled to a ruling that ensures that it will be able to engage through its movies in uninhibited debate about candidates for office—including their character, qualifications, and fitness for office—without again seeking the permission of the FEC or the courts. Unless the FEC is now willing to admit that the political speech of nonprofit ideological corporations like Citizens United poses no greater threat of corruption than that of *MCFL* entities or media conglomerates—something the FEC has thus

far been unwilling to do—the Court must test the strength of the government's assertion, rooted only in *Austin*, that suppression of Citizens United's movies is necessary to prevent actual or apparent corruption of officeholders.

B. The government argues that Citizens United's attack on "the continuing vitality of *Austin*" "is not properly before the Court." FEC Br. 33-34. Having invoked *Austin*'s anti-distortion rationale as its *only* justification for suppressing Citizens United's speech, and having argued that the sweeping breadth of that rationale—encompassing virtually any corporate speech in any format or medium—defeated *all* of Citizens United's efforts to distinguish *Austin* and *McConnell*, the government now demands that the legal sufficiency of that rationale be insulated from judicial review. Nothing in this Court's precedent or the procedural history of this case requires that untoward result. Although the plaintiffs in *McConnell* "d[id] not contest" (540 U.S. at 205) *Austin*'s anti-distortion rationale, Citizens United now has challenged it as applied to its movie, and this Court can and should address it.

As an initial matter, this case comes to the Court under its mandatory appellate jurisdiction, and, accordingly, the Court is "required to deal with its merits." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). And, as this case arises from the district court's grant of summary judgment to the FEC (J.A. 261a), "deal[ing] with its merits" means reversing the district court if its First Amendment analysis is premised on an error of law.

Any objection to a reexamination of *Austin*'s anti-distortion rationale based upon the questions presented in Citizens United's jurisdictional statement

would be equally misguided. Citizens United presented the question, *inter alia*, whether its movie is "subject to regulation as an electioneering communication." J.S. i. Because this is a First Amendment case, fundamental to the question whether Citizens United's political speech is "subject to regulation" is the validity and sufficiency of the government's sole justification for "regulati[ng]" that speech—*Austin*'s anti-distortion rationale. Particularly when a question is "submerged in [the lower court's] analysis" of another question, this Court has treated it as fairly encompassed within a question presented in a jurisdictional statement when it "is an essential, or at least an advisable, predicate to an intelligent resolution" of the question presented. *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980); *see also United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) (addressing constitutionality of anticipatory warrants before considering the requirements for such a warrant); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 378 n.1 (1970) (petitioner's "challenge to *The Tungus* is properly before us on certiorari, and, of course, it subsumes the question of the continuing validity of *The Harrisburg*, upon which *The Tungus* rests").

In any event, "consideration of issues not present in the jurisdictional statement . . . and not presented [below] is not beyond [this Court's] power." *Vance*, 444 U.S. at 258 n.5. This Court has found it appropriate to reach such questions when "what transpired at oral argument" led the Court to inquire whether one of its precedents warranted a "modification" (*Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 320 n.6 (1971)), or, more generally, when the issue is "important" and "the parties have briefed it" (*Vance*, 444 U.S. at 258 n.5), or when, as is undoubtedly true here, "resolution of

those questions is necessary for the proper disposition of the case." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 n.12 (1981).

III. BCRA § 203 Is Unconstitutional As Applied To Citizens United.

If this Court overrules *Austin*, then BCRA § 203 would be unconstitutional as applied to Citizens United's Video On Demand distribution of *Hillary*. And it would undermine, perhaps fatally, this Court's holding in *McConnell* that BCRA § 203 is constitutional on its face because that facial analysis was premised exclusively on *Austin*'s reasoning. 540 U.S. at 205. Without *Austin*, BCRA § 203 and *McConnell*'s facial analysis of that provision would be the proverbial house above a vacant lot—supported by nothing. Whether *McConnell* collapses would depend on whether this Court continues to adhere to the view, stated in *Buckley*, that the "absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47; *see also NCPAC*, 470 U.S. at 497.[1]

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[1] Restrictions on corporate independent expenditures cannot be defended on the ground that they are necessary to prevent circumvention of limits on corporate contributions. This Court has already held that, in light of the provisions of federal election law that treat coordinated expenditures as contributions, a prohibition on independent expenditures does not further the government's interest in preventing the circumvention of contribution limits. *See Buckley*, 424 U.S. at 47 (FECA's "contribution ceilings rather than [its] independent expenditure limitation prevent attempts to circumvent the Act through prearranged or coordinated expenditures").

But even if, "in some circumstances," large independent expenditures could "pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions" (*WRTL II*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.) (internal quotation marks omitted)), it would be the *government's* burden in each and every case in which it sought to apply BCRA § 203 to establish that the electioneering communication at issue created this *quid pro quo* danger. *Id.* at 2664. The government has demonstrably failed to meet that burden in this case because it is inconceivable that, had Citizens United not been chilled by BCRA § 203 from distributing *Hillary* through Video On Demand during the Democratic primary season, President Obama would have viewed an overtly conservative documentary about Senator Clinton's political background as the equivalent of a campaign contribution that demanded repayment in the form of political favors for Citizens United. And any conceivable appearance of corruption is dispelled by the fact that Citizens United's expenditures on the movie would have been treated as prohibited contributions had it coordinated the production of *Hillary* with one of Senator Clinton's Democratic primary opponents. 2 U.S.C. § 441a(a)(7)(B)(i)-(ii). The public can therefore rest assured that *Hillary* represents nothing more than one conservative ideological group's independently expressed views on Senator Clinton's political background and policy positions.[2]

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[2] Moreover, if the Court did conclude that *Hillary* created the possibility of *quid pro quo* corruption, then the Court would open the door to the regulation not only of *corporations'* independent expenditures but also *individuals'* independent expenditures because there is nothing inherent in the nature of cor-

* * *

Austin's anti-distortion rationale—and its fundamental premise that to protect the marketplace of ideas the government must suppress political speech—is antithetical to the First Amendment. It has created an unworkable campaign finance framework that chills fundamental First Amendment freedoms, punishes core political speech with felony prosecution, and continues to generate lengthy, piecemeal litigation. It must fall. And unless the government can locate some heretofore-unidentified justification for suppressing political speech, *McConnell*'s validation of BCRA's restrictions on "electioneering communications" also must fall.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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[Footnote continued from previous page]

porate-funded expenditures that creates a greater risk of *quid pro quo* corruption than individually funded expenditures.

AMICUS CURIAE BRIEF

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CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTIONS COMMISSION,

Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICUS CURIAE ALLIANCE DEFENSE FUND IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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4 WKKLN

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTEREST OF AMICUS IN THIS CASE 1
SUMMARY OF ARGUMENT 1
ARGUMENT 2

I THE COURT HAS RECOGNIZED THE CONSTITUTIONAL REQUIREMENT OF USING BRIGHT-LINE, OBJECTIVE TESTS TO DISTINGUISH REGULATED CAMPAIGN SPEECH FROM NON-REGULATED CAMPAIGN SPEECH 2

II. THE COURT'S LAUDABLE ATTEMPTS TO FASHION A BRIGHT-LINE, OBJECTIVE TEST TO VALIDATE BCRA SECTION 203 HAVE PROVEN UNWORKABLE IN PRACTICE. 6

III. THE FAILURE OF BRIGHT-LINE, OBJECTIVE TESTS IN THE CONTEXT OF "FUNCTIONAL EQUIVALENTS OF EXPRESS ADVOCACY" CREATES UNCERTAINTY AND CHILLS PROTECTED SPEECH. IN THE ABSENCE OF SUCH A CERTAIN STANDARD, SECTION 203'S BROAD PROHIBITION ON SPEECH CANNOT BE PERMITTED TO STAND 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 3
Buckley v. Valeo,
424 U.S. 1 (1976) 2, 3, 10, 19, 20
Faucher v. FEC,
928 F.2d 468 (1st Cir. 1991) 3
FEC v. Colorado Repub. Fed. Campaign Comm.,
59 F.3d 1015 (10th Cir. 1995), *rev'd on other grounds*, 518 U.S. 604 (1996) 3
FEC v. Christian Action Network, Inc.,
110 F.3d 1049 (4th Cir. 1997) 3
FEC v. Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986) 3
FEC v. Wisconsin Right to Life,
127 S.Ct. 2652 (2007) 4, 5, 6, 7, 12, 14, 18
Iowa Right to Life Comm., Inc. v. Williams,
187 F.3d 963 (8th Cir. 1999) 3
McConnell v. FEC,
540 U.S. 93 (2003) 1, 3, 4, 10, 13, 18
National Right to Work Legal Defense and Education Foundation, Inc. v. Herbert,
581 F. Supp. 2d 1132 (D. Utah 2008) 7-12
North Carolina Right to Life, Inc. v. Leake,
525 F.3d 274 (4th Cir. 2007) 6
The Real Truth About Obama, Inc. v. FEC, Case No. 3:08-CV-483, 2008 WL 4416282, *11 (E.D. Va. Sept. 24, 2008) 14
Thomas v. Collins, 323 U.S. 516 (1945) 20
Vermont Right to Life Comm., Inc. v. Sorrell,
221 F.3d 376 (2d Cir. 2000) 3

Wisconsin. Right to Life, Inc. v. FEC,
466 F. Supp. 2d 195 (D.D.C. 2006) 18

Other Authorities

11 C.F.R. § 100.22(b 13
Bipartisan Campaign Reform Act of 2002,
2 U.S.C. §441b 1, 3, 5, 6, 11
Utah Code Ann. § 20A-11-101(30)(a)(ii).....10
Utah Code Ann. § 20A-11-702 10
Utah Election Code 10

Constitutional Provisions

U.S. Constitution amend. I.....2, 4, 5, 18, 19

INTEREST OF *AMICUS* IN THIS CASE[1]

ALLIANCE DEFENSE FUND ("ADF") is a not-for-profit public interest organization that provides strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties and family values. ADF and its allied organizations represent hundreds of thousands of Americans who believe strongly in these topics, and who have a right to express those views through this nation's political process. ADF's allies include more than 1,200 lawyers and numerous public interest law firms, many of whom have been recently pressed into service to represent individuals and organizations being harassed for expressing their viewpoints in the political arena.

SUMMARY OF ARGUMENT

The portion of *McConnell v. FEC*, 540 U.S. 93 (2003), upholding the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b ("BCRA"), should be overruled. Despite the best efforts of this Court after *McConnell* to constitutionally validate Section 203's expansion of restrictions on political expression, the amount of administrative disputes and litigation which *McConnell* has generated demonstrates that Section

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

203 cannot be administered and enforced without chilling substantial amounts of previously protected First Amendment rights. Any attempt at determining whether a communication is the "functional equivalent of express advocacy" necessarily leads to a subjective, intent-based, contextual evaluation by the governmental enforcer as to whether the enforcer believes that the communication is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This subjective, contextual, intent-based, evaluation of political discourse is constitutionally prohibited and unquestionably chills speech which would have otherwise been communicated but for the threat of both civil and criminal penalties.

ARGUMENT

I. THE COURT HAS RECOGNIZED THE CONSTITUTIONAL REQUIREMENT OF USING BRIGHT-LINE, OBJECTIVE TESTS TO DISTINGUISH REGULATED CAMPAIGN SPEECH FROM NON-REGULATED CAMPAIGN SPEECH.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized that while the Government possesses the authority to regulate elections, the First Amendment requires that such regulation be carried out in a manner protective of speech. The Court established a bright-line test between regulable election-related activity and constitutionally protected political speech, by holding that the Government may only

regulate speech that is "unambiguously related to the campaign of a particular federal candidate." 424 U.S. at 80. The Court went on to identify such speech as that which in "express terms advocate the election or defeat of a clearly identified candidate" for public office. *Id.* at 44. The Court noted that only communications containing words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" would be subject to regulation as "express advocacy." *Id.* at 44 n.52. This bright line standard was applied consistently from 1976 through the 2002 passage of BCRA. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986); *Faucher v. FEC*, 928 F.2d 468, 470-72 (1st Cir. 1991); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 386-87 (2d Cir. 2000); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *FEC v. Colorado Repub. Fed. Campaign Comm.*, 59 F.3d 1015, 1023 n.10 (10th Cir. 1995), *rev'd on other grounds*, 518 U.S. 604 (1996).

After the enactment of the BCRA, this Court was forced to determine whether Section 203's definition of "electioneering communications", which dramatically expanded the scope of regulable speech, fit within the constitutional parameters established by its prior rulings in *Buckley* and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). This Court rejected a facial challenge to Section 203 in *McConnell*, 540 U.S. at 204-07, by recognizing a second category of regulated speech, denoted as the "functional equivalent of express

advocacy." *See FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2667 (2007)("*WRTL*"). In doing so, however, this Court recognized that "the interests it had found to justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *McConnell*, 540 U.S. at 206 n. 88. As originally set forth by this Court, a communication would not be considered the "functional equivalent of express advocacy" unless the communication was "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *See WRTL*, 127 S. Ct. at 2667. In the subsequent *WRTL* opinions, this Court attempted to articulate standards to be applied to distinguish between regulated and non-regulated speech. The Court looked for a standard that would be applied as an objective test, and not as a test relying upon subjective and contextual considerations. As the Court observed:

> Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. 127 S. Ct. at 2665-66.

A listener-based test is subject to the same infirmities, as such a test would "typically lead to a

burdensome, expert-driven inquiry, with an indeterminate result." *Id.* at 2666. A standard that bases the regulation on speech on how the listener will perceive or understand the message subjects the speaker to the varied understandings his listeners may have. *Id.*

To address these concerns and to safeguard First Amendment rights, the Court held that "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect." *Id.* at 2666. As explained by the Court,

> It must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation . . . . And it must eschew "the open-ended rough-and-tumble of factors," which "invit[es] complex argument in a trial court and a virtually inevitable appeal." . . . In short, it must give the benefit of any doubt to protecting rather than stifling speech.

Id. at 2666-67 (citations omitted; alteration in original). As such, the Court has concluded that:

> (1) [t]here can be no free-ranging intent-and-effect test; (2) there generally should be no discovery or inquiry into the sort of 'contextual' factors

highlighted by the FEC and intervenors; (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and (4) in a debatable case, the tie is resolved in favor of protecting speech. *Id.* at 2669 n.7.

II. THE COURT'S LAUDABLE ATTEMPTS TO FASHION A BRIGHT-LINE, OBJECTIVE TEST TO VALIDATE BCRA SECTION 203 HAVE PROVEN UNWORKABLE IN PRACTICE.

In theory, the standard might be constitutional as written. However, experiences since the enunciation of this standard demonstrate that applications of this purported objective standard have devolved into considerations of subjective intent, context, and, most often, effect on the listener. The standard apparently cannot be applied by regulators without their subjective inquiry into the unconstitutional considerations of the speaker's intent or the effect on the hearer. Necessarily, the entities determining whether particular speech may be regulated must decide whether the communication is "susceptible of no other interpretation other than as an appeal to vote for or against a specific candidate." To do so, the regulator must interpret the speech based upon what they perceive the communication to convey. The regulator is compelled to ask how the speech makes him feel and whether, given the words in the ad, the regulator finds no other purpose for the ad than an appeal to vote. Unavoidably, that individual will

draw upon his or her own subjective interpretation of the message they believe to be conveyed by the communication.

Such a conundrum is illustrated by instances where enforcing agencies have looked to contextual considerations, such as the timing of the communication, the audience to which it is made, and the speaker's other activities, to resolve internal disagreements as to whether a communication is susceptible of "no other interpretation." *See, e.g., National Right to Work Legal Defense and Education Foundation, Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1150 n.10 (D. Utah 2008) (Lieutenant Governor's proposed context-based analysis considering that ads were "run in the midst of a contentious referendum signature gathering campaign" "flies in the face of the Supreme Court's mandate for clarity"); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 281, 284 (4th Cir. 2007) (North Carolina Legislature's statute allowing consideration of contextual factors when nature of communication is "unclear" was unconstitutional; "speakers are left to guess and wonder whether a regulator, applying supple and flexible criteria, will make a *post hoc* determination that their speech is regulable as electoral advocacy"). Moreover, these same types of contextual considerations were expressly rejected by the Court in *WRTL*. *See WRTL*, 127 S. Ct. 2668-69 (rejecting as improper the consideration of factors such as speaker's active opposition to candidate in same election cycle, timing of the ads, and reference to website). The fact that regulatory agencies continue to resort to these "contextual" factors to determine

whether an ad or other statement is the "functional equivalent of express advocacy" chills political speech because the speaker cannot be sure whether the agency will subjectively determine that the ad is regulable and bring an enforcement action based upon that subjective determination. The following case and administrative adjudication serve as a prime illustration of what has become, in practice, an unworkable standard.

In *National Right to Work,* 581 F. Supp. 2d at 1135-36, the National Right to Work Legal Defense and Education Foundation, Inc. ("Foundation") challenged the constitutionality of several provisions of the Utah Code regulating campaign-related expenditures. The Utah Legislature enacted legislation permitting students to use state-funded scholarships, or vouchers, to attend private schools. *Id.* at 1136. The law was met with public opposition, leading to a ballot referendum seeking its repeal. *Id.* The Utah Teacher's Association was one of the proponents of the referendum, and several teachers and other public school employees contacted the Foundation claiming harassment and intimidation by union agents in efforts to collect signatures on petitions in opposition to the voucher bill. *Id.* at 1136-37. The Foundation, whose purpose is to defend "the rights of workers who are suffering legal injustice as a result of employment discrimination under compulsory unionism arrangements, and to assist such workers in protecting rights guaranteed to them under the Constitution and laws of the United States," began to run an radio and television ad campaign "in an effort to inform public school

employees of their rights and to oppose the Union." *Id.* at 1137 (citations omitted). The radio ad stated:

> Recently, teacher union officials have launched a state-wide political blitz in Utah's public schools. Their goal? To sabotage a popular new law meant to improve the quality of education for Utah's children.
>
> If you are a teacher or school employee, you have the right not to participate in the union's petition drive. In fact, the attorney general's office has just warned that the use of school time or resources for politics violates Utah's criminal laws. If you are pressured by a union activist, you have the legal right to say no – without fear of union retaliation. For free legal aid, contact the National Right to Work Foundation at 1-800-336-3600. Or righttowork.org.
>
> It's just plain wrong for union bosses or any special interest ground to misuse our public schools to promote their narrow political agenda. You have rights. Once again, that's 1-800-336-3600. Or righttowork.org.

Id.[2]

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[2] The television ad used similar language. *National Right to Work*, 581 F. Supp. 2d at 1137-38.

The Utah Lieutenant Governor's office warned the Foundation that the ads may be subject to the Utah Election Code and instructed the Foundation to register as a political issues committee. *Id.* at 1138. The Lieutenant Governor's office believed that the phrases "sabotage a popular new law," "petition drive" and "narrow political agenda" subjected the ads to regulation. *Id.* (citations omitted). As a political issues committee, the Foundation would be subject to various disclosure and reporting requirements. *See id.* at 1139. The Foundation responded that it was not a political issues committee, but instead was "a 'legal aid organization offering free assistance to any public employee who might be coerced or intimidated in the exercise of their political rights by union agents.'" *Id.* at 1138, 1139-40. The Lieutenant Governor's office ultimately concluded that "although the Foundation was not a political issues committee, their ads constituted political issues expenditures, requiring the Foundation to comply with the reporting and disclosure requirements of [Utah Code Ann.] § 20A-11-702." *Id.*

Utah defined "political issues expenditure" as a "'payment . . . of money made for the purpose of influencing the approval or the defeat of a ballot proposition.'" *Id.* at 1140 (quoting Utah Code Ann. § 20A-11-101(30)(a)(ii)) (alterations in original). After reviewing *Buckley*, *McConnell*, and *WRTL*, the district court stated that "campaign finance laws may constitutionally regulate only those activities that are unambiguously campaign related." *Id.* at 1140-44. The court concluded that the government

may regulate only: (a) "express advocacy" that uses the "magic words" discussed in *Buckley* and (b) "the functional equivalent of express advocacy" meeting the definition of "electioneering communications" under the BCRA and being "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 1144 (citations omitted).

Using these precedents as its guide, the court determined that the definition of "political issues expenditure" could apply only to "those expenditures that unambiguously relate to the enactment or defeat of a particular ballot measure." *Id.* at 1149. The court concluded that the ads were not express advocacy. *Id.* While the ads did refer to the voucher law and may have suggested the Foundation's support for the law, they did not "expressly advocate for either the success of vouchers or the failure of the petition drive." *Id.* at 1149-50. Moreover, the advertisements were not the functional equivalent of express advocacy because they did not meet the BCRA's definition of "electioneering communications." *Id.* at 1150.

The State, however, claimed that "any communication deemed to be the functional equivalent of express advocacy – whether it meets BCRA's definition of 'electioneering communication' or not – is constitutionally regulable." *Id.* at 1150. According to the State, when the context of the ads is considered, "a reasonable person hearing the ads would understand that a central purpose of the ads is to engender support for school vouchers" and was the

functional equivalent of express advocacy. *Id.* The court rejected this argument, reiterating the objective nature of the test for "functional equivalent of express advocacy" and noting that the State's context-based argument "flies in the face of the Supreme Court's mandate for clarity" and "provides no meaningful boundaries of regulable versus non-regulable speech, and will only lead to further disputes and litigation." *Id.* at 1150 n.10.

While the court in *National Right to Work* properly applied the constitutional standard and corrected the Lieutenant Governor's error, this case demonstrates how the standard in *McConnell* has become unworkable in practice. While the Court has eschewed standards that lead to discovery and litigation because of their chilling nature, the *McConnell* standard has had just that result. To substantiate its regulated speech position, Utah argued that the speech was the "functional equivalent of express advocacy" because of the context in which the ads were run. While the standard itself prescribes an objective view of the communications, the practical application of the standard by persons interpreting, applying, and enforcing the law is wholly subjective.

The fact that courts have corrected the misguided attempts of executive agencies to enforce campaign speech laws does not ameliorate the chilling effect that the prospect of enforcement may have upon a speaker. *See WRTL*, 127 S. Ct. at 2666 ("[l]itigation on such a [hearer-based] standard may or may not accurately predict electoral effects, but it will

unquestionably chill a substantial amount of political speech"). The fact that courts may be able to correct the unconstitutional application of *McConnell*'s standard does not assuage the fears of a speaker that faces civil and criminal sanctions for speaking. Because of the way in which *McConnell*'s standard is applied in practice, to engage in any speech that has the possibility of being interpreted as the functional equivalent of express advocacy requires a speaker willing and able to navigate through agency opinions and lawsuits, and willing to undertake the time and expense to comply with onerous reporting and disclosure requirements to speak. This situation cannot be what the *McConnell* Court envisioned or intended when it enunciated its standard for political speech.

The Commission has likewise struggled to objectively apply *McConnell*'s standard. In fact, it has adopted context-based regulations that allow a finding of express advocacy "[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because . . . [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b). Although this statement of law explicitly mandates an inquiry of how the hearer interprets the statements, and further mandates the examination of contextual factors, at least one court has

interpreted the "reasonable minds could not differ" portion of the regulation to be "virtually the same test" set forth in *WRTL*. *See, e.g., The Real Truth About Obama, Inc. v. FEC*, Case No. 3:08-CV-483, 2008 WL 4416282, *11 (E.D. Va. Sept. 24, 2008). A context-based test seems to be anything but that which was contemplated by the *WRTL* Court.

It is clear that contextual and subjective factors necessarily play a role in determining whether speech is the functional equivalent of express advocacy, and resort to those factors may simply be inevitable. Within the Commission itself, various commissioners continue to struggle to apply *McConnell*'s standard without resort to subjective considerations. A case from the most recent election cycle starkly illustrates the issues faced by individuals attempting to apply an objective standard that requires them to review a communication to determine whether it is capable of an interpretation other than an appeal to vote.

In 2008, the National Right to Life Committee, Inc. requested an advisory opinion from the Commission to determine whether two proposed advertisements were regulated speech. *See* Transcript of Commission Proceedings, October 23, 2008 ("Transcript"), Appendix at 10a. The advertisements included statements such as "Will Obama now apologize for calling us liars when we were the ones telling the truth?" and "Barack Obama: a candidate whose words you can't believe in." Transcript, Appendix at 5a n.4. Despite the black-and-white scripts that were available to the

Commission, it was unable to conclude whether the advertisements were subject to regulation. While debating the issue, the Commission internally debated the extent to which contextual factors and subjective interpretations should influence the Commission's determinations.

The transcript from the October 23, 2008 Commission meeting at which the advertisements were discussed discloses that the Commission considered contextual and subjective factors in determining whether the ads were subject to regulation. *See* Transcript, Appendix at 10a-35a. In particular, the Commission unsuccessfully grappled with the proper place that "tone" and other "factors" had in its analysis. To illustrate, Chairman McGahn mentioned Obama's candidacy for president, indicating that "when we get into referencing Senator Obama as a candidate, significantly alters the tone of the advertisement, focussing [sic] it as much on Senator Obama's bid for the Presidency as his actions as a state legislator." Transcript, Appendix at 20a. The chairman noted how the ad was related to Mr. Obama's campaign slogan, observing that "the advertisement manipulates senator [sic] Obama's campaign slogan, 'Change We Can Believe In' to attack his character and call into question his trustworthiness as a candidate whose word you can't believe in." Transcript, Appendix at 20a-21a. According to the chairman, though, "[t]he idea that the tone of the ad is now the standard to me is not a standard at all....And you know, when you get into the tone of the ad and factors and that kind of thing, I just don't see that as – as something

that provides a sort of bright-line rule that the Supreme Court thought they were doing in the Wisconsin Right to Life." Transcript, Appendix at 22a.

In response, Commissioner Weintraub, who favored finding one of the advertisements to be regulated speech, stated that "I hear what you're saying about words like 'tone' and 'factors,' and I would be happy to strip all that language out and just go by a straight meeting [sic] of the words if that would gain any votes on the other side. I'm not optimistic that it would, but I – I'm happy to make the offer." Transcript, Appendix at 27a. The Commission, however, was unable to divorce itself from considering outside factors, and another commissioner even suggested that "there are minor things that can be identified and clarified, or interpretation that can be developed through discovery....But there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly." Transcript, Appendix at 29a.

The "tone" and "factors" considered were influenced by the commissioners' own subjective thoughts, experiences, and interpretations. One commissioner recognized that, as a parent, she had taught her children to be honest while another commissioner noted that her mother "taught me that telling the truth was an important thing." Transcript, Appendix at 30a. Commissioner Weintraub also concluded that "honesty and integrity and trustworthiness and having a word that people

can believe in are really high on my list of good character traits . . . To say that a candidate is – someone who is a candidate whose word you can't believe in, I just don't think there's any reasonable interpretation of those words other than don't vote for this guy." Transcript, Appendix at 19a.

The Commission also considered the effect the ads would have on the hearer by examining how a reasonable person would interpret the ads, specifically in the context of an actual mention of an individual's candidacy for office. One of the first considerations the Commission discussed during the meeting was whether referencing Mr. Obama as a "candidate" made the advertisement an appeal to vote. Commissioner Weintraub postulated that

> Maybe that's true that [just merely referencing Senator Obama as a candidate doesn't convert the ad into an appeal to vote], but in some hypothetical context one could call somebody a candidate without it being an appeal to vote for or against, but there's no other explanation offered as to why that word, candidate, is in there otherwise. What else does it mean other than here's a candidate; somebody is running for election that you can't trust? ***What would any normal person do with that information***? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in."

Transcript, Appendix at 18a (emphasis added).

III. THE FAILURE OF BRIGHT-LINE, OBJECTIVE TESTS IN THE CONTEXT OF "FUNCTIONAL EQUIVALENTS OF EXPRESS ADVOCACY" CREATES UNCERTAINTY AND CHILLS PROTECTED SPEECH. IN THE ABSENCE OF SUCH A CERTAIN STANDARD, SECTION 203'S BROAD PROHIBITION ON SPEECH CANNOT BE PERMITTED TO STAND.

It is true that "[c]ourts need not ignore basic background information that may be necessary to put an ad in context – such as whether an ad 'describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of such scrutiny in the near future,' – but the need to consider such background should not become an excuse for discovery or a broader inquiry of the sort we have just noted raises First Amendment concerns." *WRTL*, 127 S. Ct. at 2669 (quoting *Wisconsin Right to Life, Inc. v. FEC*, 466 F. Supp. 2d 195, 207 (D.D.C. 2006)). While this guidance on *McConnell*'s standard appears workable on its face, its subsequent use in application evinces that it cannot be used by individuals without resort to the same subjective factors recognized as unconstitutional because of their chilling nature.

The consideration of the effect of a communication on the listener, the context of the speech in relation to other facts, and individual interpretations of intent by regulators leads to unlimited and

undefined factors that may be used to categorize a particular advertisement as "express advocacy," the "functional equivalent of express advocacy," or otherwise subject to regulation. The standard itself, while announced and envisioned by the Court as an objective standard, cannot be objectively applied without resort to unconstitutional "intent and effect" and contextual considerations and, instead, becomes a subjective determination based upon a morass of personal opinions and random factors, multiplied by the fact that there will likely be numerous regulatory agencies reviewing the same communication. This result hardly provides the bright line necessary to protect political speech, which is at the core of First Amendment protections. Instead of being evaluated on objective factors, speakers are left to rely upon the personal opinions, upbringings, and thoughts of a few commissioners and enforcing officials to determine whether the message the speaker wants to convey will be seen as the functional equivalent of express advocacy. As observed in *Buckley*,

> [W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy

> of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> Such a distinction offers no security for free discussion. In these conditions, it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

CONCLUSION

Amicus Alliance Defense Fund respectfully requests that this Court now overrule that portion of *McConnell* that upholds the facial validity of Section 203 of the Bipartisan Campaign Reform Act, reverse the judgment of the District Court, and remand the case to that court for further proceedings.

Respectfully submitted,

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July 30, 2009

APPENDIX 1

December 1, 2008

AOR 2008-20

Re: Advisory Opinion Request

Thomasenia P. Duncan
Office of General Counsel
Federal Election Commission
999 E Street NW (Filed Dec. 1, 2008)
Washington, DC 20463
By email & 1st Class Mail

Dear Ms. Duncan,

On behalf of the National Right to Life Committee, Inc. ("NRLC"), we respectfully request an Advisory Opinion ("AO") from the Federal Election Commission ("FEC"), pursuant to 2 U.S.C. 437f of the Federal Election Campaign Act ("FECA"). NRLC seeks guidance as to whether it may reimburse its separate segregated fund, National Right to Life Political Action Committee ("NRLPAC"), for the costs of broadcasting a radio advertisement that was declared by the FEC, see AO 2008-15, not to be subject to the corporate prohibition at 2 U.S.C. § 441b ("Prohibition").

Facts

On September 26, 2008, NRLC submitted AOR 2008-15, in which NRLC "request[ed] an immediate response" (or within the 20 days provided in 11 C.F.R. § 112.4(b) for candidates) as to whether NRLC would be prohibited from broadcasting two radio advertisements (*Apology #1* and *Apology #2*). The reason for the haste, of course, was the fact that public interest in this issue was at a peak prior to the November 4 election, so NRLC "want[ed] to begin to run its ads immediately." AOR 2008-15 at 4. NRLC added the following note regarding urgency:

> NRLC recognizes that 11 C.F.R. § 112.4(b) only provides for a shorter response period when the requester is a "candidate" and NRLC is not a candidate. But it is inexcusable that this special benefit afforded to politicians should not also be afforded to private citizens and citizen groups.

AOR 2008-15 at 4.

The Supreme Court has placed some reliance on the availability of advisory opinions to mitigate burdens on free speech and association and to mitigate vagueness concerns. *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003). And in *Citizens United v. FEC*, a case now on appeal in the United States Supreme Court (No. 08-105), the FEC argued against a preliminary injunction to protect ads that also met the statutory "electioneering communication" definition on the basis that advisory opinions were available and could be obtained on an expedited

basis: "When necessary, the Commission expedites its response to an urgent request for an advisory opinion, providing an answer in well under sixty days." Defendant Federal Election Commission's Memorandum in Opposition to Plaintiff 's Second Motion for Preliminary Injunction at 10 n.8, *Citizens United v. FEC*, No. 1:07-cv-2240-RCL (D.D.C. Jan. 8, 2008) (Doc. 33 on PACER).

The FEC set the AOR for its October 23, 2008 open meeting.

In preparation for the October 23 meeting, the General Counsel submitted a draft AO stating that *Apology #1* was not subject to the Prohibition, either as an independent expenditure or an impermissible electioneering communication. See Agenda Doc. 08-32. The General Counsel's draft AO identified *Apology #2* as containing express advocacy. Chairman McGahn submitted a draft AO stating that neither ad was subject to the Prohibition. See Agenda Doc. 08- 32-A.

At the October 23 meeting, comments by the commissioners indicated that three commissioners would have found that NRLC could permissibly broadcast both ads, Transcript ("TS")[3] at 19-20, 22, two commissioners would have followed the General Counsel's Report by finding *Apology #1* permissible and *Apology #2* impermissible, TS at 6, 28, and one commissioner would have found both ads

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[3] A transcript of the open meeting is appended.

impermissible. TS at 26-27. *See also* TS at 30-31 (votes).

Although there were apparently five commissioners (and at least the requisite four commissioners necessary for a decision) who indicated that they would have found *Apology #1* permissible, the FEC did not immediately issue an AO permitting NRLC to pay for that ad. Because an AO was not immediately issued permitting NRLC to broadcast *Apology #1*, NRLC's registered political committee NRLPAC began broadcasting it instead, starting on October 28.[4]

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[4] The version of *Apology #1* broadcast by NRLPAC slightly differs from the script included in AOR 2008-15. Instead of including the actual clip of Barack Obama's statement, NRLPAC simply read the quote, and NRLPAC removed the reference to a specific journalist in the first paragraph. These changes do not alter the substance of *Apology #1* in any legally significant way for purposes of this AOR. The complete text of *Apology #1* as broadcast by NRLPAC is as follows:

> **Male**: The following is paid for by National Right to Life PAC at nrlpac.org. Not authorized by any candidate or candidate's committee, NRLPAC is responsible for the content of this advertising.
>
> **Female 1**: In August, National Right to Life released documents proving that in 2003, Barack Obama was responsible for killing a bill to provide care and protection for babies who are born alive after abortions, and that he later misrepresented the bill's content.

On November 24, the FEC approved AO 2008-15, which found *Apology #1* permissible for NRLC to broadcast and reached no conclusion on *Apology #2.* Between October 28, when NRLPAC began broadcasting

Apology #1, and November 24, when AO 2008-15 was finally issued, NRLPAC spent $69,271.56 broadcasting *Apology # 1.*

Male: When Obama was asked about National Right to Life's charges in a televised interview, he replied: (quote) " . . . I hate to say that people are lying, but here's a situation where folks are lying."

Female 1: We challenged Obama to admit that the documents are genuine, and admit to his previous misrepresentations. FactCheck[dot]org then investigated, and concluded:

Female 2: (clinical, detached tone): "Obama's claim is wrong . . . The documents . . . support the group's claims that Obama is misrepresenting the contents of [Senate Bill] 1082."

Female 1: Was Obama afraid that the public would learn about his extreme position – that he opposed merely defining every baby born alive after an abortion as deserving of protection? Will Obama now apologize for calling us liars when we were the ones telling the truth?

Discussion

The FEC's AO 2008-15 means that *Apology #1* was in fact permissible when NRLC requested the opinion on September 26 (when the AO was requested), on October 22 (when the General Counsel submitted her draft AO), and on October 23 (when sufficient commissioners to issue an AO indicated that they believed the ad to be permissible). But NRLC could not rely on the General Counsel's initial draft (which was not approved in any event) or on the positions indicated at the October 23 meeting (especially since there were indications of attempted negotiations as to NRLC's First Amendment rights), TS 31-32, because only an official AO provides legal protection. See 2 U.S.C. § 437f(c).

So an issue-advocacy citizen group and its members were deprived of protection by the FEC for their right to engage in First Amendment-protected, core-political, amplified speech, *see Buckley v. Valeo*, 424 U.S. 1, 22 (1976), at the very time when the public's interest in NRLC's issue was at its peak. NRLC could not safely speak unless it was willing to venture forth without protection in the face of two regulations, 11C.F.R. §§ 100.22(b) and 114.15, that are so vague that the FEC Commissioners, themselves, could not readily or unanimously agree as to the regulations' applicability.

Moreover, the Commission seemed unable, or unwilling, to apply the constitutional mandate that "in a debatable case, the tie is resolved in favor of protecting speech." *FEC v. Wisconsin Right to Life*,

127 S. Ct. 2652, 2669 n.7 (2007) ("WRTL II"). This mandate ought to be applied by the Commission so that where the Commissioners split evenly on whether a communication is prohibited, the communication is recognized as permissible. Similarly, because § 100.22(b) turns on whether "reasonable minds could . . . differ" and § 114.15 turns on whether a "communication is susceptible of no reasonable interpretation other than as an appeal to vote," and because Commissioners nominated by the President and confirmed by the Senate to a federal agency specializing in campaign-finance issues surely must be assumed to be reasonable, where commissioners "differ" on whether there is an appeal to vote in a communication then that communication should not be deemed express advocacy or an impermissible electioneering communication.

These constitutional problems, coupled with the delay in processing AOs at times when public speech on public issues is most pressing, requires a new approach. While resolving all of these problems is beyond this AOR, the facts of this request offer a good place to begin.

NRLC believes that in a situation where a connected organization is able and chooses to fund communications through a separate segregated fund as a legal precaution while it awaits the outcome of a requested AO near an election, the connected organization should be able to reimburse its separate segregated fund for its disbursements to broadcast the ad if it is recognized in an AO as permissible. The

ability of NRLPAC to speak was no substitute for NRLC itself speaking. *See, e.g., WRTL II*, 127 S. Ct. at 2671 n.9 (PAC alternative not adequate substitute). And since federal funds are much more difficult to raise than other funds, connected organizations and SSFs rightly prefer using scarce federal funds only for communications for which the requirement of using federal funds is constitutionally justified.

The FEC could approach this in at least two ways. First, it might interpret the exclusion for administrative expenses, 2 U.S.C. § 441b(b)(2)(C), from the prohibition on "contribution or expenditure" and "any applicable electioneering communication," 2 U.S.C. § 441b(b)(2), to permit reimbursement for such activity where the activity was undertaken as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election. A legitimate "administration" function, 11 C.F.R. § 114.5(b), is the proper payment of obligations and the allocation of funding to comply with constitutional and legal requirements. This approach provides the advantage of fitting the new reimbursement potential into an existing body of law. For example, 11 C.F.R. § 114.15(b)(3) provides for the reimbursement of administrative expenses by a connected organization to its SSF within 30 days. And AO 1983-22 recognized that the FEC has authority to permit reimbursement beyond that time period where an entity had requested an AO within the 30-day period. This is, of course, analogous to the present situation with NRLC and NRLPAC and the present AOR.

Second, the FEC might simply recognize that 2 U.S.C. § 441b(a) prohibits corporate independent expenditures and "applicable electioneering communication[s]," not expenditures for permissible communications. So, where communications are paid for by an SSF as a legal precaution for the connected organization while it awaits a response to an advisory opinion requested near an election, there is no justification for forbidding the reimbursement. Specifically, in such a situation there is no corporate corruption concern that would justify the government from forbidding the reimbursement, so that First Amendment liberties should prevail. So the FEC could simply issue the present AO recognizing in this circumstance the permissibility of the reimbursement. The Commission may then wish to engage in a rulemaking on the subject to explore further the constitutionally- and legally-permissible boundaries for allowing such reimbursements.

Question

Under these circumstances, may NRLC reimburse NRLPAC for the costs involved in broadcasting *Apology #1*?

Sincerely,

BOPP, COLESON & BOSTROM
/s/ James Bopp, Jr.
James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen

AUDIOTAPE TRANSCRIPTION
from
FEC OPEN MEETING – OCTOBER 23, 2008

* * * *

Taken for:
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* * * *

CROSSROADS COURT REPORTING
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[2] APPEARANCES

SPEAKERS:
Donald F. McGahn, II, Chairman
Steven T. Walther, Vice Chairman
Cynthia L. Bauerly, Commissioner
Caroline C. Hunter, Commissioner
Matthew S. Peterson, Commissioner
Ellen L. Weintraub, Commissioner
Jonathan Levin, General Counsel
Robert Knop, General Counsel
David Adkins, General Counsel
Amy Rothstein, General Counsel

[3] PROCEEDINGS

CHAIRMAN MCGAHN: All right. Next up, Draft Advisory Opinion 2008-15 submitted by National Right to Life Committee, Inc.

Do we have any other late-submitted documents we need to –

UNIDENTIFIED MALE SPEAKER: Yes, Mr. Chairman. We'd move for the sustention of the attorney's – provision for the attorney's submission of documents to consider, Agenda Document Number 08-32 and Agenda Document 08-32A.

CHAIRMAN MCGAHN: Without objection, so ordered.

MR. ADKINS: Good morning, Mr. Chairman, Commissioners. The two draft advisory opinions before you, Agenda Document 08-32 and Agenda Document 08-32A, respond to an Advisory Opinion request submitted on behalf of the National Right to Life Committee, Incorporated. The NRLC is a nonstock, 501c4 nonprofit which has produced two radio advertisements. The NRLC intends to broadcast these advertisements immediately and continuously throughout the United States leading up to the November 2008 general election. The two advertisements involve a dispute between the NRLC [4] and Senator Barack Obama over a vote that Senator Obama cast as a member of the Illinois legislature and specifically whether Senator Obama

mischaracterized that vote in subsequent statements. The only difference between the two advertisements is that the second advertisement features a concluding sentence that reads, "Barack Obama, a candidate whose words you can't believe in." The committee asks whether the NRLC's use of general treasury funds to finance the broadcast of the advertisements would constitute prohibitive corporate expenditures or prohibitive electioneering communications.

The first draft, Agenda Document 08-32, concludes that the first advertisement does not contain express advocacy and would be a permissible corporate-funded electioneering communication. Therefore, the NRLC would be able to fund its broadcast with general treasury funds.

Regarding the second advertisement, the draft concludes that the ad does contain express advocacy, and therefore the NRLC's funding of its broadcast with treasury funds would constitute a prohibitive corporate expenditure.

By contrast, the second draft, which is [5] Agenda Document 08-32A, or revised Draft B, concludes that neither advertisement is an impermissible electioneering communication or contains express advocacy. Therefore, the NRLC would be able to use treasury funds to finance the broadcast of both advertisements.

However, we received two comments on the drafts, specifically the first draft, and one comment on the

request. So I'm happy to address any questions you may have. Thanks.

CHAIRMAN MCGAHN: Thank you. First, I'd like to thank Mr. Adkins for his work on this. Whenever we get anywhere near the history of the agency on issues that involve interpreting Supreme Court cases is a very challenging area. And the herding of the cats here has taken up a lot of time, and I appreciate the effort and various drafts and – and helping all the commission with their thinking on this.

Two drafts and on the first ad, my sense is there's some agreement at least as to the conclusion. And then there's a difference on the – whether mentioning – whether putting that extra line in the ad changes the ad. Given that Draft B is from me, it's pretty clear where I [6] stand, but the thing about this is it's an AO request, and it's a rather targeted request, and it certainly is a request designed to put a tough issue in front of the commission. This is not an easy case. These were ads written in a way to probably raise a lot of issues. In a lot of ways this is a law school exam on the meaning of the Wisconsin Right to Life test. And – and, you know, it's tough as an agency to look at test cases because they always raise issues that may not otherwise be raised, but that's the beauty of the AO process. We still have to try to answer the questions as best we can. Any comments, thoughts, motions? Ms. Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I support the other draft. We didn't originally have two drafts, so they're not – one of

them doesn't have a letter, and the other one is just Draft B. I support the unlettered Agenda Document, 08-32. I think that it is most consistent with the Wisconsin Right to Life decision, with our regulation implementing the Wisconsin Right to Life decision, with our – with the arguments that this agency has made in court subsequent to that regulation, and the [7] Wisconsin Right to Life decision, and with the responses that we've gotten back from the court on – from lower courts on that regulation and on interpretations of it. I know a lot of people preferred the magic word test, and, you know, there were a lot of serious, respected people who for many years thought that was the end point of under the constitution of what could be regulated was magic words. But in the McConnell case the Supreme Court said that that test is functionally meaningless and expanded into the area of functional equivalent of express advocacy.

When we got to the Wisconsin Right to Life case, the court said, an ad is a functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. Under this test, WRTL's three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter.

[8] And I'll just interrupt the quote at this point to point out that the ad in this case – I suppose it focuses on a legislative issue. It's a past legislative issue. It's a vote that was taken in the state senate in, I think, 2000, but it is – it does generally pertain to the issue of abortion, which clearly is an ongoing public policy concern that, you know, people get very animated about, and it's very important to a lot of people. So I'm, you know, not trying to read this too narrowly. The ad takes a position on – certainly on the vote on that issue. Doesn't really exhort the public to adopt that position or urge the public to contact public officials with respect to the matter. So it's not clear out of the four factors that the court mentioned as being consistent with that of a genuine issue ad. At least two of them are clearly missing from this ad.

Second, going back to the quote, their content lacks indicia of express advocacy: The ads do not mention an election candidacy, political party or challenger, and they do not take a position on the candidate's character, qualifications, or fitness for office.

[9] Now, those factors, those two factors, I think, are clearly evident. The indicia of express advocacy, in the ad – in the second ad which has the tag line – let me find it – "Barack Obama, a candidate whose word you can't believe in."

A candidate, mentions that he's a candidate and says that his word can't be believed in. In the – in a recent case that we litigated, "The Real Truth About

Obama," – there were same counsel who has filed the request today – we had a couple of other ads where the tag line was in one case, "Now you know the real truth about Obama's Position on abortion. Is this the change you can believe in?" The commission took the position that that was not express advocacy.

The second ad had the tag line, "Obama's Callousness," – and I'm going to put in a dot, dot, dot because the rest – there's a part in the middle that doesn't really go to the legal issue – Obama's callousness reveals a lack of character and compassion that should give everyone pause.

Should give everyone pause was enough for this commission to go into court and argue that that's express advocacy.

[10] Now, the really interesting thing to me about, "The Real Truth About Obama" case is that the decision we got back from the Eastern District of Virginia, not normally a place where one finds really liberal interpretations of campaign finance laws, was that both of these ads were express advocacy; that both of them met the no-other-reasonable interpretation test under Wisconsin Right to Life.

I was stunned and gratified by that because that actually had been my position all along, but, you know, I didn't expect them to agree with me.

But if you look at those two tag lines and say, well, that's express advocacy, I think it's really hard to come back and say a candidate whose word you can't believe in doesn't make the cut. As I said, either

under the direct words of Wisconsin Right to Life or under our regulation, which the court in "Real Truth About Obama" said, you know, was a pretty close matchup to the court's opinion. It pretty much endorsed our regulation as an accurate and precise reflection of the Supreme Court's view.

Now, I recognize that the other draft does attempt to proffer some other explanations for [11] what was going on in that second ad. There are – let's see. Am I on the right draft here? There are, I think, four different proposed – let's see – one, two, three, four – five different proposed interpretations of the ad, none of which go to the tag line, which is, of course, the difference between the two ads. That's why I thought the first draft, the unnumbered – unlettered draft that I support was a good, narrow interpretation of Wisconsin Right to Life and our regulation because even though the ad, I think, does clearly go to Senator Obama's character, without that tag line I think it doesn't quite cross over the line that – the very high bar that the Supreme Court set for us in Wisconsin Right to Life. And as I said, the alternative explanations for even the second ad in the – in Draft B don't address that – that tag line. What the draft does go on to say is that just merely referencing Senator Obama as a candidate doesn't convert the ad into an appeal to vote. Maybe that's true, but in some hypothetical context one could call somebody a candidate without it being an appeal to vote for or against, but there's no other explanation offered as to why that word, candidate, is in there otherwise. What [12] else does it mean other than here's a candidate: somebody is running for election

that you can't trust? What would any normal person do with that information? They would say, well, gee, I don't want to vote for somebody I can't trust, whose word I can't believe in.

The draft goes on to say that the ad, even the second ad doesn't comment on his – Senator Obama's fitness or qualifications for office.

On the contrary, it takes issue with Senator Obama's candor with respect to statements supposedly made by the senator about requester; hence, the ad does not say that Senator Obama is a candidate you can't believe in, but instead remains focused on what he supposedly said; thus stating that he's a candidate whose word you can't believe in with respect to what he said about requester. And I have to say I cannot find the legal difference or even the factual difference between those two statements; that he's a candidate you can't believe in as opposed to a candidate whose word you can't believe in because he's not doing mime out there on the campaign trail. He's using words. If you can't believe his words, what is it that you could believe about [13] this guy?

And it's interesting to me – and I don't know; maybe this is inadvertent – that the draft says – it doesn't comment on his fitness or qualifications for office, but it leaves out the word, character, which is in both the Supreme Court test and in our regulation. And I think character is really the key to this because when you say somebody's word can't be believed in, that's a very direct attack on character.

You know, you say somebody's word can't be believed in? In some parts of the country them is fightin' words.

And certainly, when I try and teach my children about what it takes to be a person of good character, what traits they ought to be adopting, honesty and integrity and trustworthiness and having a word that people can believe in are really high on my list of good character traits. And I'm – I'm willing to bet that the other parents on this panel teach their kids the same thing. This does go directly to character. To say that a candidate is – someone who is a candidate whose word you can't believe in, I just don't think there's any reasonable interpretation of those words other than don't [14] vote for this guy. And it's not clear to me actually whether if the ad said don't vote for him because he's a candidate whose word you can't believe in, if that would be enough for my colleagues to say, that makes the ad express advocacy; or whether they would still say, well, there's all this issue talk in there, and that kind of outweighs the even magic words in the context of this ad. I'm not really sure what the end point is of that analysis. I just – I just don't think it's – it's reasonable. I don't think, again, if – if – again, looking to the more conservative of the two ads in, "The Real Truth About Obama," if Obama's callousness reveals a lack of character and compassion, that should give everyone pause is enough to trip the express advocacy standard, I don't see how saying that he's a candidate whose word you can't believe in could possibly be anything other than urging somebody – urging anybody who hears this to

– to vote against him. And indeed, the fact that he came in here and said, I want a 20-day AO even though I'm not entitled to it, and I really wanted – my colleagues know I really did try to get an answer as quickly as possible on this. I [15] wanted to answer his question quickly because I always assumed that these ads were all about the election. You wouldn't need a 20-day AO if it was just an issue ad, and he wasn't seeking to affect the election. The reason that he needed to – was urging us to get him an answer quickly, I think, is because the election is coming up. And I think, you know, it would be better if we could have answered even quicker and even better if we could agree on the result; although, I'm not – I'm not optimistic.

So for all of those reasons I support the first draft, the unlettered draft, and not Draft B. And I would be happy to move Draft – Draft Unlettered – it's very confusing; sorry – Draft 08-32 at the appropriate time, or we could have further discussion, whatever my colleagues prefer.

CHAIRMAN MCGAHN: The problem I have with the unlettered draft is – well, essentially the flip side of the same coin that Commissioner Weintraub raised, page 8, lines 13 through 19, when we get into referencing Senator Obama as a candidate, significantly alters the tone of the advertisement, focussing it as much on Senator Obama's bid for the Presidency as his actions as a [16] state legislator.

Additionally, the advertisement manipulates senator Obama's campaign slogan, "Change We Can

Believe In" to attack his character and call into question his trustworthiness as a candidate whose word you can't believe in. The idea that the tone of the ad is now the standard to me is not a standard at all, and I think this ends up devolving into sort of an ink blot test kind of thing where you either see the vase or the two people talking to each other; and once you see one or the other, you're never going to see the other. To me the issue is whether or not you can read an ad as something other than an appeal to vote, and I think that both ads you can. Merely because you mention that someone is a candidate doesn't convert the ad into something other than – it doesn't convert that into an appeal to vote or preclude reading it as something other than an appeal to vote. Simply because they want an answer before the election that somehow we're going to read some inference into this being therefore the functional equivalent of express advocacy to me is a farfetched argument because folks who want to run issue ads tend to use the [17] campaign cycle as the vehicle to bring their issue to the public attention because, well, that's when the most people are paying attention. You're not necessarily going to run an issue ad on an issue of public in court, you know, the second week of January or something. I mean, you may run it during the Super Bowl; but you run it during election season, and that's when folks have the most opportunity to be heard. So, of course, they're going to use it.

And then as far as the issue being a past legislative issue, the issue that is coming up apparently constantly all across the country in state

legislatures, when I first read the ad, I thought, well, okay, these folks are Right-to-Life folks who 365 days a year care about their issue set, and now they've found a vote from a current candidate that illustrates their issue; and they have been called liars, I guess, and they want to essentially defend themselves. They want to make the point that this fellow is a candidate who what he says about is you can't believe in. And that's how I read the ad originally, and that's how I still read the ad.

And it just goes back to what I said [18] initially. This is a tough case because these are essentially a test case. They're very carefully scripted ads. But when we get into those sorts of ads, it does become tough. And, you know, when you get into the tone of the ad and factors and that kind of thing, I just don't see that as – as something that provides a sort of bright-line rule that the Supreme Court thought they were doing in the Wisconsin Right to Life.

Since it was raised – I wasn't going to raise it, but "The Real Truth About Obama" litigation, the end of the opinion, the court says that plaintiff is free to disseminate their message and make any expenditures they wish. And so, you know, it seems – it seems like we may even disagree over what that district court said or didn't say.

With that being said, I mean, this is – I read the Wisconsin Right test as a rather simple bright-line test. And if you can – if you can read the ad as something other than an appeal to vote, that sort of begins and ends the analysis. And in fact, you can't

really export the other – the other analyses without the full – the full package goods of the Wisconsin Right to Life; and in close calls the tie goes in favor of the speaker and all that [19] sort of thing. And to me I've tried to offer a variety of other reads of the ad. And whether or not they're reasonable or unreasonable, have that debate, that devolves into an issue of fact, and I don't read this as a fact issue. I read this as an issue of law; and hence, that's why I support Draft B.

Other comments?

COMMISSIONER PETERSEN: I'll just add briefly that I, too, interpret the Chief Justice's test that he set forth in Wisconsin Right to Life as setting a very high bar with regard to which kinds of ads may be subjected to BCRA's prohibition against corporate or labor-funded electioneering communications. I mean, as has been said already, Chief Justice Roberts said in that case, "The Court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than in its appeal to vote for or against a specific candidate. The test contemplates that there may be close calls as we – as – and I agree with the chairman that this was crafted in a way to be a close call. And – but the tests set forth by the chief justice contemplates those close [20] calls; that you could have situations where two people who are reasonable, one could interpret it as being the functional equivalent of express advocacy. The other one could think of it as issue advocacy. And he said when that happens, the tie goes to the speaker and

not the sensor. So the way I – again, I look at that test as setting a very high standard. And as the draft – Draft B shows, there are a number of reasonable interpretations other than as appeals to vote when you look at those ads that were proposed by the requester in this case. And for that reason I'll be supporting Draft B.

COMMISSIONER HUNTER: Mr. Chairman, thank you. I support the comments of the chairman and Commissioner Petersen. Today a non-for-profit corporation, the National Right to Life Committee, would like to exercise its First Amendment rights by running two radio ads 60 days before a general election regarding an issue that's at the core of its mission. BCRA states that a corporation may not pay for advertisements that mention a candidate within 60 days of the general election. National Right to Life can attempt to ensure that the speech doesn't cross the line by expressly [21] advocating the election or defeat of a specific candidate, by analyzing case law, the statute, and FEC regulations; but if they get it wrong, it's a potential federal crime.

In this case the National Right to Life Committee decided to file an advisory opinion, and we are in the unenviable position of determining whether an ad should be afforded the protection of the First Amendment. In June of '07 the Supreme Court decided the Wisconsin Right to Life decision, which we have talked about today, and held that the relevant section of BCRA unconstitutional as applied to issue ads that a not-for-profit corporation wanted to air within 30 days of a primary election. So very

similar facts to the Wisconsin Right to Life decision are before us today, both non-for-profit corporations. Both would like to air ads within the relevant time period before the relevant electorate.

The Supreme Court found that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

As has been noted today, Draft B notes that [22] there are several other reasonable interpretations other than of an appeal to vote.

In drawing the line between campaign advocacy and issue advocacy, the First Amendment requires us to err on the side of protecting political speech rather than suppressing it. I will support Draft B because I believe neither ad before us today is the functional equivalent of express advocacy under an analysis of the Supreme Court precedent or FEC regulations. Thank you.

CHAIRMAN MCGAHN: Ms. Weintraub again.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I don't want to short-circuit anybody else who wants to talk. I just wanted to respond very briefly to a couple of comments that you made. It's true that the "Real Truth About Obama" decision says that the plaintiff is free to disseminate their message and make any expenditures they wish. The next sentence reads, "Their only limitation is on contributions based on constitutionally permitted

restrictions." And that's always the case when we have to decide. Nobody is ever forbidden from speaking. The question is what kind of money can you use, and are there going to be any disclosure [23] ramifications. So I don't –

CHAIRMAN MCGAHN: Well, if I could just –

COMMISSIONER WEINTRAUB: Sure.

CHAIRMAN MCGAHN: So if a corporation – if a corporation would be banned from speaking, and this is a nonprofit entity giving us an Advisory Opinion request – they're a 501c4; they're not an MCFL accepted, so they are prohibited from speaking.

COMMISSIONER WEINTRAUB: Many organizations – I'm not – in fact, I'm pretty sure this one does, too – many 501c4's in that position have a PAC, and they fund these kinds of communications through their PAC. And I believe this one is one of those, so, again, it goes to funding.

CHAIRMAN MCGAHN: We agree that the C-4 is a separate entity from a PAC?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. So the C-4 is banned.

COMMISSIONER WEINTRAUB: The C-4 can't do it out of their C-4 account. They can do it out of their PAC.

The only other point that I wanted to make is that I hear what you're saying about words like [24] "tone" and "factors," and I would be happy to strip all that language out and just go by a straight meeting of the words if that would gain any votes on the other side. I'm not optimistic that it would, but I – I'm happy to make the offer.

CHAIRMAN MCGAHN: I still struggle, though, with this. We have a requester who is a candidate – or who alleges that a candidate for national office called them a liar. And we're not going to get into what the truth or – I mean, the requester included all kinds of backup for the ad; and, you know, for purposes of this, I think you just take everybody at their word for the purposes of the AO. We don't need to get into whether or not who is winning the name-calling contest, but from a pulpit he wouldn't have had if he wasn't running for president. So my view is we shouldn't foreclose a nonprofit from defending itself in the same arena, which is his candidacy. I mean, if they want to comment at a time – and to me they throw out the word, candidate, not only – and I don't think – obviously, when you mention the word, candidacy, it has something to do with the election, right? But to me, that's not the only reason why they put in the word, candidate. It's [25] another reason not to believe what he's saying because here's a situation where the candidate is saying something about a grass-roots nonprofit group, and they want to say, well, is he a candidate whose words you can't believe in? And the word is that – what he said about this nonprofit is the way I read it. And I'm not so sure stripping out the tone language still changes the

end result. If the tag line had said that – said a politician whose words you can't believe in, would that change your view?

COMMISSIONER WEINTRAUB: I'm not sure. That is a much closer call. I'd have to go back and look at the regulation again and see what –

CHAIRMAN MCGAHN: Okay. Well, let's take a look.

COMMISSIONER WEINTRAUB: It says, "Mentioned an election, candidacy, political party, opposing candidate or voting by the general public."

Maybe. I'd want it – I'd want to give it more than 10-seconds thought.

CHAIRMAN MCGAHN: So maybe if they changed that one word, that could –

COMMISSIONER WEINTRAUB: But you still have the – the very direct attack on character. So like [26] I said, I'd want to give it more than 10- seconds thought here at the table.

CHAIRMAN MCGAHN: Okay. So these are not as easy calls as some maybe would think. One word here and there can make a difference in these ads. But in any event, Vice Chair is looking at the regs as well.

VICE CHAIRMAN WALTHER: We all have looked at our regs off and on. I want to say this. I'm probably the most conservative approach on this one

because I don't – to me, the added sentence in the second example doesn't make such a difference. In my own mind it makes one express advocacy, and the other one not. Everyone knows Obama is a candidate, so it's not really an issue. And even if it were an issue, I mean, even under Roberts' opinion there are minor things that can be identified and clarified, or interpretation can be developed through discovery. The whole idea, as I understand it, is that we don't want to be able to prevent free speech by engaging in protracted litigation, and then delay is what prevents it. But there is not a restriction even engaging in minor litigation which could clarify enough so that a decision could be made fairly quickly.

[27] And I think when you look at this, then the next question is whose word you can't believe in. Well, if you read one, you can argue that perhaps Obama could redeem himself if he made an apology. But when you look at what's really the message here is the public would know about his extreme position that he opposed very defining every baby born alive after an abortion as deserving a protection; that what we're talking about is trying to convey that Senator Obama holds this position. It's unacceptable; and in addition, he's not telling the truth. And I really think at this particular point we find enough in it so that it appears an express advocacy; one is as well.

Because we're in litigation, however, I think my remarks are minor. I'm inclined to just make them as truncated as possible because in getting this interpreted in the next round of our litigation.

CHAIRMAN MCGAHN: Certainly agree. Ms. Bauerly?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman. I share many of Commissioner Weintraub and a certain amount of Commissioner Walther's concerns about this draft as well. I'll [28] support Draft A because I believe its consistent with our regulations and Supreme Court law.

And some of – just some of my concerns about Draft B include that I agree the Supreme Court set a very high bar, and I think that the commission went back and wrote a regulation consistent with that stringent test. And we could, you know, disagree whether that's the right test or the wrong test, but that's, you know, frankly not our role. But the Supreme Court did give us some guidance about how to interpret its tests, and in my view Draft B doesn't fully take account of what I think are important guidants – guiding factors that are directly applicable here. The Supreme Court talks about indicia of express advocacy including mentioning an election or a candidate and an attack on character. And I don't have children, but I agree with you. My mother taught me that telling the truth was an important thing.

So those are my concerns with Draft B, and so I will be supporting Draft A, or the unlettered draft as we refer to it.

COMMISSIONER WEINTRAUB: Make a motion?

CHAIRMAN MCGAHN: Time for a motion.

COMMISSIONER WEINTRAUB: All right, [29] Mr. Chairman. I move approval of Agenda Document Number 08-32. That's the one without the letter.

CHAIRMAN MCGAHN: That's the unlettered.

COMMISSIONER WEINTRAUB: The unlettered one.

CHAIRMAN MCGAHN: Even though we have a Draft B, we don't have a Draft A, so that would be pseudo A. On that motion all in favor say aye.

VICE CHAIRMAN WALTHER: May I comment before we vote?

CHAIRMAN MCGAHN: Sure.

VICE CHAIRMAN WALTHER: I would just like to say I would support the portion of the motion that relates to question number 2, but not with respect to question number 1; so I'll be voting against it.

And I also do have problems with the use of the word, tone. I think that's not the message or really the appropriate one to make this decision on.

CHAIRMAN MCGAHN: Okay. All in favor of the motion say aye.

COMMISSIONER WEINTRAUB: Let me just throw in one more thought, and that is that I appreciate the vice chairman's comments. That's why I think this is the compromised draft because it says

one [30] is, and one isn't express advocacy. I'm finished now.

CHAIRMAN MCGAHN: Okay. We can vote now?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: We're all set?

COMMISSIONER WEINTRAUB: Yeah.

CHAIRMAN MCGAHN: Okay. I'm just looking both ways before I cross the street here. Okay. All in favor say aye.

COMMISSIONER WEINTRAUB: Aye.

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 2 to 4 with Commissioners Weintraub and Bauerly voting in favor, the remainder voting in opposition for apparently different reasons.

Any other motions?

UNIDENTIFIED MALE SPEAKER: Mr. Chairman, I would move that we approve Agenda Document Number 08-32-A, otherwise known as Draft B.

CHAIRMAN MCGAHN: All in favor say aye.

(MEMBERS VOTE AYE)

CHAIRMAN MCGAHN: All opposed?

(MEMBERS VOTE NO)

CHAIRMAN MCGAHN: That motion fails 3-3 with [31] myself, Commissioner Petersen and Hunter voting in favor; Vice Chair, Commissioner Bauerly and Commissioner Weintraub voting in opposition. My sense is we have consensus; however, where five of us agree that the first ad – and I don't have the questions in front of me, so I don't want to say. Depending how you frame the question, do we have the okay for the c4 to run, I think, is the best way; and the second, we don't have consensus. So maybe the best thing to do at this point is ask the counsel to prepare a draft that reflects the common areas where we have in five on the first ad and then unable to reach a conclusion on the – with respect to the second ad. I think that's an accurate representation of the views up here. If it's not – yes.

COMMISSIONER WEINTRAUB: I just want to say to you what I've already said to one or two of your colleagues, and that is that I'm not – I haven't decided yet whether I would vote for that answer. In part, it depends on the legal rationale, but in part I wasn't actually kidding that I thought Draft A was a compromise. And I'm not sure that I'm willing to say, you know, just to give the permission without the complementary [32] restriction on the other ad. So I'm just – I'm continuing to ponder, and it will depend on the wording of the draft.

CHAIRMAN MCGAHN: Do we have any management administrative matters?

UNIDENTIFIED MALE SPEAKER: We do not.

CHAIRMAN MCGAHN: Okay. Anything else for the good of the order?

Okay. With that, we will adjourn our open session. Thank you.

(MEETING ADJOURNED)

[33] STATE OF INDIANA)
) SS:
COUNTY OF VIGO)

I, Renee R. Dobson, a Notary Public in and for said county and state, do hereby certify that I listened to the audiotape recording of a meeting;

That said meeting was taken down in Stenograph notes and afterwards reduced to typewriting under my direction; and that the typewritten transcript is a true and accurate record of said meeting;

I do further certify that I am a disinterested person in this matter; that I am not a relative or attorney of any of the parties, or otherwise interested in the event of this matter, and am not in the employ of the parties.

IN WITNESS WHEREFORE, I have hereunto set my hand and affixed my notarial seal this 13th day of November, 2008.

/s/ Renee R. Dobson, RMR
My Commission Expires:
September 6, 2015
Renee R. Dobson,
Notary Public,
Residing in Vigo
County, Indiana

AMICUS CURIAE BRIEF

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08-205
Supreme Court, U.S.
FILED
JUL 31 2009
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IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

SECTION 203 OF BCRA VIOLATES THE FIRST AMENDMENT AND SHOULD BE DECLARED FACIALLY UNCONSTITUTIONAL 3

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

American Civil Liberties Union, Inc. v. Jennings, 366 F.Supp. 1041 (D.D.C. 1973), *vacated as moot*, 422 U.S. 1030 (1975) 11

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 2, 18, 19

Baggett v. Bullitt, 377 U.S. 360 (1964) 13

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 4

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) ..... *passim*

Freedman v. Maryland, 380 U.S. 51 (1965) 18

Garrison v. Louisiana, 379 U.S. 64 (1964) 17

McConnell v. FEC, 251 F.Supp.2d 176, 586 (D.D.C. 2003) 10

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

Miller v. California, 415 U.S. 15 (1973) 13

Mills v. Alabama, 384 U.S. 214 (1966) 6, 13

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 15

NAACP v. Button, 371 U.S. 415 (1963) 6

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5

Payne v. Tennessee, 501 U.S. 808 (1991) 12

Randall v. Sorrell, 548 U.S. 230 (2006) 1

Smith v. Goguen, 415 U.S. 566 (1974) 13

Speiser v. Randall, 357 U.S. 513 (1958) 17, 18

United States v. National Committee for Impeachment, 469 F.2d 1135 (2d Cir. 1972) ... 11, 12

Watts v. United States, 394 U.S. 705 (1969) 13

Williams v. Rhodes, 393 U.S. 23 (1968) 16

Statutes and Regulations

Bipartisan Campaign Reform Act of 2002 2

2 U.S.C. § 434(f)(3) 3

2 U.S.C. § 441b(b)(2) (§ 203) ..... *passim*

2 U.S.C. § 437c(2)(A) 14

Federal Election Campaign Act, Pub.L. 92-225, 86 Stat. 3 (1971) 10

FISA Amendments Act, Pub.L. 110-261, 122 Stat. 2436 (2008) 4

Military Commissions Act, Pub.L. 109-366, 120 Stat. 2600 (2006) 4

11 C.F.R. § 114.10(c)(4)(ii) 19

INTEREST OF AMICUS[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws.

For the past three decades, the ACLU has been deeply engaged in the effort to reconcile campaign finance legislation and First Amendment principles, from *Buckley v. Valeo*, 424 U.S. 1 (1976), where we represented our New York affiliate, to *McConnell v. FEC*, 540 U.S. 93 (2003), where the ACLU was both co-counsel and plaintiff, to *Randall v. Sorrell*, 548 U.S. 230 (2006), where we were lead counsel. In addition, the ACLU has appeared as *amicus curiae* in many of this Court's campaign finance cases, including *FEC v. Wisconsin Right to Life, Inc.* (*"WRTL"*), 551 U.S. 449 (2007).

As framed by the Court's reargument order, 2009 WL 1841614 (2009), this case presents fundamental questions concerning the constitutionally permissible scope of campaign finance regulation that this Court first confronted in *Buckley* and subsequently revisited in *McConnell* and *WRTL*. The proper resolution of that delicate balance remains an issue

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

of substantial importance to the ACLU and its members.

SUMMARY OF ARGUMENT

The broad prohibition on "electioneering communications" set forth in § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b(b)(2), violates the First Amendment, and the limiting construction adopted by this Court in *WRTL* is insufficient to save it. Accordingly, the Court should strike down § 203 as facially unconstitutional and overrule that portion of *McConnell* that holds otherwise.

This brief addresses only that question. It does not address the additional question raised by this Court's reargument order: namely, whether *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), should be overruled. However, if *Austin* is overruled and the ban on express advocacy by corporations and unions is struck down, then the ban on "electioneering communications" in § 203 would necessarily fall as a consequence.

Even if *Austin* is not overruled, § 203 is unconstitutional precisely because it extends beyond the express advocacy at issue in *Austin*. The history of the *McConnell* litigation, as well as campaign finance litigation before and after *McConnell*, demonstrates that there is no precise or predictable way to determine whether or not political speech is the "functional equivalent" of express advocacy.

The decision in *WRTL* correctly recognized that the BCRA's prophylactic ban on "electioneering

communications" threatened speech that lies at the heart of the First Amendment, including genuine issue ads by nonpartisan organizations like the ACLU. But the reformulated ban crafted by this Court in *WRTL* continues to threaten core First Amendment speech. Its reliance on the hypothetical response of a reasonable listener still leaves speakers guessing about what speech is lawful and what speech is not. That uncertainty invites arbitrary and discriminatory enforcement. It will also lead many speakers to self-censor rather than risk sanctions or undertake the expense of suing the FEC prior to speaking, especially since most suits will not be resolved until long after the speech is timely and relevant.

In short, § 203 was a poorly conceived effort to restrict political speech and should be struck down.

ARGUMENT

SECTION 203 OF BCRA VIOLATES THE FIRST AMENDMENT AND SHOULD BE DECLARED FACIALLY UNCONSTITUTIONAL.

1. In *McConnell*, *supra*, this Court upheld the facial validity of § 203. Section 203 bans corporations and unions from using general treasury funds to pay for "electioneering communications," which are defined by BCRA as any "broadcast, cable, or satellite communication" that refers to "a clearly identified candidate for federal office" and that is made either 60 days before a general election or 30 days before a primary election. *See* 2 U.S.C. § 434(f)(3).

That ban applies to both for-profit and non-profit corporations, like the ACLU.[2] For that reason, the ACLU joined the challenge to BCRA in *McConnell*. As we noted at the time, Congress frequently votes on important bills affecting civil liberties in the period preceding an election. To choose two recent examples, the FISA Amendments Act, Pub.L. 110-261, 122 Stat. 2436, was adopted in July 2008 (shortly before the blackout period), and the Military Commissions Act, Pub.L. 109-366, 120 Stat. 2600, was adopted in October 2006 (during the blackout period).

Like many other advocacy organizations, the ACLU has found that broadcast ads can be an important tool for promoting our ideological goals. Although the ACLU has never supported or opposed a candidate for partisan office, its broadcast issue ads were nonetheless banned by BCRA if they met the definition of an "electioneering communication." The government did not dispute the impact of BCRA on the ACLU's advocacy efforts in *McConnell*, and this Court did not directly address it. Instead, the *McConnell* Court held that § 203 was facially valid because it was not substantially overbroad. 540 U.S. at 206-07.

2. Four years later, this Court significantly limited that holding in the context of an as-applied challenge to § 203. Specifically, in *WRTL*, the Court

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[2] The only exception is for non-profit corporations that meet the criteria set forth by this Court in *FEC v. Massachusetts Citizens for Life, Inc ("MCFL")*, 479 U.S. 238 (1986). The relevance of *MCFL* to this case is discussed *infra*, at pp.18-19.

construed BCRA's ban on "electioneering communications" to reach only communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 470.

Several aspects of *WRTL* are worth emphasizing. First, the Court properly described § 203 as a content-based restriction on political speech that triggers strict scrutiny under the First Amendment. *Id.* at 464-65. Second, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), the Court reiterated our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 467. Third, the Court ruled that those wishing to express their views on core political issues are entitled to a constitutional "safe harbor" that does not turn on the subjective evaluation of agency regulators. *Id.* Fourth, the Court recognized that the line between campaign advocacy and issue advocacy is often difficult to draw in the real world, *id.* at 474, and that the "[d]iscussion of issues cannot be suppressed merely because the issues may also be pertinent to an election." *Id.* Fifth, the Court made clear that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *Id.* (footnote omitted). In other words, a test that purports to distinguish between political ads that can be proscribed under the First Amendment and those that cannot "must give the benefit of any doubt to protecting rather than stifling speech." *Id.* at 469.

3. To say that "the tie goes to the speaker, not the censor," presumes a generally understood method

for determining the First Amendment score that can be fairly and consistently applied. The rules of baseball tolerate judgment calls but "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Even as construed in *WRTL*, § 203 lacks the precision that the First Amendment requires.

Congress, to its credit, understood the constitutional problems it faced when it decided to abandon the "express advocacy" test that had marked the outer boundary of government regulation in this sensitive area since *Buckley*. It therefore took the unusual step of providing alternative definitions of the "electioneering communications" it sought to prohibit in § 203.

By describing an "electioneering communication" as any broadcast, cable or satellite ad that mentions a clearly identified candidate for federal office within a specified blackout period, the primary definition has the benefit of clarity. For First Amendment purposes, however, clarity and precision are not the same. A law that prohibits newspapers from publishing endorsements on Election Day is perfectly clear. It is also unconstitutional as this Court held more than forty years ago in *Mills v. Alabama*, 384 U.S. 214 (1966), because it is not narrowly tailored to advance a compelling state interest.

Had this Court struck down the primary definition of an "electioneering communication" in *WRTL*, it would have been required to consider the fallback definition that Congress provided in anticipation of the possibility that its primary

definition might be declared unconstitutional. Unlike the primary definition, the fallback definition is not limited to the period preceding an election. Rather, its prohibition applies to any broadcast, satellite or cable communication that: (a) "promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)"; and (b) is "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate."

The Court's holding in *WRTL* borrowed heavily from this fallback definition, which has neither clarity nor precision, but did so in the guise of construing the primary definition. To be sure, there are differences. By construing the primary definition rather than adopting the fallback definition, the *WRTL* Court maintained the temporal limitations of the primary definition, which continues to apply only during the congressionally specified blackout periods. Also, the *WRTL* Court did not incorporate the language of "promote," "support," "attack," or "oppose" that Congress included in the fallback definition. But the operative language in the fallback definition, as Congress wrote it, is nearly identical to the operative effect of the primary definition, as this Court construed it in *WRTL*. Under the former, corporate and union funds cannot be used for an "electioneering communication" that is "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Under the latter, corporate and union

funds cannot be used for any "electioneering communication" that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

4. The ACLU's position in *McConnell* was that both the primary definition and the fallback definition of "electioneering communications" in § 203 are unconstitutional, and that remains our position. Because the language adopted by this Court in *WRTL* is indistinguishable in critical respects from the fallback definition, we believe it is constitutionally insufficient to solve the constitutional problems created by § 203.

Those problems are amply illustrated by the record in *McConnell*. As Justice Kennedy correctly noted in *McConnell*, "even defendants' own experts disagree among themselves about whether specific ads fall within the prohibition" against "sham" issue ads. 540 U.S. at 338. Given the current debate about health care reform, one illustration from the *McConnell* record is particularly revealing. A group called the "Alliance for Quality Nursing Home Care" broadcast the following ad prior to the 2000 presidential election.

> [Announcer]: There's a nursing home crisis in America. Despite record budget surpluses Medicare has been cut by billions. Seniors' access to quality nursing care threatened.
>
> [Woman]: Caring for the elderly: it becomes your life. But with Medicare cuts my job is much harder.

[Announcer]: Call. Tell Al Gore to fight to restore the Medicare cuts. Keep the promise.

[Woman]: Help me help those who need it most.

This ad was shown to the principal congressional sponsors of BCRA during discovery in *McConnell*. Senator Feingold testified at his deposition that "[the ad] is certainly not helpful to Al Gore because what it suggests is that he was somehow responsible for the Medicare cuts and it, in my view, it's sort of a sneaky way of trying to blame him without directly saying that he should be thrown out of office or not elected." Senator McCain testified that the ad "implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment." Representatives Meehan and Shays, on the other hand, thought that the ad was "probably" intended to promote Senator Gore's presidential candidacy.[3]

It is possible, we realize, to dismiss the significance of those inconsistent responses by arguing that they focused on the intent of the ad's sponsor, which is no longer a relevant consideration under this Court's decision in *WRTL*.[4] But, we think it is even more important to acknowledge that the

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[3] *See* Consolidated Brief for Plaintiffs in Support of Motion for Judgment, *McConnell v. FEC*, No. 02-0582 (D.D.C.), at 72-73.

[4] "Far from serving the values the First Amendment is meant to protect, an intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of § 203, on the theory that the speaker actually intended to affect the election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue." *WRTL*, 551 U.S. at 468.

question of whether an ad is the "functional equivalent" of express advocacy necessarily calls for a subjective response on the part of the listener despite this Court's characterization of the *WRTL* test as an objective standard. Furthermore, those responses are likely to differ even among reasonable listeners. As Judge Kollar-Kotelly observed after reviewing the voluminous evidence presented to the three-judge district court in *McConnell*: "The expert testimony in this case . . . illustrates how one person's genuine issue advertisement can be another's electioneering commercial." *McConnell v. FEC*, 251 F.Supp.2d 176, 586 (D.D.C. 2003)(concurring opinion).

The history of campaign finance regulation demonstrates the need to erect sturdy safeguards for free speech. The modern era of campaign finance regulation began when Congress passed the Federal Election Campaign Act ("FECA") of 1971, Pub.L. 92-225, 86 Stat. 3. That law was applied for the first time against the National Committee Against Impeachment, a nonprofit organization that purchased a two-page ad in *The New York Times* in May 1972 calling for the impeachment of President Nixon and listing an "honor roll" consisting of Members of Congress supporting impeachment. The government's theory was that the ad was intended to "influence" the outcome of the 1972 presidential and congressional elections and that, under FECA, the National Committee Against Impeachment was therefore barred from accepting contributions and spending additional funds unless it first registered as a "political committee." Reversing a preliminary

injunction in the government's favor, the Second Ciruit ruled that it would be "abhorrent" and "intolerable" to permit FECA to "regulat[e] the expression of opinion of fundamental issues of the day." *United States v. National Committee for Impeachment*, 469 F.2d 1135, 1142 (2d Cir. 1972).

The ACLU found itself in a similar position when it sought to purchase an ad shortly before the 1972 elections criticizing President Nixon's busing policies and praising Members of Congress who shared the organization's support for court-ordered busing as a remedy for school segregation in appropriate circumstances. Based on its understanding of FECA, *The New York Times* treated the ad as one "on behalf" of the reelection of the congressional members listed in the ad, and "in derogation" of President Nixon's reelection campaign. It refused, accordingly, to print the ad unless the ACLU provided the newspaper with a statutorily required certification. A three-judge court held that the proposed interpretation of FECA "establishe[d] impermissible prior restraints, discourage[d] free and open discussion of matters of public concern and as such must be declared an unconstitutional means of effectuating legislative goals." *American Civil Liberties Union, Inc. v. Jennings*, 366 F.Supp. 1041, 1051 (D.D.C. 1973), *vacated as moot*, 422 U.S. 1030 (1975).

It is certainly true that a legislative scheme that permits the regulation of political speech "on behalf" of a candidate, *Jennings*, or speech that is intended to "influence" an election, *National Committee*, is more constitutionally pernicious than the narrowing

interpretation of § 203 adopted in *WRTL*. But, that ought not to be the measuring stick.

The *WRTL* Court implicitly recognized that a determination of whether or not a particular ad (or in this case a movie) is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" will necessarily depend on the totality of circumstances. The Court then tried to limit the reach of that judicially-crafted language by noting that the particular ad at issue in *WRTL* did not mention an election or candidacy, and did not take a position on a candidate's character, qualifications, or fitness for office. 551 U.S. at 470. However, none of those criteria were described as dispositive, which is hardly surprising since the underlying statute was consciously designed as an alternative to *Buckley's* express advocacy test. By definition, any test that depends on a reasonable interpretation of the totality of circumstances has considerable play in the joints.

5. Despite this Court's effort to narrow the scope of § 203 in *WRTL*, the statute should be declared facially unconstitutional for at least three independently sufficient reasons.[5]

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[5] Under these circumstances, *stare decisis* does not justify preserving the contrary holding in *McConnell*. *McConnell* is only six years old, its rationale on this point was substantially undermined by *WRTL* just two years ago, *stare decisis* has less force for constitutional rulings that cannot be corrected by Congress, and this is not a situation where there are any significant reliance issues. *See Payne v. Tennessee*, 501 U.S. 808, 828 (1991)(and collected cases).

First, § 203 remains unconstitutionally vague. Vague laws chill speech and the vagueness doctrine therefore applies with special force in First Amendment cases. *See Smith v. Goguen*, 415 U.S. 566, 572 (1974); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

For that reason, First Amendment tests do not typically rely on the reaction of a "reasonable listener." There are, of course, exceptions. The *Miller* test for obscenity rests, in part, on the response of the "average person" to the material at issue. *Miller v. California*, 415 U.S. 15, 24 (1973). This Court has also referred to the "reaction of the listeners" in determining whether speech qualifies as a "true threat" that can be proscribed. *See Watts v. United States*, 394 U.S. 705, 708 (1969). But, both those cases were dealing with speech that has historically been deemed outside the First Amendment.

This case, by contrast, deals with political speech at the First Amendment's core.

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to public processes.

Mills v. Alabama, 384 U.S. at 218-219. To facilitate these discussions, the First Amendment demands a

bright line between protected speech and unlawful advocacy because political campaigns in the real world so rarely provide one. "Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest." *Buckley*, 424 U.S. at 42.

As an abstract matter, a hypothetically reasonable speaker should perhaps be able to predict with a reasonable degree of certainty how a hypothetically reasonable listener will interpret an ad. But piling hypotheticals together is no more consistent with strict scrutiny under the First Amendment than the "prophylaxis-upon-prophylaxis approach to regulating expression" that this Court rejected in *WRTL*. 551 U.S. at 479.[6]

Second, vague laws invite discriminatory enforcement on the basis of viewpoint and that risk is particularly acute when what is at stake is political speech that may be harshly critical of those in power. FECA seeks to minimize that risk by providing that each major party is entitled to equal representation on the Federal Elections Commission. 2 U.S.C. §437c(2)(A). But the bipartisan composition of the

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[6] Citing *Buckley*, the *WRTL* Court explained that a test based on the "actual effect" that speech will have on the target audiences "puts the speaker . . . wholly at the mercy of the varied understanding of his hearers." 551 U.S. at 469. Although the majority rejected Justice Scalia's critique that its own test suffered from the same vagueness problems, *id.* at 474 n.7, it is hard to see how a test based on the hypothetical impact of speech on a reasonable listener or listeners (who may have different responses that could be described as reasonable) provides greater clarity.

FEC does not protect minor parties; it does not protect groups that operate independently of any political party; and it does not extend to state and local laws that may not even attempt to insulate campaign finance enforcement from partisan political influence.

Third, BCRA's ban on "electioneering communications" currently extends only to broadcast, cable and satellite. That selective focus presents its own constitutional problems. The government concedes that *Hillary: The Movie* is not subject to BCRA if it is purchased as a DVD and watched at home, yet contends that it is subject to BCRA if ordered for home viewing as a pay-per-view movie. It is difficult to justify that distinction in any rational First Amendment world.[7]

More seriously, the limitations on covered media included in BCRA could be changed at any time. As the government made perfectly clear during oral argument in March, its constitutional theory would permit Congress to ban a book as well as a 30-second TV spot if the book satisfied the operative definition of an "electioneering communication" and the book's corporate publisher paid for the book with general treasury funds (as it almost certainly would). Tr. at 26-30. The breadth of that concession is staggering. It has become commonplace to publish

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[7] *Cf. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)(holding that a special tax targeting a handful of newspapers "presents such a potential for abuse that no interest suggested by [the state] can justify the scheme.").

books about candidates during campaign season. Such books almost always take a position on a candidate's character, either explicitly or implicitly, which is one of the indicia of prohibited advocacy that this Court identified in *WRTL*. The fact that such books could be banned under the government's theory unless funded by a PAC vividly illustrates why those criteria are insufficient to safeguard the important First Amendment interests at stake.[8]

6. The government devotes a scant four pages of its supplemental brief to defending *McConnell's* holding on the facial validity of § 203. Its defense is not only short, but unpersuasive. Initially, the government repeats its mantra that § 203 – as drafted by Congress and, *a fortiori*, as construed in *WRTL* – only reaches political speech that is the "functional equivalent" of express advocacy. Supp.Br. at 21-22. That cannot mean that § 203 only bans speech that would previously have been covered by the express advocacy rules since § 203 would then be pointless. Yet, the government never even attempts to define the daylight between *Buckley* and BCRA by explaining what speech is permitted by the former and prohibited by the latter.

If the government cannot state the difference clearly and succinctly, speakers covered by § 203 will necessarily be guessing when they venture beyond

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[8] "Debate on the qualifications of candidates is integral to the system of government established by our Constitution," *Buckley*, 424 U.S. at 14, and thus "at the core of our electoral process and of the First Amendment freedoms," *Williams v. Rhodes*, 393 U.S. 23, 32 (1968).

express advocacy. Rather than risk sanctions, many speakers will "steer far wider of the unlawful zone," *Speiser v. Randall*, 357 U.S. 513, 526 (1958). If so, the resulting constitutional injury is not limited to those who are silenced. "[S]peech concerning public affairs is more than self-expression, it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

In fashioning the express advocacy doctrine, the *Buckley* Court was not naive. It understood that groups could devise "expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U.S. at 46. But, contrary to the government's position, the Court chose to accept that possibility rather than permit the suppression of constitutionally protected speech.

The government next contends that the chilling effect of § 203 is overstated because the FEC has provided "a simple mechanism" for corporations and unions to claim that their speech is permissible under *WRTL*. Supp.Br. at 22. But that "simple mechanism"—a regulatory form—only works if the FEC agrees with the speaker's contention about *WRTL*'s impact on particular speech. The administrative review mechanism becomes less simple if the speaker must take the FEC to court.

In fact, the government's suggested solution only compounds the constitutional problem. This Court has repeatedly held that the government may not impose a content-based restriction on speech and then place the burden on the speaker to establish the constitutionality of the proposed speech.

> [W]here particular speech falls close to the line separating lawful and the unlawful, the possibility of mistaken fact-finding – inherent in all litigation – will create the danger that the legitimate utterance will be penalized . . . This is especially to be feared when the when the complexity of the proofs and the generality of the standards applied . . . provide but shifting sands on which the litigant must maintain his position."

Speiser v. Randall, 357 U.S. at 526 (citations omitted). *See also Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

Finally, the government argues that free speech interests are adequately protected because Congress provided for expedited review of constitutional challenges to BCRA. Supp.Br. at 23. This Court took a more realistic view in WRTL, agreeing with the district court's assessment that "it would be 'entirely unreasonable . . . to expect that [the speaker] could have obtained complete judicial review of its claims in time for its ads' during the BCRA blackout periods." 551 U.S. at 462 (citations omitted).

7. As noted at the outset, this brief does not address the question of whether *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), should be overruled. At the very least, however, the ACLU strongly believes that this Court should hold that the *MCFL* exception for nonprofit, ideological corporations that do not accept corporate funding, *see* n.2, *supra*, should extend to organizations like the ACLU that only accept *de minimis* funding from

sources other than individual donors. Contrary to the position it has taken for years, *see* 11 C.F.R. § 114.10(c)(4)(ii), the government now apparently concedes, or at least acknowledges, that *MCFL* applies to nonprofit, ideological corporations that are financed "overwhelmingly" by individual donations. Supp.Br. at 3 n.3. The ACLU urges the Court to adopt that interpretation of *MCFL*, if it does not overrule *Austin* entirely.

CONCLUSION

For the reasons stated herein, this Court should declare § 203 of BCRA facially unconstitutional under the First Amendment, and overrule the contrary holding in *McConnell*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

134

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IN THE

Supreme Court of the United States

Citizens United, *Appellant,*

v.

Federal Election Commission, *Appellee.*

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR *AMICUS CURIAE* THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANT CITIZENS UNITED

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TABLE OF CONTENTS

Table of Authorities.....i

Interest of Amicus Curiae.....1

Summary of Argument.....2

Argument.....4

I. THIS CASE INVOLVES CORE POLITICAL SPEECH, ENTITLED TO THE HIGHEST POSSIBLE CONSTITUTIONAL PROTECTION.....4

II. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY THE RESTRICTION ON CORE POLITICAL SPEECH IN THIS CASE.....5

III. *AUSTIN* SHOULD BE OVERRULED BECAUSE IT IS NOT CONSISTENT WITH THE FIRST AMENDMENT'S PROTECTIONS FOR CORE POLITICAL SPEECH.....9

Conclusion.....17

TABLE OF AUTHORITIES

Cases — Page

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)..... *passim*

Boos v. Barry, 485 U.S. 312 (1988)..... 4

Buckley v. Valeo, 424 U.S. 1 (1976)..... 4,5,6,8,10

Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982)..... 4

Davis v. FEC, 128 S. Ct. 2759, 2771 (2008)..... 11

FCC v. League of Women Voters of California, 468 U.S. 364 (1984)..... 14

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986)..... 4,5

FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007)..... 4,5,6

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985)..... 4-5,6,8

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)..... 4,5,13

Jenkins v. Georgia, 418 U.S. 153 (1974)..... 4

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)..... 4

Williams v. Rhodes, 393 U.S. 23 (1968).....5

Other Authorities

The Bipartisan Campaign Reform Act of 2002.....5

U.S. Constitution, First Amendment.....5

INTEREST OF THE AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties consented to the filing of this brief and were timely notified.

particular ideology. That includes the right to Freedom of Speech under the First Amendment.

SUMMARY OF ARGUMENT

This case involves core political speech, which is at the heart of the First Amendment. The freedom to engage in such core political speech has been recognized since the Founding as a fundamental foundation of our democracy. It can be restricted only in the most extreme circumstances, where the restriction is narrowly tailored to serve a compelling state interest. Such extreme circumstances are not present in this case, and the free speech rights of appellant Citizens United have consequently been violated.

There is no corruption or appearance of corruption in the case of a non-profit corporation engaging only in independent expenditures. The facts of this case clearly show no *quid pro quo* or appearance of any such *quid pro quo*.

Moreover, Citizens United is a modest non-profit with no "immense aggregation of wealth." The entire corporate treasury of Citizen's United does come precisely from those who support the corporation's political ideas, because the corporation was formed precisely to advance a particular, stated, ideological viewpoint.

The First Amendment's free speech guarantee is focused on maximizing freedom of speech, not equalizing or balancing speech. Indeed, what has not been sufficiently recognized is that this case

involves simple speech, which the listener can accept or reject. If the speech persuades many listeners, then it was all the more important to protect. If the speech does not persuade many listeners, then it cannot be harmful.

Moreover, corporate interests are not monolithic in their views on politics and public policy. Their views are generally in competition with each other, and there are many corporate supporters of both political parties. Many corporate interests favor public policies that will give them competitive advantages over other corporate interests, which are then naturally opposed by those disfavored corporate interests.

This Court should protect the free speech rights of Citizens United with a broad ruling establishing that the government may not restrict the core political speech of non-profit corporations involving independent expenditures. It should expressly reserve the issue of protections for the core political speech of for-profit corporations based on independent expenditures for a case involving for-profit corporations.

This Court should overrule *Austin* as fundamentally inconsistent with the protections of the First Amendment for core political speech. The government may not restrict core political speech on an impossible mission of balancing all such speech in society. The Constitution's policy is far more realistically for all such speech to compete, with the public making the ultimate decision as to what is right, within constitutional limitations.

ARGUMENT

I. THIS CASE INVOLVES CORE POLITICAL SPEECH, ENTITLED TO THE HIGHEST POSSIBLE CONSTITUTIONAL PROTECTION.

This case involves a movie discussing the public record of Hillary Clinton, a top candidate for President of the United States at the time the movie was to be distributed. It is the cinematic equivalent of an opinion commentary in a newspaper or magazine, or a book presenting political opinions. *See Jenkins v. Georgia*, 418 U.S. 153 (1974); *Board of Educ. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853 (1982). As such, it involves core political speech at the very heart of the First Amendment.

The freedom to engage in such core political speech has been recognized since the Founding as a fundamental foundation of our democracy. The freedom to engage in such speech is exactly what the First Amendment is all about. Such political speech, not pornography or nude dancing, is the core concern of the Amendment, and consequently entitled to its highest possible protection. *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *Boos v. Barry*, 485 U.S. 312 (1988); *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007); *FEC v. National Conservative Political Action*

Committee, 470 U.S. 480 (1985)("*NCPAC*"); *Williams v. Rhodes,* 393 U.S. 23 (1968).

Yet, acting under the authority of the BCRA (The Bipartisan Campaign Reform Act of 2002), the Appellee Federal Election Commission effectively banned the movie for the entire 2008 election season. This amounts to a gross violation of the fundamental political free speech rights of Appellant Citizens United, which must be corrected so that Citizens United will be free to distribute future movies reflecting the political views and opinions of its members.

The First Amendment states, "Congress shall make no law...abridging the freedom of speech...." The well-established precedents of this Court allow regulation of protected speech only when the restrictions are narrowly tailored to serve a compelling state interest. *E.g., Buckley; MCFL; NCPAC; Bellotti; Wisconsin Right to Life.*

But there is no compelling state interest that would justify the severe restriction on the political free speech of Appellant Citizens United in this case. The restriction on free speech is also not narrowly tailored, but that is a secondary consideration when there is no compelling state interest to justify the restriction in the first place.

II. THERE IS NO COMPELLING STATE INTEREST TO JUSTIFY THE RESTRICTION ON CORE POLITICAL SPEECH IN THIS CASE.

As this Court said in *NCPAC*, "[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-497. But there is no such corruption or the appearance of corruption in this case.

Citizens United is a modest non-profit corporation whose expenditures in producing and promoting the movie were all completely independent of any campaign. Such independent expenditures do not involve any "actual or apparent *quid pro quo* arrangements." *Wisconsin Right to Life*, 127 S. Ct. at 2672 (opinion of Roberts, C.J.).

As this Court said in *Buckley*, the

> "absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."

424 U.S. at 47. The Court also recognized in *NCPAC* that there is a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." 470 U.S. at 496-497.

Kennedy adds in dissent in *Austin*,

> "Our cases acknowledge the danger that corruption poses for the electoral process, but

> draw a line in permissible regulation between payments to candidates ('contributions') and payments or expenditures to express one's views ('independent expenditures')."

494 U.S. at 702. Kennedy also stated,

> In *NCPAC*...[w]e distinguished between the campaign contributions at issue in *FEC v, National Right to Work Committee, supra,* and independent expenditures, by noting that while 'the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funded through the corporate form' with regard to candidate campaign contributions, a similar finding could not be supported for independent expenditures. *NCPAC, supra, at 500-501."*

494 U.S. at 705.

Similarly, Scalia stated in dissent in *Austin,*

> "Independent advocacy, moreover, unlike contributions, 'may well provide little assistance to the candidate's campaign and indeed may prove counterproductive,' thus reducing the danger that it will be exchanged 'as a *quid pro quo* for improper commitments from the candidate.'"

494 U.S. at 683-684 (quoting *Buckley* 424 U.S. at 47). That is why, as Scalia also said in *Austin,* this Court held in *Buckley* "that independent expenditures to express the political views of individuals and

associations do not raise a sufficient threat of corruption to justify prohibition." 494 U.S. at 682.

The facts of this case clearly show no *quid pro quo* or appearance of any such *quid pro quo*. If the FEC had not prevented Citizens United from distributing and broadcasting the movie about Hillary Clinton during the Democratic party primaries last year, it is inconceivable that President Obama would now feel in any way obligated to repay the ideologically conservative Citizens United with policy accommodations to those conservative views or other political favors.

The majority in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990) saw a compelling state interest justifying restrictions on political speech to counter,

> "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

494 U.S. at 660. But Citizens United is a modest non-profit with no such "immense aggregation of wealth." Moreover, the entire corporate treasury of Citizen's United does come precisely from those who support the corporation's political ideas, because the corporation was formed precisely to advance a particular, stated, ideological viewpoint. The independent expenditures here, therefore, are the same as the independent expenditures in *NCPAC*,

which this Court held could not be banned under the First Amendment.

Consequently, while we do not agree that the state interest advanced in *Austin* can justify restricting political speech, that interest in any event is not present in this case. As Scalia said in dissent in *Austin*,

> "If narrow tailoring means anything, surely it must mean that action taken to counter the effect of amassed 'war chests' must be targeted, if possible, at amassed 'war chests.' And surely such targeting is possible...."

494 U.S. at 688.

For these reasons, there is no compelling state interest to justify the restriction on core political speech in this case.

III. *AUSTIN* SHOULD BE OVERRULED BECAUSE IT IS NOT CONSISTENT WITH THE FIRST AMENDMENT'S PROTECTIONS FOR CORE POLITICAL SPEECH.

Austin involved a Michigan campaign finance statute prohibiting corporations from using their general corporate treasury funds for contributions or independent expenditures in support of, or in opposition to, any candidate in state elections. The Michigan Chamber of Commerce, a non-profit corporation, wanted to pay for a newspaper ad supporting a candidate for the Michigan House of

Representatives in a June, 1985 special election. Since violation of the state campaign finance statute was punishable as a felony, the Michigan Chamber sued for injunctive relief against enforcement of the statute, on the grounds that it unconstitutionally violated the free speech guarantee of the First Amendment.

The *Austin* majority found a compelling state interest to restrict core political speech based on "a different type of corruption in the political arena." 494 U.S. at 660. That was, again, "the corrosive and distorting effects of immense aggregations of wealth," that are both "accumulated with the help of the corporate form," and that "have little or no correlation to the public's support for the corporation's political ideas." Id.

This concern that the resources of some may enable them to engage in too much speech, which is somehow unfair to others, is inconsistent with the whole notion of the First Amendment's free speech guarantee. That guarantee is focused on maximizing freedom of speech, not equalizing or balancing speech. The Court recognized this point in *Buckley*, in expressly rejecting the argument later embraced by the *Austin* majority, saying,

> "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the *First Amendment*, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered

> interchange of ideas for the bringing about of political and social changes desired by the people.' The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."

424 U.S. at 48-49 (citations omitted). This Court reiterated this same principle just last term in *Davis v. FEC*, 128 S. Ct. 2759, 2771 (2008), holding that "the interest in equalizing the relative ability of individuals and groups to influence the outcome of elections cannot support a cap on expenditures for express advocacy of the election or defeat of candidates."

Kennedy added in dissent in *Austin*, "The regulatory mechanism adopted by the Michigan statute is aimed at reducing the quantity of political speech, a rationale endorsed by today's majority. The First Amendment rests on quite the opposite theory." 494 U.S. at 704. Kennedy also stated,

> "The suggestion that the government has an interest in shaping the political debate by insulating the electorate from too much exposure to certain views is incompatible with the First Amendment. '[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.' Id., at 791."

494 U.S. at 706 (Quoting *Bellotti*).

Similarly, Scalia stated in dissent in *Austin* regarding the compelling interest argument of the majority,

> "This is not an argument that our democratic traditions allow – neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be 'unduly' extensive (because they are rich) or 'unduly' persuasive (because they are movie stars) or 'unduly respected' (because they are clergymen). The premise of our system is that there is no such thing as too much speech – that the people are not foolish but intelligent, and will separate the wheat from the chaff."

494 U.S. at 695.

Indeed, if this concern of the *Austin* majority is a valid basis for restricting core political speech, then as Scalia asks in dissent in *Austin,* "Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with 'actual public support' for his positions?" 494 U.S. at 685. As Scalia adds, the state interest in balancing speech advanced by the *Austin* majority cannot be "sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates." 494 U.S. at 680.

The most fundamental error of the *Austin* majority is that what is involved here is just speech, which can be accepted or rejected by the listener, and

doesn't force anyone to do anything. If it is accepted by a majority of listeners, then the speech is highly desirable from a social perspective, and if it is rejected by a majority, then there is no harm. As this Court said in *Belloti*, "[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it." 435 U.S. at 790. Scalia added in dissent in *Austin*,

> "The advocacy of such entities that have 'amassed great wealth' will be effective only to the extent that it brings to the people's attention *ideas* which – despite the invariably self-interested and probably uncongenial source – strike them as true."

494 U.S. at 684.

Another fundamental error of *Austin* is that the political and policy views of corporate interests are not monolithic. Indeed, a sophisticated economic understanding recognizes that corporate interests are always jockeying for competitive advantage over one another by law, known as "economic rents." Much if not most corporate advocacy is aimed at achieving such artificial advantages through law and politics, rather than advancing a general "corporate interest." The failure to recognize this reflects an unsophisticated, "neo-Marxist" mindset assuming that corporate interests will always be advancing a mythical "class interest," rather than what they see as their narrow individual corporate interests.

These two reasons, and the focus of the First Amendment on maximizing rather than equalizing

speech, are why the fact that corporations accumulate their wealth in part with government help is irrelevant to whether there is a compelling government interest justifying restrictions on core political speech. However corporations may accumulate their wealth, what is involved is still just speech that listeners may accept or reject, espousing competing rather than monolithic political interests, and the policy of the First Amendment is to protect the freedom to engage in such speech to the maximum extent possible, not hopelessly try to balance such speech through restrictions on freedom of speech.

That is why, as Scalia says in answer to the legal advantages granted to corporations,

> "[S]o are other associations and private individuals given all sorts of special advantages that the state need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiting of *First Amendment* rights."

494 U.S. at 680.

These points are reflected in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). In that case, this Court protected the free speech rights of corporate noncommercial broadcasting stations that received federal funds to operate, in striking down a Congressional ban on editorializing by those stations. Advocates of the ban tried to justify it

based on the federal assistance, but this Court rejected that justification.

The policy of the First Amendment protecting freedom of speech rather than balancing of speech is based in part on the judgment that the government cannot be trusted to balance speech without favoritism among political viewpoints. Scalia again explained this in his dissent in *Austin*, saying,

> "[G]overnmental abridgement of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars). The premise of our *Bill of Rights*, however, is that there are some things – even some seemingly desirable things – that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature...was trying to give unincorporated unions...political advantage over major employers. Or perhaps...it knows that with evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment...was to assume the worst, and to rule the regulation of political speech 'for fairness sake' simply out of bounds."

494 U.S. at 692-693.

Scalia concludes on this point,

> "Despite all the talk of 'corruption and the appearance of corruption' – evils that are not significantly implicated and that can be avoided in many other ways – it is entirely obvious that the object of the law we have approved today is not to prevent wrongdoing but to prevent speech."

494 U.S. at 694. Scalia adds,

> "The Michigan law appears to be designed...neither to protect shareholders, nor even (impermissibly) to 'balance' general political debate, but to protect political candidates."

494 U.S. at 686.

For all of these reasons, this Court should overrule *Austin* as fundamentally inconsistent with the protections of the First Amendment for core political speech. We respectfully submit that the Court should issue a broad ruling establishing the clear principle that the government may not restrict the core political speech of non-profit corporations involving independent expenditures. It should expressly reserve the issue of protections for the core political speech of for-profit corporations based on independent expenditures for a case involving for-profit corporations.

CONCLUSION

For all of the foregoing reasons, *Austin* should be overruled, and the judgment of the District Court below should be reversed.

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AMICUS CURIAE BRIEF

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CITIZENS UNITED,

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FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE COURT SHOULD OVERRULE *McCONNELL* AND HOLD THAT § 203 IS FACIALLY UNCONSTITUTIONAL 4

II. THE ANTI-CORRUPTION INTEREST THAT SUPPORTS RESTRICTIONS ON CONTRIBUTIONS DOES NOT JUSTIFY RESTRICTIONS ON INDEPENDENT SPEECH 9

III. NO OTHER COMPELLING GOVERNMENTAL INTEREST WARRANTS PROHIBITION OF UNION INDEPENDENT EXPENDITURES 13

CONCLUSION 18

TABLE OF AUTHORITIES

CASES Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) 13, 16

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 2, 15, 16

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Communications Workers of America v. Beck, 487 U.S. 735 (1988) 16, 17

Eastex, Inc. v. NLRB, 437 U.S. 556 (1978) 13

Ellis v. Bhd. of Railway and Airline Clerks, 466 U.S. 435 (1984) 13

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 533 U.S. 431 (2001) 10

Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 8, 9, 15

Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 10, 11, 15

Federal Election Commission v. National Right to Work Committee, 459 U.S. 197 (1982) 13, 18

Federal Election Commission v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) .. *passim*

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 12

Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991) 12

Machinists v. Street, 367 U.S. 740 (1961) 12, 13, 16, 17

McConnell v. Federal Election Commission, 540 U.S. 93 (2003) ..... *passim*

McConnell v. Federal Election Commission, 251 F.Supp. 2d 176 (D.D.C. 2003) 6, 7

Pattern Makers League v. NLRB, 473 U.S. 95 (1985) 17

Pipefitters v. United States, 407 U.S. 385 (1972) 13

Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944) 16

Thomas v. Collins, 323 U.S. 516 (1945) 9

United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948) 14

United States v. United Auto Workers, 352 U.S. 567 (1957) 14, 15

Wisconsin Right to Life, Inc. v. Federal Election Commission, 546 U.S. 410 (2006) 2

STATUTES AND REGULATION

2 U.S.C. § 431 *et seq.* 1

2 U.S.C. § 434(f)(3)(A)(i)(I) 5

2 U.S.C. § 437g(a)(4) 8

2 U.S.C. § 437g(a)(5) 8

2 U.S.C. § 437g(a)(5)(C) 8

2 U.S.C. § 437g(a)(5)(D) 8
2 U.S.C. § 437g(a)(6) 8
2 U.S.C. § 441b(b)(2) 1
2 U.S.C. § 441b(c) 1
29 U.S.C. § 159(a) 17
29 U.S.C. § 411 17
29 U.S.C. § 411(a)(3) 17
29 U.S.C. § 481 17
29 U.S.C. § 481(e) 17
29 U.S.C. § 482 17
29 U.S.C. § 483 17
11 C.F.R. § 114.15 8

MISCELLANEOUS

Annenberg Public Policy Center, "Issue Advertising in the 1999-2000 Election Cycle" 5, 6

Brief of AFL-CIO as *Amicus Curiae, Grutter v. Bollinger*, 539 U.S. 306 (2003) 13

Federal Election Commission Advisory Opinion 2008-15 (2009) 8

J. Krasno and F. Sorauf, "Evaluating the Bipartisan Campaign Reform Act (BCRA)" 6

Joint Appendix, Vol. III, *McConnell v. Federal Election Commission* 6

W. Osborne, ed., *Labor Union Law and Regulation* (2003) 16, 17

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 56 national and international labor organizations with a total membership of 11 million working men and women, files this brief *amicus curiae* in support of Appellant with the consent of the parties as provided for in the Rules of this Court.[1]

INTEREST OF *AMICUS*

As plaintiffs in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the AFL-CIO and its federal political committee ("the AFL-CIO Plaintiffs") brought a facial First Amendment challenge to § 203 of the Bipartisan Campaign Reform Act ("BCRA") of 2002, 2 U.S.C. § 441b(b)(2) and (c) (amending the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*), which proscribes union and corporate funding of "electioneering communications." The AFL-CIO Plaintiffs did so because this provision criminalized the AFL-CIO's use of the broadcast medium as a legislative and policy advocacy tool, falsely characterized substantial labor organization speech on matters of public concern as wholly or substantially electoral, and impaired union political participation as a matter of law.

The AFL-CIO Plaintiffs placed in the *McConnell* record approximately 85 different television and radio advertisements that the AFL-CIO had sponsored throughout every year from 1995 through 2001, many of which would have been prohibited by § 203

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[1] No counsel for a party authored this brief *amicus curiæ* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

because they referred to incumbent Members of Congress. See Joint Appendix ("J.A."), Vol. I, pp. 440-62 (Declaration of Denise Mitchell), J.A. Vol. II, pgs. 464-587 (Index of AFL-CIO Issue Advertising, 1995-2001); Brief of AFL-CIO Appellants/Cross-Appellees at 1-7, *McConnell v. Federal Election Commission*, No. 02-1775. Without specifically addressing that evidence or the other plaintiffs' evidence of overbreadth, however, this Court held that the various *McConnell* plaintiffs had not "carried their heavy burden of proving that [§ 203] is overbroad" and that § 203 constitutionally proscribed advertising "to the extent that [it was] the functional equivalent of express advocacy." *See* 540 U.S. at 203-11.

The AFL-CIO subsequently filed briefs *amicus curiae* in support of a tax-exempt, non-profit corporation in *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006), and *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), in order to preserve its own right to make as-applied challenges to § 203 and to undertake advertising that was structurally similar to that which the Government sought to ban in those cases.

Because the controlling opinion in *WRTL II* still leaves the AFL-CIO uncertain as to which of its public speech is potentially criminal, it has a direct interest in whether *McConnell's* facial upholding of § 203 stands. And, because the AFL-CIO and other labor organizations have fundamental interests in communicating with the general public about candidates and elections, it has a commensurate interest in the fate and interpretation of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

SUMMARY OF ARGUMENT

McConnell should be overruled as to §203's facial constitutionality. *McConnell* endorsed record evidence and theories that treated virtually all advertising literally described by §203 as bearing an "electioneering purpose" or a likely electoral "effect" that justifies its prohibition as the "functional equivalent" of express advocacy. But *WRTL II* rightly rejects these as permissible bases for censorship, eliminating the analytical underpinning of *McConnell*'s overbreadth holding. And, as construed in *WRTL II*, §203 covers an insufficiently defined realm of speech that the FEC's regulatory implementation cannot satisfactorily define. Only express advocacy itself avoids undue vagueness.

The Court need not reconsider *Austin* to decide this case. The Government does not even defend *Austin*'s anti-corruption rationale, instead contending that union and corporate independent speech may be prohibited if candidates and officeholders react favorably to it. But that proposition threatens the established constitutional line between contributions and independent expenditures, and its reliance on the *McConnell* record would justify censorship of speech well beyond even that captured by §203 as written.

The Government cannot demonstrate any other compelling governmental interest in prohibiting union independent expenditures. *Austin* aptly distinguished unions from corporations, and the Government's suggestion that such a prohibition is warranted to protect dissident employees is incorrect because federal constitutional and statutory law fully enable non-members to avoid paying for union political activities they oppose and empower union mem-

bers to form and operate unions democratically with full voting and other participatory rights.

ARGUMENT

I. THE COURT SHOULD OVERRULE *McCONNELL* AND HOLD THAT § 203 IS FACIALLY UNCONSTITUTIONAL

A. *McConnell* upheld §203 on the ground that it was not overbroad, and *WRTL II* declined to revisit that holding in deciding an as-applied challenge. See 127 S. Ct. at 2670 n. 8. But the two decisions coexist in hopeless tension, as *WRTL II's* diligent effort to make constitutional sense of § 203 rebuts *McConnell's* ill-founded departures from sound and established First Amendment principles. The result is that labor organizations, including the AFL-CIO, and corporations, including Citizens United, remain subject to an unworkable censorship regime that can be redressed only by overruling *McConnell's* facial upholding of § 203.

McConnell concluded that "the vast majority of ads" that "clearly identified a [federal] candidate" and aired during the 30- and 60- day periods preceding recent general elections had "an electioneering purpose," 540 U.S. at 206, and "BCRA's application to pure issue ads is [in]substantial." *Id.* at 207. *WRTL II* states that *McConnell's* "vast majority" statement was "beside the point" because the Court "did not find that a 'vast majority' of the issue ads considered were the functional equivalent of express advocacy." 127 S. Ct. at 2670 n.8. But *WRTL II* rejects the analytical linchpins of McConnell's cursory overbreadth analysis, stating both that "electioneer-

ing purpose" was *not* "the appropriate test for distinguishing between genuine issue ads and the functional equivalent of express campaign advocacy," *id.* (emphasis added), and that "this Court in *Buckley* [*v. Valeo*, 424 U.S. 1, 43-44 (1976),] had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates," a holding that *McConnell* "did not...address." 127 S. Ct. at 2665.

If "electioneering purpose" and "intent-and-effect" are not proxies for "functional equivalen[ce]," then no empirical underpinning remains for *McConnell*'s overbreadth holding, which relied on "studies [that] classified the ads in terms of intent and effect." 127 S. Ct. at 2665. *McConnell* plainly endorsed the explicit position of the Government and the BCRA sponsor-intervenors that, with *rare* exception, § 203's primary definition of "electioneering communication" – a mere "refer[ence] to a clearly identified candidate for federal office" broadcast during the pre-election period and receivable by the requisite electorate, see 2 U.S.C. § 434(f)(3)(A)(i)(I) – *literally* identified "the functional equivalent of express advocacy," with "[in]substantial" exceptions. The *McConnell* majority pointed to four specific portions of the record to support its holding, see 540 U.S. at 206, and all treated § 203's "bright line" capaciously:

- The referenced pages of Annenberg Public Policy Center, "Issue Advertising in the 1999-2000 Election Cycle," termed *all* ads that *referred* to a candidate as "candidate-centered," and stated that they "usually present a candidate in a favorable or unfavorable light and then urge the audience to contact the candidate and tell him or her to support the sponsoring organization's policy position. Though

the intent of these ads is to encourage voters to favor or oppose a candidate, because they do so implicitly instead of explicitly these ads fall outside the current regulatory jurisdiction of federal election law." *Id.* at 13 (emphasis added).

- The referenced pages of J. Krasno and F. Sorauf, "Evaluating the Bipartisan Campaign Reform Act (BCRA)," endorsed the work of student coders who reviewed ads and then answered this question: "In your opinion, is *the* purpose of the ad to provide information about or urge action on a bill or issue, *or* is it to generate support or opposition for a particular candidate?" J.A., Vol. III, p. 1336, *McConnell v. Federal Election Commission* (emphasis added). The few ads that these coders decided were "pure issue ads" "rarely mention[ed] federal candidates." *Id.* at 1339.
- The referenced pages of Judge Kollar-Kotelly's opinion rejected the plaintiffs' overbreadth claim by reasoning that it was "very likely that these eight advertisements did influence federal elections because they refer to a federal candidate in a broadcast advertisement aired in close proximity to a federal election, and targeted to the candidate's electorate" -- enough, she concluded, to warrant prohibition. See 251 F. Supp. 2d 176, 575 (D.D.C. 2003). For example, an ad that "[c]riticized a candidate on past votes in the period immediately before a federal election with no indication of future legislation on the issue likely serves no purpose other than to affect the outcome of the election" and so constitutes prohibitable "electioneering." *Id.*

- The referenced portion of Judge Leon's opinion, which discussed only *political party* advertisements, deemed as "electioneering" those that either "focused on the positions, past actions, or general character traits of federal candidates" or "compared the positions or past actions, of two competing federal candidates," rather than "focusing" on pending legislation or executive action. *Id.* at 826-87.

During the *McConnell* litigation, neither the Government, the BCRA sponsor-intervenors nor their *amici* subjected the advertisements in the record to anything resembling the *WRTL II* test, namely, that irrespective of an ad's actual or likely intent or effect, and irrespective of its context (other than timing and audience), whether the message was "susceptible of *no reasonable interpretation other than* as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2666 (emphasis added). To the contrary, they emphasized § 203's "bright line" and explicitly urged the Court to embrace the view that all candidate-referencing ads broadcast to the electorate close to elections were "functional[ly] equivalent to express advocacy" and so could be prohibited, subject only to rare as-applied challenges regarding ads that, in an inversion of *WRTL II*'s holding, were susceptible of no reasonable interpretation other than as an *entirely non-electoral* legislative or other issue appeal – a so-called "pure" issue ad. Like the student coders' question, they and *McConnell* presumed away the constitutionally critical fact that "'the distinction between discussion of issues and candidates and advocacy of election or defeat may often dissolve in practical application.'" *WRTL II*, 127 S. Ct. at 2669, quoting *Buckley*, 424 U.S. at 42. The Government relies upon the *McConnell* record, see Gov. Br. at 21, but,

as we and other *McConnell* plaintiffs demonstrated through our submissions of actual advertisements in that case, *McConnell* erred in concluding that § 203 was not unconstitutionally overbroad, and the Court should overrule that determination.

B. As a category of speech whose utterance may be either prosecuted as "a federal crime," *WRTL II*, 127 S. Ct. at 2658; see 2 U.S.C. § 437g(a)(5)(C) and (D), or subjected to a wide-ranging FEC investigation and then to "burdensome [civil] litigation," *WRTL II*, 127 S. Ct. at 2666; see 2 U.S.C. § 437g(a)(4)-(6), *WRTL II's* "appeal to vote" standard is unduly vague and therefore unworkable. Relying as it does upon illustrative features that are, respectively, "consistent with that of a genuine issue ad" and "indicia of express advocacy," 127 S. Ct. at 2667, the standard introduces the kind of subjective analysis that the Court eschewed in *Buckley* and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 248-49 (1986). The resulting uncertainty is well captured by the FEC's ensuing regulation, which offers a grudgingly narrow "safe harbor" and then "rules of interpretation" to determine whether, "on balance," the "appeal to vote" standard is satisfied. See 11 C.F.R. § 114.15. The agency has already failed to achieve a majority when it sought to apply this regulation during the very advisory opinion process that *McConnell* confidently predicted would suffice to "clarif[y]" other BCRA language "and thereby remove any doubt there may be as to the meaning of the law." 540 U.S. at 170 n.64 (citation and interior quotation marks omitted). See FEC Advisory Opinion 2008-15 (2009). Although this Court does not now sit in judgment of the FEC's regulatory implementation of *WRTL II*, it is an inevi-

table administrative consequence of an inherently uncertain standard for permissible speech.

Only express advocacy itself marks an *electoral* speech category that is precise enough to avoid "[t]he constitutional deficiencies" of vagueness: it unacceptably "'puts the speaker wholly at the mercy of the varied understanding of his hearers,'" "'blankets with uncertainly whatever may be said,'" and "'compels the speaker to hedge and trim.'" *Buckley v. Valeo*, 424 U.S. at 43, quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945). *See also Buckley*, 424 U.S. at 79-80; *MCFL*, 479 U.S. at 249; *WRTL II*, 127 S. Ct. at 2682 (Scalia, J. concurring) ("If a permissible test short of the magic-words test existed, *Buckley* would surely have adopted it."). If salvaging § 203 requires the delineation of a category of speech that defies comparably clear application, the Court should invalidate the restriction outright.

II. THE ANTI-CORRUPTION INTEREST THAT SUPPORTS RESTRICTIONS ON CONTRIBUTIONS DOES NOT JUSTIFY RESTRICTIONS ON INDEPENDENT SPEECH

Because the Government does not contend that *Hillary: The Movie* contains express advocacy, and because the Court can and should overrule *McConnell* irrespective of *McConnell*'s reliance on *Austin*, it is unnecessary in this case for the Court to reconsider *Austin*. Moreover, the Government neither directly acknowledges nor defends *Austin*'s holding concerning Michigan's prohibition of corporate independent expenditures, and instead contends that a prohibition of both corporate *and union* expenditures

is warranted by concerns about *quid-pro-quo* corruption that, since *Buckley*, the Court has consistently held warrant restrictions *only* on *contributions*. *See generally Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 441-42 (2001).

The Government supports that proposition with a fraction of the *McConnell* record and asserts that it "indicated that... federal office-holders and candidates were aware of and felt indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents." Gov. Br. at 8; see also *id.* at 11 (independent speech "has come to be used as a means of currying favor with and attempting to influence federal office-holders"). The Court should reject this invitation.

First, the Government fails to explain why that anecdotal record suffices to eliminate "the fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to a candidate to be spent on his campaign." *Federal Election Commission v. National Conservative Political Action Committee ("NCPAC")*, 470 U.S. 480, 497 (1985). *Buckley* so distinguished expenditures from contributions in invalidating FECA § 608(e)(l), which limited to $1,000/yr. "any expenditure... advocating the election or defeat of [a] candidate" by any "person," including unions and corporations. 424 U.S. at 44-45 and n.45. After construing this provision to mean only express advocacy in order to "preserve the provision against invalidation on vagueness grounds," *id.* at 46-47, the Court held that the prohibition "inadequate[ly]" served "the governmental interest in preventing corruption and [its] appearance" in part because the in-

dependence of the speech did *not* pose the danger that contributions did, namely, the risk of a "*quid pro quo* for improper commitments from the candidate," and, in fact, uncoordinated speech "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 48.

Moreover, "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for [independently] by [others] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *NCPAC*, 470 U.S. at 498. And, independent speech is as likely to curry disfavor as any "favor"; § 203 was fueled by caustic congressional denunciations of advertisements, from "negative" to "nightmare." *McConnell*, 540 U.S. at 260 (Scalia, J.) (collecting examples). All speech risks reaction, and the decision to undertake that risk is the speaker's constitutional prerogative.

Second, *the McConnell union and corporate advertising record, including the portions referenced by the Government, was comprised entirely of independent speech that did not contain express advocacy at all, because 2 U.S.C. § 441b then, as now, prohibited it* – indeed, the point of the Government and the BCRA sponsor-intervenors in compiling that record was to justify banning vast swaths of speech *in addition to* express advocacy, because, it was claimed, they were "functionally equivalent" to each other. The Government's contention now proves far too much and, if accepted, would lay the foundation for Congress and state legislatures to engulf in prohibition both the very independent speech that *WRTL II* held was immune from § 203 and much more.

The spillover in the Government's arguments from express advocacy to other speech on matters of public concern is also reflected in its dismissive contention that advertisements are often "unrelated to the mission of the financing corporation," or, for example, "focus[] on [judicial] candidates' records on crime rather than on issues of special concern to the corporate or union speaker," so their "electoral advocacy is a means to an end rather than an expression of political conviction." Gov. Br. at 10-11 n. 2. But "[i]n the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978). The Government does not even acknowledge *Bellotti*, which invalidated a state statute that prohibited corporations from spending on any ballot measure "other than one materially affecting any of [their] property, business or assets[.]" *Id.* at 768 n. 2 (interior quotation marks omitted). *See also Buckley*, 424 U.S. at 57.

The Government's casual dismissal of union political and social concerns brings to mind Justice Frankfurter's observation that "[to] write the history of the [railroad] Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation." *Machinists v. Street*, 367 U.S. 740, 814-15 (1961) (dissenting opinion). "[U]nions have traditionally aligned themselves with a wide range of social, political and ideological viewpoints," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), "expended funds in the support of political

candidates and issues," *Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 447 (1984), and played a vital role in the public arena as advocates for both their members and all workers. *See generally Eastex, Inc. v. NLRB*. 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Board of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States*, 407 U.S. 385, 402-32 (1972); *Machinists v. Street*, 367 U.S. at 767. "[T]his Court accepts briefs from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense," *id.* at 814 (Frankfurter, J., dissenting), an observation that still holds true. See, *e.g.*, Brief of AFL-CIO as *Amicus Curiae*, *Grutter v. Bollinger*, 539 U.S. 306 (2003). The Government simply lacks constitutional authority to designate and enforce its view of what are a union's "mission" or "special concern[s]."

III. NO OTHER COMPELLING GOVERNMENTAL INTEREST WARRANTS PROHIBITION OF UNION INDEPENDENT EXPENDITURES

Nor can the Government point to any other compelling governmental interest that could justify restricting union-financed express advocacy to the general public, and, except inferentially in *McConnell*, the Court has never held that there is one. *See, e.g.*, *Federal Election Commission v. National Right to Work Committee ("NRWC")*, 459 U.S. 197, 208 (1982) (discussing unions with respect to *contributions*, not expenditures). Indeed, even before *Buckley*, indictments of labor organizations for allegedly violating the 1947 Taft-Hartley Act's proscription of union and corporate "expenditures" led every Justice who ad-

dressed its constitutionality to conclude that it violated the First Amendment.

In *United States v. Congress of Industrial Organizations* ("*CIO*"), 335 U.S. 106 (1948), the Court reviewed an indictment of the CIO and its president for making "expenditures" by endorsing a congressional candidate in the CIO's weekly newspaper. Reviewing the 1947 enactment, the Court concluded that the term "expenditure" "has no definitely defined meaning," *id.* at 112, and the "congressional explanation of [its] intended scope...[was] scanty and indecisive." *Id.* at 116. *See also id.* at 134 (Rutledge, J., concurring) (describing legislative history as "a veritable fog of contradictions relating to specific possible applications"). The majority dismissed the indictment by finding that it was not intended to apply to electoral publications by unions and corporations to their "members, stockholders or customers," because otherwise "the gravest doubt would arise in our minds as to its constitutionality." *Id.* at 121. And, four concurring Justices – as urged by the CIO and *amici* AFL and the Machinists Union – concluded that the "expenditure" prohibition should be invalidated because it was unduly vague, the justification that it was necessary to counter unions' "undue influence" was inadequate, and the asserted "minority protection" interest was trumped by its unwarranted "majority prohibition" since unions operated on "the principle of majority rule" in matters of "public advocacy." *See id.* at 147-48.

The Court returned to this prohibition nine years later when it considered another indictment of another labor organization for allegedly violating the expenditure provision in a television broadcast. *United States v. United Auto Workers ("UAW")*, 352

U.S. 567 (1957). Uncertain of the facts, the Court allowed the indictment to proceed and declined to address the union's constitutional claims. *Id.* at 590-93. The three dissenters echoed Justice Rutledge's *CIO* concurrence, *id.* at 593 (Douglas, J., dissenting), and *Buckley* 424 U.S. at 43, approvingly cited that dissent where it rejected the notion that union speech could be prohibited because it might "incite to action," including with the "purpose" "to sway voters." *UAW*, 352 U.S. at 595-96.

In upholding § 203, *McConnell* recited concern about "the special characteristics of the *corporate* structure [that] require particularly careful regulation" but recited none about unions. See *id.* at 205 (emphasis added) (quotation marks and citations omitted). Between *UAW* and *McConnell*, *Austin* was the Court's only decision holding any interest sufficient to warrant such a restriction on any group, there the non-profit Michigan Chamber of Commerce, which was primarily composed and funded by for-profit corporate members. See 494 U.S. at 656.[2] *Austin* identified "a different form of corruption" than had *Buckley*, namely, "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660.

Whatever the correctness of this holding as to the Chamber, the Court squarely rejected its applicability to *unions* in denying the Chamber's equal-

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[2] *McConnell* erred in saying that, since *Buckley*, Congress's power to prohibit union and corporate express advocacy "has been firmly embedded in our law." 540 U.S. at 203. See *Austin*, 494 U.S. at 682-83 (Scalia, J., dissenting); *MCFL*, 479 U.S. at 263; *NCPAC*, 470 U.S. at 496.

protection claim that the state law under-inclusively failed also to apply to unincorporated labor organizations. The Court reasoned that unions have "crucial differences" from corporations: first, although unions too "may be able to amass large treasuries, they do so without the significant state-conferred advantage of the corporate structure"; and, second, "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury" because a union may not compel represented non-members to support, with dues or other fees, the union's political, legislative and other ideological spending that is not directly germane to "'collective bargaining, contract administration and germane adjustment.'" *Id.* at 665-66, quoting *Communications Workers of America v. Beck*, 487 U.S. 735, 746 (1988).

The legal framework governing unions, members, and other workers confirms that conclusion. "[T]he union is obliged 'fairly and equitably to represent all employees..., union and nonunion,' within the relevant unit." *Abood v. Detroit Board of Education*, 431 U.S. at 221, *quoting Machinists v. Street*, 367 U.S. at 761. "Wherever necessary to that end, the union is required to consider requests of nonunion members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 203 (1944). In 28 states and the District of Columbia, private sector unions and employers may lawfully reach "union-security" agreements under which non-members pay "agency fees" reflecting their fair share for that representation. See W. Osborne, *ed.*, *Labor Union Law and Regula-*

tion 518 (2003). But these non-members cannot be compelled to contribute toward a union's partisan political activities or its legislative, ideological and other activities unrelated to collective bargaining and contract administration. *Communications Workers of America v. Beck.* And, their dissent "is not to be presumed – it must affirmatively be made known by the dissenting employee." *Machinists v. Street*, 367 U.S. at 774. Meanwhile, in the other 22 states, so-called "right-to-work" laws preclude *any* requirement in the private sector that non-members pay *any* fees to their exclusive union representative for *any* purpose, yet the union's duty of fair representation nonetheless applies. See Osborne, *supra.*

Moreover, from their inception unions are democratic, member-controlled organizations. A union forms by its "designat[ion] or select[ion] for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purpose." 29 U.S.C. § 159(a). Following this voluntary formation, members elect their officers and national convention delegates by secret ballot, see 29 U.S.C. §§ 481-483; members determine their dues rates by these same methods, see 29 U.S.C. § 411(a)(3); all members enjoy equal rights to nominate candidates for union office, vote in union elections and otherwise participate in union affairs, and they have rights of speech and association. See 29 U.S.C. §§ 411, 481(e). Membership itself is completely voluntary, and resignation cannot be restricted. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

These laws and practices, which set unions apart from other entities subject to FECA's speech prohibitions, completely undermine the Government's only other proffered rationale for restricting union inde-

pendent expenditures, namely, to protect individuals "'who have paid money into a ...union for purposes other than the support of candidates from having that money used to support political candidates to whom they are opposed.'" See Gov. Br. at 12, quoting *NRWC, supra*. *See also* Gov. Br. at 13 ("protections against the use of compulsory union dues for political purposes"). Even so, the Government tepidly terms that interest as merely "legitimate," *id.* at 12, 13, but only a *compelling* governmental interest can justify such a restriction on any speaker, *WRTL II*, 127 S. Ct. at 2671, and the Court has never held this interest to justify prohibiting union-financed speech outright. However the Court addresses *Austin*, it should recognize no compelling governmental interest in criminalizing independent union electoral speech.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-205

In The Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICUS CURIAE* AMERICAN INDEPENDENT BUSINESS ALLIANCE IN SUPPORT OF APPELLEE ON SUPPLEMENTAL QUESTION

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QUESTION PRESENTED

Whether, for the proper disposition of this case, the Court should overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002.

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 4

THE COURT SHOULD NOT OVERRULE *AUSTIN* OR *MCCONNELL* BECAUSE BOTH DECISIONS PROPERLY RECOGNIZE THE FUNDAMENTAL DIFFERENCES BETWEEN CORPORATIONS AND INDIVIDUALS WITH RESPECT TO FIRST AMENDMENT PROTECTIONS FOR PARTICIPATION IN ELECTORAL CAMPAIGNS 4

A. Because Corporate "Speech" Is Legally Constrained and Does Not Reflect Views of Any Citizen, Business Corporations Do Not Have a Legitimate Claim to First Amendment "Expressive" Protection as Speakers in the Marketplace of Ideas 4

B. Corporate Electoral Participation Interferes with Republican Self-Government, Contrary to the First Amendment's Political Goals 9

C. Corporate Participation in Candidate Campaigns Promotes Market Entrenchment, Contrary to First Amendment Goals of Self-Governance 16

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

California Medical Association v. FEC, 453 U.S. 182 (1981) 12

Cohen v. California, 403 U.S. 15 (1971) 8

Corbin v. Corbin, 429 F. Supp. 276 (D.C. Ga. 1977) 7

Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) 5, 9

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 12, 16

FEC v. Nat'l Right to Work Committee, 459 U.S. 197 (1982) 2, 13, 14

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 15

Gilbert v. Norfolk & W. Ry. Co., 171 S.E. 814 (W. Va. 1933) 10

Home Ins. Co. v. State of New York, 119 U.S. 129 (1886) 14

Lochner v. New York, 198 U.S. 45 (1905) 19

McConnell v. FEC, 540 U.S. 93 (2003) 2, 4, 11, 17, 20

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003) 17

Michelson v. Duncan, 407 A.2d 211 (Del. 1979) 9

TABLE OF AUTHORITIES – Continued

Page

Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U.S. 26 (1889) 14

Missouri Pac. Ry. Co. v. Mackey, 127 U.S. 205 (1888) 14

Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1 (1986) 13

Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) 8

Santa Clara County v. Southern Pac. RR Co., 118 U.S. 394 (1886) 13, 14

Spiegel v. Buntrock, 571 A.2d 767 (Del. 1990) 5

Union Pac. RR Co. v. Trustees, Inc., 329 P.2d 398 (Utah 1958) 10

UNITED STATES CONSTITUTION

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. XIV 13, 14

U.S. Const. amend. XIV § 1 14

U.S. Const. amend. XIV § 2 14

STATUTES

Bipartisan Campaign Reform Act of 2002, § 203 2

Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159 15

TABLE OF AUTHORITIES – Continued

Page

Tillman Act, 1907, ch. 420, 34 Stat. 864 15

2 U.S.C. § 441b 15

REGULATIONS

Securities Exchange Act Rule 14a-8(i), 17 C.F.R. § 240.14a-8(i) 5

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Page

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INTEREST OF *AMICUS CURIAE*[1]

The American Independent Business Alliance (AMIBA) is a U.S. non-profit organization helping communities design and implement programs to support independent locally-owned businesses and maintain ongoing opportunities for entrepreneurs. AMIBA also engages in public education to raise awareness of the economic, civic, environmental and cultural importance of community-based enterprise.

AMIBA supports 65 affiliates (community organizations) across 31 states and has helped many more cities and towns with programs to support their local independents. AMIBA's affiliates represent approximately 15,000 independent businesses covering virtually every sector of business, many of which face direct competition from chains and other large corporations. Many large corporations have converted their economic power into political favors that extract subsidies from taxpayers, stifle enforcement of antitrust laws, create legal tax evasion opportunities, and other rules that disadvantage small business and the constituents of AMIBA affiliates. AMIBA maintains that enabling corporations to further increase their

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[1] Pursuant to Rule 37.6, counsel for *Amicus* state that they authored this brief, and that this brief was not authored by counsel for any party. No person or entity other than *Amicus* and its counsel made a financial contribution to this brief. Consent to the filing of briefs *amicus curiae* has been granted by counsel for appellee, as indicated on this Court's docket. A letter of consent by appellant has been filed with this Court.

political power would harm the political process and undermine genuine market competition. Political freedom and the dignity of citizens are threatened far more by treating corporate entities as if they were real citizens than by upholding common-sense, democratically enacted rules limiting participation by for-profit corporations in electoral campaigns. AMIBA therefore urges that this Court should not overrule its decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), nor the portion of *McConnell v. FEC*, 540 U.S. 93 (2003), upholding Section 203 of the Bipartisan Campaign Reform Act of 2002 as facially valid.

SUMMARY OF ARGUMENT

This Court's decisions in *Austin* and *McConnell* both are premised on the long-standing recognition that "the special characteristics of the corporate structure require particularly careful regulation" with respect to corporate participation in the electoral process. *FEC v. Nat'l Right to Work Committee* ("*NRWC*"), 459 U.S. 197, 209-210 (1982). The request to overrule those decisions purports to bring into play not merely the question whether and under what conditions non-profit, expressly ideological corporations require First Amendment protection for the use of corporate funds in elections, but whether the deployment of huge corporate treasuries amassed through for-profit activities may ever be treated differently from individual citizen participation in

electoral campaigns. Supplemental Brief for Appellant at 3, 6-9. Accordingly, the wisdom of overruling those decisions must be evaluated by understanding the structure and role of large, publicly traded corporations and the implications of according these artificial entities the same protections for electoral participation that are enjoyed by citizens.

The governance system of such corporations is highly successful for the pursuit of profit, making them important instruments in the economic sphere. But the very factors that make the corporate form an effective instrument of wealth accumulation are the factors that make it inappropriate for corporations to claim the full panoply of First Amendment protections for political speech and participation that are enjoyed by natural persons. Because of the way corporations are structured, corporate speech does not express the political views of any individual or group of individuals associated with the corporation. Moreover, the constraints that drive a corporation's political speech – the requirement that corporate actions all must be calibrated toward profit – directly undermine the notion that a corporation can be a free participant in the marketplace of ideas. And precisely because a corporation enjoys significant state-created economic advantages designed for the narrow purpose of furthering wealth-accumulation, corporate participation in candidate campaigns promotes market entrenchment and corrupts the political marketplace in a fundamentally undemocratic manner.

ARGUMENT

THE COURT SHOULD NOT OVERRULE *AUSTIN* OR *MCCONNELL* BECAUSE BOTH DECISIONS PROPERLY RECOGNIZE THE FUNDAMENTAL DIFFERENCES BETWEEN CORPORATIONS AND INDIVIDUALS WITH RESPECT TO FIRST AMENDMENT PROTECTIONS FOR PARTICIPATION IN ELECTORAL CAMPAIGNS.

A. Because Corporate "Speech" Is Legally Constrained and Does Not Reflect Views of Any Citizen, Business Corporations Do Not Have a Legitimate Claim to First Amendment "Expressive" Protection as Speakers in the Marketplace of Ideas.

An understanding of the structure and role of large, publicly traded companies confirms the wisdom of the long-standing distinction that Congress, the states and this Court have drawn between electoral participation by individuals and electoral participation by state-created, for-profit corporations.

Publicly traded corporations are among our most important institutions for wealth accumulation. State law structures business corporations to enable them to accumulate large quantities of capital in order to create jobs and produce useful goods and services.

Corporations are regulated internally largely by state law fiduciary duties that require the various people working for them (employees, managers and other agents) and their governing board of directors

to act in the corporation's interest as defined by state law. Critically, state law demands that managers use corporate funds to act in the interest of securing financial return. *See, e.g., Dodge v. Ford Motor Co.*, 204 Mich. 459, 507, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

Because a business corporation's speech is the result of legally imposed fiduciary duties, corporate speech cannot be said to express the autonomous political views of any individual or group of individuals associated with the corporation, whether as shareholder, manager, customer, or employee.

Corporate advocacy certainly does not reflect the political views of shareholders (many of which, in any event, are themselves highly regulated legal entities rather than autonomous human citizens). Indeed, corporate law generally bars shareholders from directing business decisions of the corporation. *See, e.g., Spiegel v. Buntrock*, 571 A.2d 767, 772-73 (Del. 1990) ("A basic principle of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."); Securities Exchange Act Rule 14a-8(i), 17 C.F.R. § 240.14a-8(i) (listing numerous grounds on which corporations may exclude shareholder proposals from proxy statements). Thus, if a corporation deploys corporate funds in electoral campaigns, the business decision on how best to deploy such funds is

not dictated by the political views of any individual shareholder or group of shareholders, but instead is determined by management.[2]

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[2] Electoral spending to enhance shareholder profit cannot be deemed shareholder speech merely by adopting the fiction that shareholders abandon all interests apart from profit maximization when they become shareholders:

> [O]ne might say that whatever else shareholders want in the rest of their lives, surely they all want higher share values. But human shareholders who are also neighbors or employees or customers or friends may have other commitments beyond an extra nickel in the quarterly dividend. Even on purely economic issues, since shareholdings in this country are not only wide but shallow, many shareholders will find that their basic interests are aligned more with employees, stability or customers than with the highest possible value for their shareholdings: a decrease in your phone bill is likely to be worth more to you than the commensurate drop in the price of the telephone company shares held by your pension fund. Only foreign shareholders with little connection to the American economy or politics beyond their shareholdings approximate this conventional image of a shareholder always interested in higher stock returns.
>
> * * *
>
> The humans who stand behind the shares have various and conflicting goals, as all people do: they want their shares to increase in value, of course, but they may also want decent jobs for their kids or neighbors, attractive and safe cities, a clean environment, and other things that, from time to time, conflict with the increase in value of their shares. The corporate law system eliminates all these conflicting goals, leaving the agents with a simple and clear directive: maximize shareholder value.

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But that does not mean that corporate political participation can be understood to express the political views of corporate officers. A corporate officer would be violating her fiduciary duty to shareholders if she permitted her own political views and interests to determine how she spends corporate general treasury funds. *Corbin v. Corbin*, 429 F. Supp. 276, 281 (M.D. Ga. 1977) (corporate funds "cannot be used to meet an officer's personal desires").

Moreover, the fiduciary duty to deploy corporate funds in the interest of the corporation does not even mean that a corporate officer may direct corporate electoral spending according to her understanding of the political views of shareholders (even assuming such preferences could be determined in any practical manner). The duty of the corporate officeholder is to maximize corporate profit, not to represent shareholder preferences regarding candidates for office. Corporate managers have neither the right nor the ability to determine how the real human citizens behind their shares would balance corporate profits against other individual or social goals.

Nor is there any credible argument that corporate political speech can be thought to express the political views of employees or customers, either individually or as a group. While those groups are the

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Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 Iowa L. Rev. 995, 1036-37, 1040-41 (1998) (hereafter, "Greenwood, *Essential Speech*").

primary source of any successful corporation's funds, neither has the ability to direct corporate electoral speech. Tom Bennigson, Nike *Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?*, 39 Conn. L. Rev. 379, 411-412 (2006); Greenwood, *Essential Speech*, at 1052.

In short, corporate speech is the result of officials acting in accord with their legally imposed duties, without reflecting the commitments of any individual citizen or group of citizens. Corporate campaign expenditures are the result of fiduciary law and bureaucratic imperative, not of expression by any of the people affiliated with the corporation.

Consequently, the individualistic, anti-majoritarian aspects of First Amendment protections are completely inapplicable to corporate electoral spending. First Amendment protections against majoritarian enactments have as an important goal the protection of free expression and individual autonomy as key attributes of the dignity of citizens. *See, e.g.*, *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (noting that "right to express any thought, free from government censorship" is necessary "to assure self-fulfillment for each individual" as well as "to permit the continued building of our politics and culture"); *Cohen v. California*, 403 U.S. 15, 24 (1971) (First Amendment places "the decision as to what views shall be voiced largely into the hands of each of us," not only to promote a "more perfect polity," but also "in the belief that no other approach would comport with the premise of individual dignity and choice

upon which our political system rests."); Thomas I. Emerson, Toward a General Theory of the First Amendment 4-7 (1966). Because corporate speech in furtherance of the corporation's legally imposed function is not the expression of anyone's individual autonomy or dignity, this key rationale for First Amendment protection is unavailable as a basis for judicial intervention on behalf of corporate electoral participation.

B. Corporate Electoral Participation Interferes with Republican Self-Government, Contrary to the First Amendment's Political Goals.

It is not merely the absence of individual expression when a corporation speaks, but also the absence of any choice about the goals that a corporation may pursue through its electoral spending, that differentiates corporate political participation from that of individuals or other organizations. Publicly traded business corporations are legally structured to be effective in economic markets. To be economically effective, they must act with a single voice toward a single goal – profit maximization – while setting aside the value conflicts that drive politics. *Dodge v. Ford Motor Co.*, 170 N.W. at 684 ("the discretion of the directors is to be exercised in the choice of means to attain that end [the profit of the stockholders], and does not extend to a change in the end itself"); *Michelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979) (corporate expenditures not directed to enhancement of shareholder profit constitute "waste" of corporate

assets); Am. Law Inst., 1 Principles of Corp. Governance § 2.01 (1994) (corporate action should be directed "with a view to enhancing corporate profit and shareholder gain"). Thus, before the corporation enters the political arena, its choice of possible *electoral* goals has been narrowed by law to only one: the enhancement of corporate earnings.

For this reason,

> corporations entering the political sphere cannot be conceptualized as groups of citizens. Unlike groups of citizens, who must always debate the proper and shifting balance of conflicting values, corporations will pursue a single value to the detriment of all others. . . . The goal – increasing the value of the shares – is set and debate is restricted only to the technical issue of the best means to reach this destination[.]

Greenwood, *Essential Speech*, at 1052.[3]

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[3] Even when a corporation engages in activity related to the public welfare or for other reasons not directly business-related, a business-related motive for the conduct generally is required. *See, e.g., Union Pac. RR Co. v. Trustees, Inc.*, 329 P.2d 398, 401 (Utah 1958) (concluding that corporate directors would not have made contribution to non-profit organization "if they were not confident that their company, presently and directly . . . , would receive a quid pro quo as the resultant of good will engendered by contributions"); *Gilbert v. Norfolk & W. Ry. Co.*, 171 S.E. 814, 815 (W. Va. 1933) ("Consistent with the general rule that a private business corporation is carried on primarily for the profit of its stockholders, . . . it has, nevertheless, been generally held that such corporations may, *for the ultimate benefit of the*

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Corporate electoral speech thus differs fundamentally from the electoral speech of citizens. Of course, individuals may sometimes participate in politics with a single-issue focus. They may decide to base their electoral decisions solely on a candidate's position on abortion, or on the environment, or health policy, and citizens often vote their business interests – but no individual is required by law to do so. Even the most single-minded individual may, in theory, be persuaded to embrace broader or different goals by other participants in the political marketplace. In contrast, publicly traded business corporations are legally bound to use their resources to enhance the profitability of the company, no matter how persuasive the arguments for a broader or conflicting set of priorities.[4]

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corporation itself translated into profit, use the funds of such corporation for purposes which might appear directly to be charitable and humanitarian.") (emphasis added); *see also* Am. Law Inst., 1 Principles of Corp. Governance § 2.01, comment f (commenting that most corporate conduct undertaken for legal, ethical, public welfare, humanitarian, educational, or philanthropic purposes is usually "consistent with economic self-interest").

[4] This analysis does not apply to a not-for-profit corporation formed explicitly to represent citizens in a political controversy. When organizational funding comes from donations or mission-related revenue rather than purely commercial sales of a product or service, the organization is fairly viewed as an "amplifier" for the speech of its (human) donors. *McConnell v. FEC*, 540 U.S. at 136. As with any organization, non-profits will simplify and change the views of their donors. *See*, Robert Michels, Political Parties: A Sociological Study of the

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Citizens participating in electoral debate, moreover, not only make their own judgments, but spend their own money. Corporate managers spend money that is not their own while setting aside their own judgment as to the ultimate merits of the political position they take. In effect, they act as agents for a legally mandated profit-maximization principle, not any human principals. Greenwood, *Essential Speech* at 1041.

Because of these fundamental differences between an individual's participation in the electoral arena, and the participation of an artificial entity that is structurally and legally incapable of independently choosing the goal for its electoral advocacy, *Austin* and *McConnell* were correct in understanding that judicial intervention to protect the latter is not warranted in every circumstance where it might be justified to protect the former. *See California Med. Assoc. v. FEC*, 453 U.S. 182, 201 (1981) ("The differing restrictions placed on individuals and unincorporated associations, on the one hand, and on unions and corporations, on the other, reflect a judgment by

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Oligarchical Tendencies of Modern Democracy (Eden and Cedar Paul trans., Hearst's Intl. Library Co. 1915) (describing how the views of leaders diverge from those of their supporters in the "iron law of oligarchy"). However, unlike publicly traded for-profit corporations, non-profit managers are managing funds donated specifically for the corporation's cause – not accumulated due to economic activity. This Court's precedents appropriately distinguish between the two. *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 260-61 (1986).

Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation in order to protect the integrity of the electoral process"); *NRWC*, 459 U.S. at 210-11 (restriction on solicitation by non-profit, noncapital stock corporation for contributions to campaign committee permissible even though "governmental interest in preventing both actual corruption and the appearance of corruption . . . [was] *accomplished by treating* unions, *corporations,* and similar organizations *differently from individuals.*") (emphasis added); *Pacific Gas & Electric Co. v. Public Utilities Comm'n of California*, 475 U.S. 1, 35 (1986) (Rehnquist, J., dissenting) ("The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same.")[5]

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[5] This case involves federal legislation challenged under the First Amendment. This makes it a particularly inappropriate vehicle to reconsider *Austin*, which arose under the Fourteenth Amendment and raises federalism issues not present here. Corporate due process rights are generally attributed to *Santa Clara County v. Southern Pac. RR Co.*, 118 U.S. 394 (1886), although the relevant ruling appears only in the Reporter's summary of oral argument and is entirely unreasoned. *See* Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* 106-108 (2002). No subsequent case has offered a reasoned explanation of how the language, structure or intent of the Fourteenth Amendment can be extended to protect corporations. Linguistically, while corporations are "legal persons" for some purposes, the plain meaning of "person" in the Fourteenth Amendment is human

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Requiring corporations to use segregated funds raised from like-minded officers and shareholders for electoral participation, instead of using the corporation's general treasury funds – the requirement upheld in *Austin* and *McConnell* – enables individuals to associate for electoral goals that serve the corporation if they find those goals worthy of support. It accomplishes this, moreover, without enlisting the use of for-profit corporate general treasury funds for electoral expression that the shareholders, bondholders, customers or employees who created those funds may not support. *See NRWC*, 459 U.S. at 208 (noting that restrictions on corporate or union electoral participation "protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed"); Adam Winkler, McConnell v. FEC, *Corporate Political Speech,*

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beings: only humans are "born or naturalized," U.S. Const. amend. XIV, § 1, and only humans qualify as "persons" for the Amendment's Apportionment Clause, U.S. Const. amend. XIV, § 2. Moreover, the first modern business corporate laws barely predate the Twentieth Century. It is implausible that the original intent of the Civil War Amendments (or the First Amendment) was to radically restrict future citizens' ability to regulate a legal form that did not yet exist in its modern form. Perhaps recognizing *Santa Clara*'s weakness, the earliest cases following it permitted legislative classifications based in part on corporate status. *See Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 29 (1889); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-210 (1888); *Home Ins. Co. v. State of New York*, 119 U.S. 129, 133 (1886).

and the Legacy of the Segregated Fund Cases, 3 Elec. L. J. 361 (2004) (noting long tenure of doctrine upholding segregated fund requirement for corporate and union political participation).

The arguments set forth above also show why the rights of listeners do not provide an adequate basis for judicial intervention to promote corporate general treasury spending in electoral campaigns. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), relied on the rights of listeners in the political marketplace in striking down a ban on corporate spending in a referendum campaign. But reliance on the rights of listeners should not be a sufficient basis to ignore the critical differences between corporations and individuals when it comes to participation in electoral campaigns. Nothing in *Belloti*, which addressed a complete ban on any corporate spending on the state referendum in question – even through a separate segregated fund – suggested that the First Amendment might bar the century old ban on direct corporate participation in federal election campaigns. *See* Tillman Act, 1907, ch. 420, 34 Stat. 864; *see also* Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159; 2 U.S.C. § 441b. The right of individuals as individuals to direct their own political expenditures on electoral activity remains a compelling basis for requiring the use of segregated funds for corporate electoral participation.[6] As Justice

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[6] In addition, for all the reasons noted earlier, the "volume" of corporate speech – its ability to be heard in the political

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Brennan, a champion of the First Amendment, noted in *Austin*, "'A's right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication.'" 494 U.S. at 675 (Brennan, J., concurring) (quoting Victor Brudney, *Business Corporations and Stockholders' Rights under the First Amendment*, 91 Yale L. J. 235, 247 (1981)).

C. Corporate Participation in Candidate Campaigns Promotes Market Entrenchment, Contrary to First Amendment Goals of Self-Governance.

Corporate assets result from prior success in the economic marketplace and the special privileges of state corporate law.[7] Corporate decision-makers will

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marketplace – has no relation to the level of commitment any individual may have to the speech. When a citizens individual spends funds in the electoral arena, the expenditure requires a personal sacrifice that presumably reflects the citizen's genuine commitment to some electoral goal. Not so in managerially controlled business corporations; if managers believe in good faith that the corporate interest will be promoted by spending corporate money, they must do so, regardless of their, or anyone else's, views of a fitting electoral goal.

[7] *See, e.g.*, *MCFL*, 479 U.S. at 258 ("The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas."); *Austin*, 494 U.S. at 658-59 ("State law grants

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use those assets to promote law that will grant the firm advantages in the next iteration of that marketplace. Incumbents, in other words, will seek to protect their incumbent privilege. This is as dangerous in the economic sphere as in the political sphere. The political First Amendment should protect the right of the people to control their institutions, even highly useful ones such as successful business corporations – not the ability of those institutions to escape political control. In a market economy, companies ought to compete based on their products and services, not the electoral clout corporate funds can buy, and the First Amendment should be no bar to the regulation necessary for vibrant economic competition.

The record before this Court in *McConnell* amply demonstrated the potential for the appearance and reality of electoral corruption created by corporate spending on electioneering communications in particular. *McConnell v. FEC*, 251 F. Supp. 2d 176, 623-24 (D.D.C. 2003) (Kollar-Kotelly, J.). The problem of corruption is closely analogous to the equally serious problem of incumbent protection.

Our market system depends on competition and innovation. Those goals are threatened if the successful businesses of the last generation are allowed

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corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets – that enhance their ability to attract capital and to deploy their resources").

(by this Court) and required (by state fiduciary law and market pressures) to use their accumulated wealth to elect politicians who can be counted on to enact laws to protect the incumbent corporations from upstart innovators. When one company can obtain special tax or regulatory treatment that its closely held competitors cannot, the free market itself suffers.[8] If we are to remain a democracy and if our

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[8] For example, family farmers and ranchers not only are handicapped by subsidies flowing to agribusiness, but also by non-enforcement of antitrust law. As a result, more than 83% of the beef packing industry nationally is controlled by four corporations (and the concentration typically is more extreme in any individual market, often leaving ranchers at the mercy of packers). Mary Hendrickson and William Heffernan, Concentration of Agriculture Markets, April 2007, available at http://civileats.com/wp-content/uploads/2009/05/2007-heffernanreport.pdf. Similarly, tax loopholes benefiting many multi-state chains allow them to legally evade income taxes, thus penalizing the majority of independent competitors that operate within a single state. Shifting income across states through paying rent or licensing fees to subsidiary shell corporations is one such example perpetuated by corporations' existing political influence. Pallavi Gogoi, *Wal-Mart Courts State Politicos: A new report shows that Wal-Mart has jacked up political contributions in states where it wants to reduce its tax bill*, Business Week, October 26, 2007. The Wall Street Journal reported that Walmart Stores Inc. avoids half its statutory income tax obligation by exploiting such loopholes. Jesse Drucker, *Wal-Mart's State Tax Evasion Ploy: Paying Rent to Itself*, The Wall Street Journal, Feb. 1, 2007. Such problems will only be compounded if this Court interprets the First Amendment to ban limits on the fiduciary obligations of corporate executives to use corporate treasury funds in electoral campaigns.

economy is to succeed, it is essential that the law structure the market and not the other way around.

Since the end of the *Lochner* era, this Court has recognized that Congress and the states, not the Court, are the appropriate bodies to determine the fundamentally political question of exactly where the economic marketplace ends and the political one begins. For all the reasons set forth here, the people acting through their elected representatives should retain the right to ensure that corporate electoral spending reflects the choices of individuals, through laws that require such spending be made through segregated PAC funds rather than from general treasury funds.

CONCLUSION

The Court should not use this case to overrule *Austin* or the relevant portion of *McConnell*. The judgment of the district court should be affirmed.

July 2009

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AMICUS CURIAE BRIEF

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Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* AMERICAN JUSTICE PARTNERSHIP AND LET FREEDOM RING IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. RATHER THAN PREVENT CORRUPTION, *AUSTIN* HAS CORRODED AND DISTORTED THE POLITICAL PROCESS 4

A. The Government Has No Compelling Interest in Limiting Either The Amount of Political Speech or the Quantity of Speakers 7

B. Restrictions on Corporate Speech Alone Are Overbroad Because They Apply Regardless of Wealth, Size, or Actual Facts Related to the Speaker 9

C. Restrictions on Corporation Speech Are Under-Inclusive Because They Exempt Wealthy Media Corporations, Individuals, and Unincorporated Entities 11

D. Neither the Exception for "*MCFL*" Organizations Nor the PAC "Alternative" Is Sufficient to Cure *Austin*'s Constitutional Infirmity 15

1. The *MCFL* exception violates the First Amendment by prohibiting all for-profit corporations from expressing their political views 15

2. Political action committees are not a viable option for many corporations and impose undue burdens on corporate free speech 16

II. BY ALLOWING RESTRICTIONS ON CORPORATE SPEECH, *MCCONNELL* HAS PERMITTED CIRCUMVENTION OF THE FIRST AMENDMENT ITSELF 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Associated Press v. United States,
326 U.S. 1 (1945) 6

Austin v.
Mich. State Chamber of Commerce,
494 U.S. 652 (1990) ..... *passim*

Buckley v. Valeo,
424 U.S. 1 (1976) 4, 5, 16

Davis v. Federal Election Comm'n,
128 S. Ct. 2759 (2008) 6, 7, 16

Federal Election Comm'n v.
Massachusetts Citizens for Life,
479 U.S. 238 (1986) ("MCFL") ..... *passim*

Federal Election Comm'n v.
National Conservative Political Action Comm.,
470 U.S. 480 (1985) ("NCPAC") 4, 7, 10, 11

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 5, 8

McConnell v. Federal Election Comm'n,
540 U.S. 93 (2003) ..... *passim*

Nixon v. Shrink Missouri Gov't PAC,
528 U.S. 377 (2000) 15

Wisc. Right to Life, Inc. v. Federal Election Comm'n, 546 U.S. 410 (2006) 9

CONSTITUTIONAL PROVISION

U.S. CONST. amend. I ..... *passim*

STATUTES, RULES & REGULATIONS

26 U.S.C. § 501(c)(4) 1, 2, 10, 15

Alaska Stat. §§ 15.13.010, .135 (2009) ..... n. 3

Ariz. Rev. Stat. Ann. § 16-907 (2008) 11

Ariz. Rev. Stat. Ann. § 16-919 (2008) ..... n. 3, 18

Col. Const. art. XXVIII § 2(8)(b)(II) (2008) 11

Col. Const. art. XXVIII § 3(4)(a) (2008) 18

Col. Const. art. XXVIII § 3(7)(b) (2008) 19

Col. Const. art. XXVIII § 5 (2008) ..... n. 3

Col. Const. art. XXVIII § 6 (2008) ..... n. 3

Conn. Gen. Stat. § 9-613(a) (2008) ..... n. 3

Conn. Gen. Stat. § 9-613(c) (2008) ..... n. 3

Fla. Stat § 106.011(1)(a)1.c (2009) 19

Fla. Stat § 106.011(18) (2009) 19

Fla. Stat § 106.071 (2009) 19

Iowa Code § 68A.503 (2009) 17

Ky. Rev. Stat. Ann. § 121.025 (West 2009) ..... n. 3

Ky. Rev. Stat. Ann. § 121.035 (West 2009) ..... n. 3

Mass. Gen. Laws ch. 55, § 8 (2009) 12

Mich. Comp. Laws § 169.206.6(2)(a) (2009) 12

Mich. Comp. Laws § 169.254 (2009) ..... n. 3

Mich. Comp. Laws § 169.255 (2009) ..... n. 3

Minn. Stat. § 10A.27 (2008) ..... n. 3

Minn. Stat. § 10A.211B.15(3) (2008) ..... n. 3

Mont. Code Ann. § 12-35-227 (2007) 19

N.C. Gen. Stat. § 163-278.15 (2009) ..... n. 3

N.C. Gen. Stat. § 163-278.19(a) (2009) ..... n. 3

N.D. Cent. Code § 16.1-08.1-03.3 (2009) ..... n. 3

N.D. Cent. Code §§ 16.1-08.1-03.5 (2009) ..... n. 3

N.Y. C.L.S. Elec. § 14-100 11

Ohio Rev. Code Ann. § 3517.01(17) (LexisNexis 2009) 11

Ohio Rev. Code Ann. § 3517.082
(LexisNexis 2009) ..... n. 3

Ohio Rev. Code Ann. § 3517.105
(LexisNexis 2009) 11

Ohio Rev. Code Ann. § 3599.03
(LexisNexis 2009) ..... n. 3

Okla. Stat. Ann. tit. 21, § 187.7.b(7) (2009) 12

Okla. Stat. Ann. tit. 21, § 187.8.b (2009) ..... n. 3, 12

Okla. Stat. Ann. tit. 74,
app. § 257:1-1-2 (2009) ..... n. 3, 12

25 Pa. Cons. Stat. § 3247 (2009) ..... n. 3

25 Pa. Cons. Stat. § 3253 (2009) ..... n. 3

R.I. Gen. Laws § 17-25-10.1 (2009) ..... n. 3

S.D. Codified Laws § 12-27-1 (2009) ..... n. 3

S.D. Codified Laws § 12-27-18 (2009) ..... n. 3

Tenn. Code Ann. § 2-19-132 (2009) ..... n. 3

Tex. Elec. Code Ann. § 253.094
(Vernon 2009) ..... n. 3

W. Va. Code § 3-8-8 (2009) ..... n. 3

Wis. Stat. § 11.38 (2008) ..... n. 3

Wyo. Stat. Ann. § 22-25-102 (2008) ..... n. 3

OTHER AUTHORITIES

AMER. TORT REFORM FOUND., White Paper, Defrocking Tort Deform: Stopping Personal Injury Lawyers from Repealing Existing Tort Reforms and Expanding Rights to Sue in State Legislatures (2008) 13

U.S. Internal Revenue Service, *Statistics of Income, Corporation Income Tax Returns*, Table 732 ("Corporations by Receipt-Size Class and Industry: 2005") 9

www.guidestar.org/FinDocuments/2007/132/630/2007-132630359-049cff52-9O.pdf 16

www.letfreedomringusa.com/about 1

www.opensecrets.org 14

www.triallawyersinc.com 14

BRIEF OF *AMICI CURIAE* AMERICAN JUSTICE PARTNERSHIP AND LET FREEDOM RING IN SUPPORT OF APPELLANT

INTEREST OF *AMICI CURIAE*[1]

American Justice Partnership ("AJP") is a non-profit, Section 501(c)(4) corporation dedicated to reform of the civil justice system at the state level. AJP seeks to educate citizens, public officials, and candidates of the dangers to states' economic well-being resulting from runaway litigation and excessive damage awards.

Let Freedom Ring ("LFR") is also a non-profit, Section 501(c)(4) corporation, formed for the express purpose of mobilizing citizens on issues regarding protection of fundamental American values and free enterprise, and educating voters about candidates' views and votes on its priority issues.[2]

AJP rarely if ever contributes to political campaigns. LFR never contributes to political candidates. The interest of both AJP and LFR in this case is prompted by the fact that they are subject to restrictions on their right to free speech solely by virtue of the fact that they are incorporated.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See* www.letfreedomringusa.com/about.

Unlike its adversaries, AJP is a corporation and therefore subject to state laws restricting its right to express its views on public policy issues. AJP's philosophical opponents include trial lawyers (some of whom have amassed a net worth of millions of dollars) and associations of trial lawyers. Unlike AJP, trial lawyers — both individually and in combination — are free during an election year in ***any*** state to criticize ***by name*** candidates for public office at the state level who support caps on punitive damages and other aspects of tort reform. In contrast, AJP would in many states face severe civil — and in some states and circumstances — criminal sanctions if it were even to mention specific political candidates who support (or oppose) its legal reform agenda.

LFR was created to operate within the parameters of the exemption from corporate political speech restrictions established by the Court's decision in *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). LFR is thus permitted to engage in political speech of the type that AJP cannot, but only if it foregoes corporate membership and financial support altogether. To qualify for the *MCFL* exception, LFR cannot even hold meetings at a church, synagogue, or mosque without paying for use of the facility out of fear that otherwise it might be deemed to have accepted an "in-kind" corporate contribution.

Both AJP and LFR were organized under Section 501(c)(4) so that their members could pool their resources and speak in support of a common agenda. AJP and LFR therefore jointly file this

amici brief to seek restoration of their rights to free speech by asking the Court to overturn its prior decisions in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003).

SUMMARY OF THE ARGUMENT

Empowered by the Court's decisions in *Austin* and *McConnell*, twenty-two states now impose severe restrictions on corporate political activity, including contributions to candidates, expenditures on behalf of candidates, and/or "electioneering communications" (collectively, the "Offending State Statutes").[3] The Offending State Statutes apply to ***all*** corporate political activity — even when undertaken independently from political candidates or their campaign organizations. Under this patchwork quilt of state laws proscribing and restricting corporate political speech, AJP and — to a lesser extent — LFR cannot engage in unrestrained discussion of the issues that they were specifically formed to address. The restrictions that *Austin* has permitted states to enact serve no compelling government interest. Nor can they survive strict scrutiny, because they are both overbroad and under-inclusive. On their face, the Offending State Statutes deny the fundamental right of free speech to AJP and LFR, to their members, and indeed to all Americans who choose to organize, work, and speak through the corporate form. The only one way to right this constitutional wrong is to overturn *Austin* and *McConnell*.

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[3] Citations to the statutes of these twenty-two states are listed in the Table of Authorities.

ARGUMENT

I. RATHER THAN PREVENT CORRUPTION, *AUSTIN* HAS CORRODED AND DISTORTED THE POLITICAL PROCESS.

Before *Austin*, the Court's precedents were clear that the "the only legitimate and compelling government interests" sufficient to justify restrictions on protected First Amendment political speech were "preventing corruption or the appearance of corruption." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) ("*NCPAC*"). By "corruption," the Court meant large contributions to "secure a political *quid pro quo* from current and potential officeholders." *Buckley v. Valeo*, 424 U.S. 1, 26 (1976). In *Austin*, however, the Court recognized a compelling government interest in preventing "a different type of corruption in the political arena." 494 U.S. at 660. *Austin* expanded the definition of "corruption" to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.*

By expanding the definition of "corruption," *Austin* narrowed the protections of the First Amendment. And it did so based on a purported government interest that was factually dubious and without legal precedent. As Justice Kennedy observed in dissent at the time, "the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative

influence of speakers on elections" is "antithetical to the First Amendment." *Id.* at 704.

Austin's expansive definition of "corruption" eviscerated the principle that the First Amendment protects ***speech itself*** regardless of the identity of the speaker. Before *Austin*, the Court found "no support ... for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). The Michigan statute that the Court upheld in *Austin*, however, "discriminates on the basis of the speaker's identity," allowing "any person or group other than a corporation" to "engage in political debate over candidate elections" while corporations "must remain mute." 494 U.S. at 699 (Kennedy, J., dissenting). Before *Austin*, at least, the Court's "precedents condemn[ed] this censorship." *Id.*

In *Austin*, the Court accepted a notion that it had previously rejected in *MCFL*, that associations "suddenly present the specter of corruption merely by assuming the corporate form." 479 U.S. at 263. Before *Austin*, the only "corruption" that the government legitimately could seek to prevent was that caused by campaign ***contributions***. In *Buckley*, the Court thus upheld limits on campaign contributions while reaffirming the principle that spending money to influence elections is a form of constitutionally protected free speech. 424 U.S. at 963-64. By expanding the definition of "corruption," *Austin* thus excised from the Bill of Rights — at least for corporations — the principle that the First Amendment protects independent expenditures

expressing political speech. In contrast, campaign expenditures by individuals continue to enjoy First Amendment protection as free speech. *Davis v. Federal Election Comm'n*, 128 S. Ct. 2759 (2008). By permitting restrictions on corporate free speech that do not apply to individuals, *Austin* had the unintended consequence of depriving individuals of their First Amendment right to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The Offending State Statutes deprive individuals of their right to hear AJP's message and impair LFR's ability to communicate its views if it accepts corporate contributions, resulting in the very "corrosive and distorting effects" on the political process about which *Austin* expressed concern. The total censorship to which AJP is subject in many states does not apply to trial lawyers, many of whom can and do accumulate "immense aggregations of wealth." *Austin*, 494 U.S. at 660. The jury verdicts and other sources of income from which this wealth is often accumulated "have little or no correlation to the public's support for [trial lawyers'] political ideas." *Id.* Yet the Offending State Statutes allow only one side of the debate to be heard, particularly during the election years in which robust debate matters most. Contrary to the premise of *Austin*, the government has no compelling interest in restricting the amount of political speech or the identity of speakers.

A. The Government Has No Compelling Interest in Limiting Either The Amount of Political Speech or the Quantity of Speakers.

Reversing *Austin* would not undermine the government's ability to protect the political process from "corruption" as that term long has been understood. "The hallmark of corruption is the financial *quid pro quo:* dollars for political favors." *NCPAC*, 470 U.S. at 497. Like the Michigan statute at issue in *Austin*, the Offending State Statutes are not intended merely to prevent corruption resulting from the exchange of "dollars for political favors." Rather than being limited to campaign contributions, these statutes also restrict independent expenditures by corporations. As a result, they limit free speech in violation of the First Amendment.

The government has no compelling interest in "protecting" the political process from too much political speech by too many speakers (or too many of the "wrong" types of speakers, such as corporations and labor unions). A campaign finance law that inhibits political speech is particularly invalid when it fails to deal with an identifiable problem of corruption in politics. On that basis, the Court's recent decision in *Davis* rejected Congress' attempt to legislate in the name of "level[ing] electoral opportunities" through the so-called Millionaires Amendment. *See* 128 S. Ct. at 2774.

Rather than setting limits on political dialogue, the First Amendment is intended to facilitate robust debate. The First Amendment

entrusts not the government but rather "the people in our democracy ... with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791. The First Amendment allows the people to "consider, in making their judgment, the source and credibility of the advocate." *Id.* The First Amendment does not permit the government to silence certain advocates "on the basis of the speaker's identity." *Austin*, 494 U.S. at 699 (Kennedy, J., dissenting).

Under the First Amendment, a non-profit corporation like AJP has the same right to participate in public policy and electoral debates as individuals and unincorporated entities — for-profit and non-profit alike. Under the First Amendment, other corporations have the right to express their support for LFR's agenda by contributing financial support. Even if AJP and LFR were for-profit corporations that had accumulated "immense aggregations of wealth," both would have the same right of free speech as individuals and unincorporated associations at all levels of income and wealth. In this regard, the *Austin* majority cited no authority for the proposition that the First Amendment permits "progressive taxation" of political free speech — including outright confiscation of all corporate free speech.

The Offending State Statutes prevent AJP from engaging in public discussion that is "indispensable to decision-making in a democracy." *Bellotti*, 435 U.S. at 777. LFR's free speech is shackled in ways that individuals and unincorporated entities (and media corporations) are not. The restrictions that *Austin* has permitted

states to enact serve no compelling government interest and otherwise do not pass constitutional muster because they are both overbroad and under-inclusive.

B. Restrictions on Corporate Speech Are Overbroad Because They Apply Regardless of Wealth, Size, or Actual Facts Related to the Speaker.

For censorship of corporate speech to survive strict scrutiny, the government must demonstrate that it "furthers a compelling interest and is narrowly-tailored to achieve that interest." *Wisc. Right to Life, Inc. v. Federal Election Comm'n*, 546 U.S. 410 (2006). Even if the government had a compelling interest in protecting the marketplace of ideas from a "corrosive and distorting effect" caused by "immense aggregations of wealth," *Austin*, 494 U.S. at 660, banning corporate political speech is not "narrowly-tailored" to accomplish that purpose according to the government's own data. When the IRS sampled corporate tax returns filed in 2005, it found that 81 percent of corporations had annual revenues of less than $1 million, and 95 percent had annual revenues of less than $5 million.[4] Incorporation alone is no guarantee that an entity will amass "immense aggregations of wealth." To the contrary, many corporations end up in bankruptcy. In any event, there is no constitutional

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[4] U.S. Internal Revenue Service, *Statistics of Income, Corporation Income Tax Returns*, Table 732 ("Corporations by Receipt-Size Class and Industry: 2005"), available at www.census.gov/compendia/statab/cats/business_enterprise.html.

basis for *Austin*'s premise that corporations are demons that must be exorcised from the body politic.

The absurdity of *Austin*'s rationale for restricting corporate political speech is demonstrated by the facts and circumstances of AJP and LFR themselves. Both are non-profit corporations. Neither one has accumulated "immense aggregations of wealth." By virtue of Section 501(c)(4), both are prohibited from doing so. AJP's total annual budget for educational and advocacy activity nationwide is approximately $3 million. LFR conducts events in numerous states across the country, yet operates on a budget of roughly $1 million. Expenditures of this magnitude by AJP and LFR, made in multiple states, hardly threaten to have a "corrosive and distorting effect" on political debate in those states in which corporations have not been silenced. Like the statute that the Court invalidated in *NCPAC*, the Offending State Statutes are unconstitutionally overbroad:

> Even were we to determine that the large pooling of financial resources ... did pose a potential for corruption or the appearance of corruption, [the statute] is a fatally overbroad response to that evil. It is not limited to multimillion dollar war chests; its terms apply equally to informal discussion groups that solicit

> neighborhood contributions to publicize their views about a particular Presidential candidate.

470 U.S. at 498.

C. Restrictions on Corporate Speech Are Under-Inclusive Because They Exempt Wealthy Media Corporations, Individuals, and Unincorporated Entities.

Restrictions on corporate speech alone are plainly insufficient to protect the political process from "the corrosive and distorting effects of immense aggregations of wealth." With the blessing of *Austin*, the Offending State Statutes impose no restrictions on wealthy media corporations,[5] wealthy associations and other business entities that are not incorporated,[6] or wealthy individuals. To be heard effectively, individuals with less financial wherewithal must pool their resources. If they seek

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[5] *See, e.g.*, Col. Const. art. XXVIII § 2(8)(b)(II) (exempting "[a]ny editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party" from the definition of "expenditure").

[6] *See, e.g.*, Ariz. Rev. Stat. Ann. § 16-907 (political contributions by partnerships permitted and allocated in the name of partner(s)); N.Y. C.L.S. Elec. § 14-100 (limited liability companies treated as individuals and subject to individual, rather than corporate, campaign finance limits); Ohio Rev. Code Ann. §§ 3517.01(17), .105 (independent expenditures by partnerships, unincorporated business organizations or associations, and other non-corporate business entities permitted, subject to disclosures).

to do so by forming a corporation, *Austin* permits them to be silenced rather than heard. Meanwhile, the Offending State Statutes impose no restrictions on individuals like George Soros, Ross Perot, and T. Boone Pickens who have "immense aggregations of wealth" — even if their wealth originally was amassed in a corporation before being distributed to them in the form of profits or distributions.

In states that restrict both corporate contributions and corporate expenditures, the prohibitions of the Offending State Statutes are not limited to public communications regarding candidates. Indeed, corporations are prohibited even from telling their own employees which candidates are sympathetic to furthering the company's interests — information that may well be of interest and importance to employees in deciding whom to support or oppose at election time.[7]

While silencing AJP solely because it is a corporation, *Austin* leaves voters free to hear the viewpoints of AJP's political opponents, who are not subject to the same political speech restrictions imposed on AJP. AJP was formed to combat the well-organized efforts of trial lawyers to influence state legislation and policies related to civil justice reform. Personal injury lawyers actively engage in the political process to protect and promote

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[7] *See, e.g.*, Okla. Stat. Ann. tit. 21, §§ 187.7.b(7), .8.b (2009); *id.* tit. 74, app. § 257:1-1-2 (2009); Mass. Gen. Laws ch. 55, § 8 (2009); Mich. Comp. Laws § 169.206.6(2)(a) (2009).

candidates and policies that oppose, repeal, or chip away at tort reform laws.[8] Trial lawyers are able to use their "immense aggregations of wealth" to engage in unlimited political speech, while AJP and its members are not. For example:

- The American Association for Justice (formerly the Association of Trial Lawyers of America), ranks as the sixth-highest donor to federal candidates and national political parties — across all contributors — over the last two decades (1989-2008).

- Lawyers and law firms as an industry have given the most or the second most amount of federal campaign contributions each cycle for at least the past two decades, giving more than any other industry over that time period.

- In 2008, lawyers and law firms contributed $232,763,315 to federal campaigns, with 92.5 percent of that

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[8] *See, e.g.*, Amer. Tort Reform Found., White Paper, *Defrocking Tort Deform: Stopping Personal Injury Lawyers from Repealing Existing Tort Reforms and Expanding Rights to Sue in State Legislatures* (2008) ("[P]ersonal injury lawyer groups have contributed substantially to the election of representatives on key legislative committees and to state legislatures as a whole").

amount coming from individual lawyers.[9]

- Lawyers in tobacco settlement cases received $30 billion in fees, with $8 billion going to the lawyers in Mississippi, Florida, and Texas who pioneered the claims. The Florida litigation team was awarded $233 million per lawyer.[10]

Even when not acting as individuals, trial lawyers typically do not organize in the form of corporations. Instead, many law firms are structured as partnerships, limited liability partnerships, professional limited liability companies, and other types of unincorporated entities. Unlike AJP, individual lawyers, law firms, and associations to which they belong can make direct political contributions to and expenditures — in unlimited amounts — on behalf of candidates. This unintended consequence of *Austin* is yet another reason that overturning that decision is necessary to restore the primacy of the First Amendment:

> Our First Amendment principles surely tell us that an interest thought to be the compelling reason for enacting a law is cast into grave doubt when a worse evil surfaces in the law's actual operation. And our obligation to

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[9] *See* www.opensecrets.org.

[10] *See* www.triallawyersinc.com.

> examine the operation of the law is all the more urgent when the new evil is itself a distortion of speech.

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) (Kennedy, J., dissenting).

D. Neither the Exception for "*MCFL*" Organizations Nor the PAC "Alternative" Is Sufficient to Cure *Austin*'s Constitutional Infirmity.

Rather than overturn *Austin*, this Court has carved out various exceptions to the ban on corporate political activity. This effort to address *Austin*'s constitutional infirmities on a piecemeal basis has not cured the fundamental flaws in *Austin*, as demonstrated by the experience of both AJP and LFR.

1. The *MCFL* exception violates the First Amendment by prohibiting all for-profit corporations from expressing their political views.

The *MCFL* exception does not apply to organizations that receive corporate contributions or funding through corporate membership dues. Because AJP's members are corporations and other for-profit businesses, AJP does not qualify for the *MCFL* exception. In contrast, certain other 501(c)(4) corporations, such as NARAL-ProChoice America ("NARAL"), fall within the *MCFL* exception solely because their membership is comprised entirely of individuals. Whether a 501(c)(4) is comprised of

individuals or corporations bears no rational relationship to the wealth of the organization (again, to the extent that wealth is even a valid basis for restricting free speech). NARAL, for example, reports annual revenues and expenditures of more than $12 million — more than four times the annual budget of AJP.[11] Discrimination among social welfare organizations, based solely on the source of the organization's members and dues, is contrary to the First Amendment as interpreted by *Buckley* and *Davis*, among other precedents.

Unlike AJP, LFR has made the conscious decision to forego corporate support so that it can qualify for the *MCFL* exception. But why should it have to? To qualify for an exception to a ban on corporate political speech that was unconstitutional in the first place, LFR is subject to burdens and restrictions on its free speech that do not apply to individuals, unincorporated entities, or media corporations.

2. Political action committees are not a viable option for many corporations and impose undue burdens on corporate free speech.

The FEC would have the Court believe that corporations and labor unions should be relegated to the back of the constitutional bus by exercising their political free speech rights solely within the confines of a political action committee ("PAC"). Regardless

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[11] *See* www.guidestar.org/FinDocuments/2007/132/630/2007-132630359-049cff52-9O.pdf.

of how many PACs have been organized by large for-profit corporations and labor unions, this "separate but equal" approach to the First Amendment is not a viable option for either AJP or LFR. A PAC is typically used to make direct contributions to candidates. LFR never contributes to candidates, and AJP rarely does so. The primary purpose of both organizations is to make public communications about issues, positions of candidates, and voting records.

Relatively few corporations in the United States have resources approaching those of the Fortune 100. For AJP, LFR, and other small corporations, forming a PAC is not a viable option. PACs can normally solicit only a select "restricted class" (defined by law) consisting of executive and managerial employees or the individual members of an association. A PAC is not a viable option for AJP, whose only members are themselves corporations. A small company or organization lacks the expertise and personnel to manage the administrative burdens of registering and reporting to a state agency multiple times each year. And in Iowa, for example, state law prohibits a corporation from absorbing the administrative, accounting, compliance, and fundraising costs of the company PAC. Iowa Code § 68A.503 (2009). A PAC is a separate legal entity, distinct from the corporation itself. It must maintain a separate bank account, file a separate tax return, and otherwise be a wholly separate legal organization under the law. In short, establishing a PAC imposes administrative and financial burdens on corporations simply to exercise rights of free speech that the Constitution permits them to exercise in their own right.

II. BY ALLOWING RESTRICTIONS ON CORPORATE SPEECH, *MCCONNELL* HAS PERMITTED CIRCUMVENTION OF THE FIRST AMENDMENT ITSELF.

The constitutional defects in *Austin* were compounded when, in *McConnell*, the Court permitted restrictions intended to prevent "circumvention" of the corporate contributions ban through independent spending in support of election campaigns. The federal prohibitions that this Court upheld in *McConnell* have — in a perverse display of "trickle-down unconstitutionalism" — resulted in state law prohibitions and restrictions on corporate contributions and expenditures alike. Every state that prohibits corporate contributions directly to candidates also imposes draconian restrictions and prohibitions on corporate political expenditures — even those that are independent of candidates, and often even where no express advocacy is involved. Arizona, for example, allows only political committees (not corporations) to make "independent expenditures," which are treated as in-kind contributions to candidates even if made totally independently of a candidate. Ariz. Rev. Stat. Ann. § 16-919 (2009). And Colorado is one of at least sixteen other states prohibiting corporate independent expenditures, defined as "express advocacy" for and against candidates, not in coordination with candidates. Col. Const. art. XXVIII § 3(4)(a).

Many states also prohibit corporations from making or contributing to "electioneering communications." Since *McConnell*, many states have prohibited much more than the radio and

television broadcast advertising regulated by federal law. The speech restrictions include communications made in print advertising, billboards, direct mail, telephone, and even direct delivery by a "person" to a personal residence.[12]

In the name of preventing "circumvention" of prohibitions on corporate contributions, the states have enacted not just parallel — but greatly expanded — prohibitions on any and all corporate expenditures referencing state candidates. Montana, for example, prohibits "all" political expenditures by corporations. Mont. Code Ann. § 12-35-227 (2007). Other state speech restrictions are wholly counter to the Court's reasoning in *Austin*. Florida, for example, allows corporate direct contributions to candidates ***but*** imposes severe restrictions on a corporation's ability to "speak," requiring a corporation to register as a "political committee" if it makes independent expenditures and requiring the creation of an "electioneering communications organization" to make ***any*** public communications that reference a clearly identified candidate within 120 days of any election. Fla. Stat. §§ 106.011(1)(a)1.c, 106.011(18), and 106.071 (2009).

Both in theory and in practice, *McConnell* represents an even more radical departure from

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[12] In Colorado, for example, "electioneering communications" are communications to voters that unambiguously refer to a candidate that are distributed, broadcast, printed, directly mailed or delivered by hand to residence of individual 30 days before a primary or 60 days before a general election. Col. Const. art. XXVIII, § 3(7)(b) (2008).

prior First Amendment jurisprudence. *Austin* at least paid lip service to the principle that "preventing corruption or the appearance of corruption" is the only constitutionally valid basis for government restrictions on political speech (while expanding the definition of "corruption" to the point where it became barely recognizable). *McConnell* has since recognized a new compelling interest in "avoiding circumvention" of prohibitions that were unconstitutional in the first place.

The result is a regulatory regime in state after state that stifles political participation by non-profit corporate organizations such as AJP and LFR, by for-profit corporations such as AJP's members, and by for-profit corporations that cannot contribute to LFR without jeopardizing its *MCFL* exception. The entire regime is counter to basic First Amendment principles and must fail.

CONCLUSION

In *Austin*, the Court stepped onto (if not through) constitutionally thin ice by endorsing the notion that restrictions on free speech can and should vary depending upon the identity of the speaker. The resultant censorship of corporate political speech is based upon the constitutionally indefensible position that the government has a compelling interest in silencing the expression of those deemed to be inordinately wealthy. Even if the government had a compelling interest in silencing the wealthy, *Austin* permits restrictions on free speech that are at once overbroad and under-inclusive. Like most U.S. corporations, for-profit and non-profit alike, AJP and LFR have not amassed the

"immense aggregations of wealth" with which the *Austin* majority seemed preoccupied. Silencing AJP while allowing wealthy trial lawyers and associations of trial lawyers to monopolize the legal reform debate does nothing to address the type of alleged "corruption" upon which *Austin* was based.

Under the weight of *McConnell*, the flawed logic upon which *Austin* was resting has simply collapsed altogether. *McConnell* has permitted restrictions to "avoid circumvention" of restraints on corporate free speech that were constitutionally impermissible in the first place. The resultant corrosive and distorting effects on the First Amendment itself can be corrected only by reversing both *Austin* and *McConnell*.

Respectfully submitted,

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July 31, 2009

AMICUS CURIAE BRIEF

134 (42) No. 08-205

In The Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* CALIFORNIA BROADCASTERS ASSOCIATION, ILLINOIS BROADCASTERS ASSOCIATION, LOUISIANA ASSOCIATION OF BROADCASTERS, MAINE ASSOCIATION OF BROADCASTERS, MICHIGAN ASSOCIATION OF BROADCASTERS, MISSOURI BROADCASTERS ASSOCIATION, MINNESOTA BROADCASTERS ASSOCIATION, NEBRASKA BROADCASTERS ASSOCIATION, NEW YORK STATE BROADCASTERS ASSOCIATION, AND TENNESSEE ASSOCIATION OF BROADCASTERS IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A. BCRA Violates The First Amendment By Restricting The Content Of Political Speech Communicated Through Broadcast Media 3

B. WRTL's As-Applied Standard Impermissibly Chills Political Speech 13

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES

Ashcroft v. ACLU,
535 U.S. 564 (2002) 6

Associated Press v. United States,
326 U.S. 1 (1945) 6

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 4, 5

Baggett v. Bullitt,
377 U.S. 360 (1964) 17

Buckley v. Valeo,
424 U.S. 1 (1976) 4, 5, 10, 17

CBS v. Democratic Nat'l Comm.,
412 U.S. 94 (1973) 10

CBS v. FCC,
453 U.S. 367 (1981) 9

City of Ladue v. Gilleo,
512 U.S. 43 (1994) 5

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009) 10

FCC v. League of Women Voters,
468 U.S. 364 (1984) 10

FEC v. Wisconsin Right to Life,
551 U.S. 449 (2007) ..... *passim*

First National Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 3, 8, 11

Florida Star v. B.J.F.,
491 U.S. 524 (1989) 13

McConnell v. FEC,
251 F. Supp. 2d 176,
aff'd in part and rev'd in part,
540 U.S. 93 (2003) ..... *passim*

Miami Herald Publ'g Co. v. Tornillo,
418 U.S. 241 (1974) 3, 4

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 3, 4

North Carolina Right to Life, Inc. v. Leake,
525 F.3d 274 (4th Cir. 2008) 8

Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.,
475 U.S. 1 (1986) 3

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 9, 10

Reno v. ACLU,
521 U.S. 844 (1997) 6

Republican Party of Minnesota v. White,
536 U.S. 765 (2002) 12

Schneider v. State (Town of Irvington),
308 U.S. 147 (1939) 7

Smith v. Goguen,
415 U.S. 566 (1974) 17

Telecommunications Research and Action Center v. FCC,
801 F.2d 501 (D.C. Cir. 1986) 10

Thomas v. Collins,
323 U.S. 516 (1945) 17

Turner Broad. Sys., Inc. v. FCC,
512 U.S. 622 (1994) 5, 13

Virginia v. Hicks,
539 U.S. 113 (2003) 17

CONSTITUTIONAL PROVISION

U.S. CONST. amend. I ..... *passim*

STATUTES

2 U.S.C. § 434(f)(3) 3

REGULATIONS

11 C.F.R. § 100.29(b)(2) 4

11 C.F.R. § 114.15(b) 15

11 C.F.R. § 114.15(c) 16

11 C.F.R. § 114.15(c)(2)(i) 16

11 C.F.R. § 114.15(c)(2)(iii) 16

OTHER AUTHORITIES

44 Cong. Rec. S979 (Feb. 25, 1998) 9

147 Cong. Rec. S2457 (March 19, 2001) 7

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Aaron Smith, *The Internet's Role in Campaign 2008*, Pew Internet and Am. Life Project, April 15, 2009, http://www.pewinternet.org/Reports/2009/6--The-Internets-Role-in-Campaign-2008.aspx 9, 12

Adam Nagourney, *The '08 Campaign: Sea Change for Politics as We Know It*, N.Y. Times, Nov. 4, 2008 12

Explanation and Justification to Electioneering Communications Rules, 72 Fed. Reg. 72899, 72905 (December 26, 2007) 16

Posting of Kate Linthicum to Los Angeles Times Top of the Ticket, http://latimesblogs.latimes.com/washington/2008/08/mccain-obama-ho.html (Aug. 24, 2008) 14

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are the California Broadcasters Association, Illinois Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Michigan Association of Broadcasters, Missouri Broadcasters Association, Minnesota Broadcasters Association, Nebraska Broadcasters Association, New York State Broadcasters Association, and Tennessee Association of Broadcasters (collectively the "Named Associations"). Each of the Named Associations is, in turn, a voluntary association of broadcasters who are licensees of radio and television stations serving communities within their respective states.

Each of the Named Associations represents its members in matters relating to the broadcasting industry. Each has a keen interest in ensuring that the First Amendment protects access to all forms of media for the exercise of political speech.

SUMMARY OF ARGUMENT

The Court has long rejected attempts by the government to channel political speech to favored forms of media while foreclosing access to others. Yet Section 203 of the Bipartisan Campaign Reform Act ("BCRA") does exactly this by prohibiting

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

corporations and unions from using broadcast media for communications that merely refer to a federal candidate and that are disseminated in defined periods before an election.

McConnell v. FEC, 540 U.S. 93 (2003), erred in sustaining Section 203 against a facial challenge. A speaker's choice of media is intertwined with the message itself. Media choice determines the sensory impact of the message, the audience the message is likely to reach and the interest it generates. The reason that *McConnell* upheld Section 203 – that broadcast advertising by corporate or labor interests may excessively skew public opinion and diminish the impact of other voices – is no constitutional basis for curbing that speech. Simply put, it is not for the government to elevate the rights of some speakers over others, differentiate between acceptable and unacceptable media, and deprive the public of the right to hear competing political views and determine which views are worthy of adherence.

Even if these objectives were not constitutionally fatal, Section 203 is not narrowly tailored, as is constitutionally required. It bars speech that poses no threat to the law's ostensible objectives, while permitting the very same speech when it is communicated through favored forms of media or paid for by favored speakers. Finally, the as-applied test established by the Court in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (WRTL) chills speech by requiring speakers to make complex and subtle judgments that can expose them to criminal prosecution.

For these reasons, the Court should overrule the portion of *McConnell* that upheld the facial validity of Section 203.

ARGUMENT

A. BCRA Violates The First Amendment By Restricting The Content Of Political Speech Communicated Through Broadcast Media.

Section 203 of BCRA makes it a federal crime for corporations or unions to fund "electioneering communications," defined as broadcast, cable or satellite communications aired 60 days before a general election or 30 days before a primary election that refer to a clearly identified federal officeholder or candidate. 2 U.S.C. § 434(f)(3) (2007). In so doing, BCRA disenfranchises certain speakers from expressing political opinion in a manner of their own choosing.[2]

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[2] The Court has never singled out corporations for lesser First Amendment protection. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 n.14 (1978) ("In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual or association was involved."). In fact, the Court has applied strict scrutiny in various contexts involving the First Amendment rights of corporations. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (compelled speech); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 260 (1974); ("right of reply"); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation).

"[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . " *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Moreover, Section 203 is a content-based restriction, barring access to the airwaves if an officeholder or candidate is "clearly identified" by including the person's name, nickname, photograph, or other likeness, or where the identity of the candidate is otherwise apparent through an unambiguous reference. 11 C.F.R. § 100.29(b)(2) (2005).

"Content-based restrictions are the essence of censorial power." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Kennedy, J., dissenting). The First Amendment countenances few exceptions to the right of speakers to decide which public policy views are worthy of expression. The mere fact that political communications mention candidates or take the form of paid programming cannot serve as the basis for censorship. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).[3] Indeed, "the most exacting scrutiny [applies] to regulations that suppress, disadvantage, or impose differential

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[3] Section 203 also intrudes into the editorial function of broadcasters by determining when political opinion is acceptable and when it must be excluded. Just as the government has no authority to compel a newspaper to publish editorial views that the newspaper would not otherwise put into print, it cannot dictate to the media what political views must be left out. "Any other accommodation – any other system – would make the government the censor of what the people may read and know." *Tornillo*, 418 U.S. at 260.

burdens upon speech because of its content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

McConnell held that the content-based restriction in Section 203 of BCRA is a constitutionally-permissible effort to "stanch [the] flow of [soft] money" from corporations and unions because of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *McConnell*, 540 U.S. at 205-207 (quoting *Austin*, 494 U.S. at 660). The Court characterized Section 203 as an incremental approach, justified by the record, noting that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207 (quoting *Buckley*, 424 U.S. at 105).

In upholding a scheme that forcibly diverts political speech to certain kinds of media, *McConnell* departs from a long history of reserving such decisions to the speaker. Prior to *McConnell*, this Court time and again "voiced particular concern with laws that foreclose an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech." *Id.* The First

"Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

It is "no answer to say that the speaker should 'take the simple step of utilizing a [different] medium.'" *Ashcroft v. ACLU*, 535 U.S. 564, 596 (2002) (Kennedy, J., concurring). In *Reno v. ACLU*, 521 U.S. 844, 879 (1997), the Court concluded that this was a constitutionally-unacceptable option:

> The Government first contends that, even though the [Communications Decency Act of 1996] effectively censors discourse on many of the Internet's modalities – such as chat groups, newsgroups, and mail exploders – it is nonetheless constitutional because it provides a 'reasonable opportunity' for speakers to engage in the restricted speech on the World Wide Web. . . . The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books. In invalidating a number of laws that banned leafleting on the streets regardless of their content – we explained that 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other

> place.' *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939).

Moreover, the choice of media is an essential element of one's speech. Television allows a speaker to deploy words, moving images and music to make a connection with a broad audience. As Chief Justice Roberts observed, "Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness." *WRTL*, 551 U.S. at 477 n.9.

In fact, it is the very effectiveness of broadcast speech – evidenced by the so-called "torrent of television election-related ads," *McConnell*, 540 U.S. at 207 – that led Congress to restrict it. *See, e.g.*, 148 Cong. Rec. S2135 (March 20, 2002) (statement of Sen. Snowe) ("What we are talking about are broadcast advertisements that are influencing our Federal elections and, in virtually every instance, are designed to influence our Federal elections."); 147 Cong. Rec. S2457 (March 19, 2001) (statement of Sen. McCain) ("Guess what. The ads [that survey respondents] viewed to be the most influential of all the ads run were the ones that were run by interest groups that mentioned a candidate, that are supposedly issue ads, even more than the ads that were run by the candidates themselves.").

The government has no business making distinctions on this basis. "Nothing could be further removed from the spirit of the First Amendment than labeling speech corruptive merely because it is effective." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 295 (4th Cir. 2008). As the Court declared in *Bellotti*:

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . . Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments.

435 U.S. 765, 790 (1998). *See also McConnell*, 540 U.S. at 284 (Thomas, J., concurring in part and dissenting in part) ("One would think that *The New York Times* fervently hopes that its endorsement of Presidential candidates will actually influence people. What is to stop a future Congress from determining that the press is 'too influential,' and that the 'appearance of corruption' is significant when media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties?").

Indeed, the effect of singling out broadcast media is to restrict the medium that Americans still rely on most to inform their decision-making on political issues. An April 2009 study by the Pew

Internet and American Life Project found that television remains the dominant medium for political news: nearly 80% of those surveyed report getting most of their campaign news from television. Aaron Smith, *The Internet's Role in Campaign 2008*, Pew Internet and Am. Life Project, April 15, 2009, http://www.pewinternet.org/Reports/2009/6--The-Internets-Role-in-Campaign-2008.aspx.

No doubt aware that Section 203 raised grave constitutional concerns, some Members of Congress argued that stricter regulation of broadcast media could be justified based on the limited availability of television and radio frequencies.[4] This rationale was first applied by the Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969), to promote a diversity of voices, "which would otherwise, by necessity, be barred from the airwaves." *See also CBS v. FCC*, 453 U.S. 367, 396 (1981) (law requiring broadcasters to give "reasonable access" to federal candidates justified as means for increasing

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[4] *See, e.g.*, 147 Cong. Rec. S2611 (March 21, 2001) (statement of Sen. Torricelli) ("Why indeed should broadcasters not bear some of the responsibilities? Do they not have public licenses? Do they not have responsibility to air the news fairly, cover campaigns, to inform the public? . . . The spectrum has limited the number of television stations; hence, the FEC's requirements and Federal law."); 44 Cong. Rec. S979 (Feb. 25, 1998) (statement of Sen. Levin) ("Now, why radio and television? The answer is that the Supreme Court itself has held that, due to the fact that these media, radio and television, are regulated, are licensed, and that the spectrum is limited, you can regulate these media in ways in which you cannot regulate newspapers or the printed word. . . . ").

"freedom of expression by enhancing the ability of . . . the public to receive" information).[5]

Red Lion is not authority for suppressing speech. "It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media." *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986).[6]

Even assuming for the sake of argument the legitimacy of Congress's objectives in enacting Section 203, regulation must be narrowly tailored to satisfy a compelling government interest. *Buckley*, 424 U.S. at 25, 64. *McConnell* concluded in error that Section 203 should be sustained as an "incremental" reform. Such a conclusion is belied by the gap between the impact of the law and its ostensible objectives; it is grossly over- and under-inclusive.

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[5] We take no position here on the continued viability of the scarcity doctrine in other contexts. We note simply that it has been called into question. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (Thomas, J. concurring); *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) ("The prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years."); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 158 n.8 (1973) ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*.").

[6] This rationale is equally unavailing because BCRA's prohibitory ambit also applies to cable and satellite – media that this Court has never subjected to the scarcity rationale.

On the one hand, Section 203 is crafted so broadly that it applies to all for-profit companies, regardless of whether they are large or small, public or private.[7] Section 203 also applies to non-profit corporations, such as incorporated charities and social welfare organizations – organizations that manifestly do not possess "corrosive and immense wealth," even were they legitimate categories upon which to base prior restraints on First Amendment speech. Moreover, *McConnell* recognized that some percentage of ads swept up in the electioneering communications ban have no electoral purpose at all. 540 U.S. at 206. While some messages from corporations and unions will surely not be "corrosive" in any sense of the word, the law provides no way to distinguish such ads from all others, nor does it provide them with any exemption.

At the same time, by targeting only some forms of media, BCRA ensures that the prescription cannot cure the perceived ill. BCRA allows corporations and unions to purchase full-page ads in major newspapers, but forbids the same speakers from spending a tiny fraction of that cost for a television or radio advertisement in a small suburban market. Likewise, the same message that is forbidden on radio and television may be disseminated through electronic media, such as iPods and other MP3 players, the Internet and

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[7] As the Court observed in *Bellotti*, "Corporations, like individuals or groups, are not homogeneous. They range from great multinational enterprises whose stock is publicly held and traded to medium-size public companies and to those that are closely held and controlled by an individual or family." 435 U.S. at 784 n.22.

cellphones.[8] This sort of arbitrary line-drawing is both discriminatory and ineffective. "[N]ot only will the same ads be seen and heard [via non-broadcast media], they will *still* be aired on the television and the radio; the only difference is that they will be sponsored by a smaller (and less diverse) class of privileged speakers. . . . [including] wealthy individuals, PACs or unincorporated associations." *McConnell*, 251 F. Supp. 2d 176, 371 (D.D.C. 2003) (Henderson, J., concurring in part and dissenting in part).

Narrow tailoring this is not. It is no more than a swipe at political speech with a poorly-designed tool. Predictably, the results are not only uneven, they are also constitutionally unsupportable. Such arbitrary line-drawing puts in doubt the rationale for the broadcast ban in the first place. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 783-800 (2002) (prohibiting judicial candidate from announcing views on political issues – but "only at certain times and in certain forms" – failed strict

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[8] The 2008 Presidential campaign was a "seminal, transformative race" where the Internet and social media were harnessed to reach voters who have become accustomed to using new forms of media. "The platforms included YouTube, which did not exist in 2004, and the cell phone text messages that the campaign was sending out to supporters on [the day before the election] to remind them to vote." Adam Nagourney, *The '08 Campaign: Sea Change for Politics as We Know It*, N.Y. Times, Nov. 4, 2008 at A1. Likewise, the Pew study of the 2008 election found that "fully 30% of those who post political content online are under the age of 25, and more than half are younger than 35. Smith, *supra*. Political content creation is also tightly linked with the use of social media platforms such as online social networks, video sharing sites, blogs and status update services such as Twitter." Smith, *supra*.

scrutiny because it was "so woefully underinclusive as to render belief in [its stated] purpose a challenge to the credulous"); *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (striking down law that prohibited publication of names of rape victims by "instruments of mass communication" because law did not prohibit dissemination by other means).

At the heart of the First Amendment is the principle that each speaker has the right to choose the ideas deserving of expression and each listener the right to choose those ideas deserving of adherence. Our political system and cultural life rest on this foundation. *Turner*, 512 U.S. at 641. Section 203 of BCRA contravenes this essential right by criminalizing political speech based on the content of the message, the identity of the speaker and the choice of media to communicate the message. Additionally, the law sweeps in considerable speech that poses no threat to the law's ostensible objectives, while permitting the very same speech when it is communicated through favored forms of media or paid for by favored speakers. Accordingly, the Court should overrule that portion of *McConnell* upholding Section 203 of BCRA against a facial challenge.

B. WRTL's As-Applied Standard Impermissibly Chills Political Speech.

In *WRTL*, the Court announced an as-applied test, which allows corporations and unions to communicate over the airwaves about issues, as distinguished from elections. 551 U.S. at 452. Under

this test, the electioneering communications ban applies if speech is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.* at 451. Justice Alito cautioned that if the implementation of this test impermissibly chills political speech, the Court's ruling in *McConnell* on the facial challenge to Section 203 may need to be reconsidered. *Id.* at 482.

Any doubts about the potential chilling effect of the Court's as-applied test were confirmed by the sixteen pages of implementing rules and explanation published in the Federal Register by the Federal Election Commission. The regulations are complex and subjective, requiring subtle judgments that may have to be made in the course of a 24-hour-a-day news cycle when "rapid response" is increasingly the norm. *See, e.g.*, Posting of Kate Linthicum to Los Angeles Times Top of the Ticket, http://latimesblogs.latimes.com/washington/2008/08/mccain-obama-ho.html (Aug. 24, 2008). More significantly, making the wrong decision can trigger a civil or criminal investigation and expose the speaker to fines and jail. Reason dictates that under these circumstances, speakers who wish to engage in political discourse will shy away from anything close to the line or simply choose a type of media that is not subject to the Section 203 ban. Furthermore, broadcasters are left unable to offer effective guidance to prospective speakers in order to prevent their media from being used in a manner that the law treats as a federal crime.

The FEC rules begin by creating a "safe harbor" for communications that (1) do not mention

any election, candidacy, political party, or voting by the public; (2) do not take a position on any candidate's character or qualifications; and (3) focus on an issue and urge the candidate to take a position on it or urge the public to contact the candidate about that issue. 11 C.F.R. § 114.15(b) (2007). The creation of a safe harbor is a sensible approach to protect core First Amendment speech, but this harbor is not safe at all; it is rife with interpretive issues, and far different from the ample shelter envisioned by the Court.

For example, how does a speaker determine when an ad does not "take a position on the candidate's qualifications for office?" The challenge this presents to the speaker was foreshadowed by the Court in *WRTL*, where the justices themselves disagreed about whether an ad that *McConnell* regarded as the paradigmatic electioneering communication would be protected under the as-applied test. Notably, the dissent in *WRTL* concluded that the as-applied test would permit corporate or labor funding of an ad that "condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 551 U.S. at 498 n.7. The principal opinion, however, pointedly distinguished this kind of ad from a genuine issue ad, implying that the "Jane Doe" ad might still be subject to Section 203's prohibition. *Id.* at 2667 n.6. With such differing views on the Court about an ad of this sort, it is entirely predictable that a covered speaker will have difficulty finding the line.

Anticipating that many ads will not satisfy every element of its safe harbor, the FEC articulated the factors that it will "consider," such as whether the communication has "any indicia of express advocacy" . . . 'to determine whether, on balance, a communication' meets the Court's as-applied test." 11 C.F.R. § 114.15(c) (2007). One factor is whether the communication "[i]ncludes a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party." § 114.15(c)(2)(iii). Another factor requires determining whether the communication "focuses on a public policy issue." These are precarious judgments for anyone to make, let alone an organization acting on pain of criminal penalties, fines, and investigations. § 114.15(c)(2)(i).

As the Court observed in *WRTL*, such an "open-ended rough-and-tumble of factors" is sure to invite complex argument. *WRTL*, 551 U.S. at 451. Moreover, the FEC has acknowledged that an ad might have no indicia of express advocacy and still be subject to the electioneering communications ban, intimidating speakers who would otherwise exercise their First Amendment rights. *See* Explanation and Justification to Electioneering Communications Rules, 72 Fed. Reg. 72899, 72905 (December 26, 2007).

The First Amendment "demands a greater degree of specificity than in other contexts," lest speech be deterred by the speaker's uncertainty about what is permitted and reluctance to come too

close to the line. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). If a test lacks sufficient specificity, speakers will "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citations and quotations omitted). This is especially true if the statute imposes criminal sanctions. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003). Free speech may not be so inhibited.

In the end, it is hardly surprising that the as-applied test articulated by this Court, and as implemented by the Federal Election Commission, chills constitutionally protected speech. As the Court noted in *McConnell*, "the distinction between 'issue' and express advocacy seemed neat in theory, [but] the two categories of advertisements have proved functionally identical in important respects." 540 U.S. at 126. In the words of one witness in the *McConnell* litigation, "What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day." *Id.* at n.16 (internal quotation marks omitted).

Such an uncertain line between the constitutionally protected and the felonious "offers no security for free discussion," and thus "compels the speaker to hedge and trim." *Buckley*, 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). Under Section 203, a speaker must choose a mode of communication based on a maze of acceptable and prohibited paths, rather than a straightforward assessment of the best means of reaching and persuading the desired audience. The

as-applied test is thus insufficient and Section 203 should be held invalid on its face.

CONCLUSION

For the reasons stated above, the Court should overrule the portion of *McConnell* which upheld the facial validity of Section 203 of BCRA.

Respectfully submitted,

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Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The
United States District Court
For The District Of Columbia

BRIEF OF *AMICUS CURIAE* CALIFORNIA FIRST AMENDMENT COALITION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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HUKKUX

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. *AUSTIN* SHOULD BE OVERRULED BECAUSE IT IMPOSES AN UNCONSTITUTIONAL BURDEN ON THE POLITICAL SPEECH OF NONPROFIT ENTITIES 4

A. *MCFL* Recognized The Importance Of Permitting Independent Expenditures By Nonprofit Entities 4

B. *Austin* Read *MCFL* Too Narrowly And Did Not Give Adequate Breathing Room For Political Advocacy By Nonprofit Entities 5

1. Section 441b Is A Restriction On Political Speech, And It Is Subject To Strict Scrutiny 6

2. The Statute Upheld In *Austin* Was Not Narrowly Tailored To Advance Any Purportedly Compelling State Interests, And The Decision In *Austin* Should Not Control The Treatment Of Independent Nonprofit Entities Under Section 441b 7

TABLE OF CONTENTS – Continued

Page

a. The "Specter Of Corruption" Is Not A Sufficient Reason To Prevent Independent Nonprofit Entities From Engaging In Political Speech 7

b. The Concern Over "Aggregated Wealth" Does Not Apply In The Case Of Independent Nonprofit Entities 8

c. This Court Repeatedly Has Rejected The Argument That The Government Has A Compelling State Interest In Restricting The Political Speech Of A Corporation In Order To Protect The Views Of Some Of Its Members 12

3. *Austin* Should Be Overruled And Replaced With A New Standard In Order To Give Breathing Room To Nonprofit Entities' Political Speech 13

II. *McCONNELL* SHOULD BE OVERRULED TO THE EXTENT IT UPHOLDS THE FACIAL VALIDITY OF SECTION 203..... 15

A. On Its Face, Section 203 Is Unconstitutionally Overbroad..... 15

B. Section 203 Facially Violates This Court's Holding In *MCFL* 17

TABLE OF CONTENTS – Continued

Page

C. An *MCFL* Exception Cannot Be Read Into Sections 203 And 204 Because An Express Purpose Of The Wellstone Amendment Was To Silence Nonprofit Entities 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 19

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) 7, 8, 12

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*

FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985) 7, 8, 12, 16

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 127 S.Ct. 2652 (2007) 5, 17

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 6, 7, 8, 13

Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967) 15

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

CONSTITUTION

U.S. Const. amend. I 2, 5, 19

STATUTES

2 U.S.C. § 441b ..... *passim*

2 U.S.C. § 441b(c)(2) 18

2 U.S.C. § 441b(c)(6) 18

TABLE OF AUTHORITIES – Continued

Page

Bipartisan Campaign Reform Act of 2002 (BCRA) § 203, Pub. L. No. 107-155, 116 Stat. 81 (2002) 3, 15, 16, 17, 18

Bipartisan Campaign Reform Act of 2002 (BCRA) § 204, Pub. L. No. 107-155, 116 Stat. 81 (2002) 17, 18, 19

I.R.C. § 501(c)(3) 1

I.R.C. § 501(c)(4) 17

I.R.C. § 527(e)(1) 17

OTHER AUTHORITIES

147 Cong. Rec. S2846-S2847 (daily ed. Mar. 26, 2001) 18, 20

INTERESTS OF *AMICUS CURIAE*[1]

The California First Amendment Coalition is a nonprofit organization (incorporated under California's nonprofit law and tax exempt under Section 501(c)(3) of the Internal Revenue Code) that is dedicated to freedom of expression – resisting censorship of all kinds – and to promotion of the "people's right to know" about their government so that they may hold it accountable. The Coalition is supported mainly by grants from foundations and individuals, but receives some of its funding from for-profit news media, law firms organized as corporations, and other for-profit companies. Although the Coalition does not endorse candidates for political office, it is outspoken in its public advocacy and values its freedom, and the freedom of its members and supporters, to speak out on controversial issues, whether in the context of a regulated political campaign or otherwise.

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[1] Appellee has consented to the filing of *amicus curiae* briefs in support of either party, and its consent has been filed with the Clerk. Appellant has consented to the filing of this *Amicus Curiae* brief, and its consent letter is submitted to the Clerk concurrently with this brief. This brief was not written in whole or in part by counsel for any party, and no persons other than *Amicus* have made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Court need not decide in this case whether compelling state interests invoked to justify limitations on corporate expenditures under 2 U.S.C. § 441b ("Section 441b") may apply to speech by for-profit corporations and unions. That is an issue that is perhaps best left for another day. What is clear, however, is that the First Amendment protects from federal regulation the political speech of independent nonprofit entities and the corresponding right of citizens to hear that speech. There are no compelling state interests advanced by banning the political speech of a nonprofit entity that is independent – meaning that it is neither coordinated with a campaign nor controlled by a for-profit corporation or union. The speech of such an organization is no different, in principle or constitutional terms, from the speech of the people who belong to, contribute money to, or otherwise support it.

Section 441b, *Amicus* submits, may not apply to a nonprofit entity unless the Government proves, under a strict scrutiny analysis, that either: (a) the nonprofit entity is substantially controlled by one or more for-profit corporations or unions; or (b) the nonprofit entity is acting in coordination with a campaign. This test fosters political speech and also preserves an avenue for enforcing compelling state interests, if any, that may warrant restricting expenditures in other circumstances. Under this test, Appellant Citizens United's speech could not be restricted unless the Government could prove that

Citizens United is controlled by one or more for-profit corporations or unions, or that Citizens United is acting in coordination with a campaign.

This new proposed standard may not, however, be squared with this Court's decisions in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), or *McConnell v. FEC*, 540 U.S. 93 (2003), which should be overruled in whole and in part, respectively. Although *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), provides a measure of protection for independent expenditures by nonprofit entities, *Austin* is unfaithful to those protections, and should be overruled because it permits restrictions on political speech that are not narrowly tailored to any compelling state interests.

McConnell should be overruled to the extent that it upholds Section 203 of the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), which amended Section 441b, because Section 203, on its face, does not have an *MCFL* exception, or any other kind of meaningful exception, for nonprofit entities. Section 203 is overbroad, particularly when read in conjunction with Section 204 of the BCRA, because it removes all protections for nonprofit entities' "electioneering communications."

ARGUMENT

I. *AUSTIN* SHOULD BE OVERRULED BECAUSE IT IMPOSES AN UNCONSTITUTIONAL BURDEN ON THE POLITICAL SPEECH OF NONPROFIT ENTITIES

A. *MCFL* Recognized The Importance Of Permitting Independent Expenditures By Nonprofit Entities

The "central organizational purpose" of the nonprofit in *MCFL* was "issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates." *Id.* at 252 n.6. MCFL had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings." *Id.* at 264. It "was not established by a business corporation or a labor union," and it did not "accept contributions from such entities." *Id.* at 264. These facts led this Court to characterize MCFL as "not the type of 'traditional corporatio[n] organized for economic gain,' that has been the focus of regulation of corporate activity." *Id.* at 259 (citation omitted).

The same can be said for many nonprofit entities, even those that do not maintain their contribution procedures as scrupulously as MCFL. *See generally id.* at 263 ("[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status"). *MCFL* should be the ceiling, not the floor, for protecting the political speech of

nonprofit entities. The principles of *MCFL* can and should be extended further. This Court's decision in *Austin*, however, has restricted nonprofits' political speech for nearly two decades in a manner that cannot be reconciled with *MCFL* or the First Amendment.

B. *Austin* Read *MCFL* Too Narrowly And Did Not Give Adequate Breathing Room For Political Advocacy By Nonprofit Entities

In *Austin*, this Court did not extend *MCFL*, but instead read it narrowly to uphold "a direct restriction on the independent expenditure of funds for political speech for the first time in [this Court's] history." *Austin*, 494 U.S. at 695 (Kennedy, J., dissenting); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 2678 (2007) (*WRTL II*) (Scalia, J., concurring) ("[*Austin*] was the only pre-*McConnell* case in which this Court had ever permitted the Government to restrict political speech based on the corporate identity of the speaker").

The statute that was upheld in *Austin* prohibited nonprofit corporations from "making any 'expenditure' in connection with an election campaign for state office." *Austin*, 494 U.S. at 696 (Kennedy, J., dissenting). The nonprofit entity in *Austin* was the Michigan Chamber of Commerce, which received more than three-quarters of its funding from business corporations, whose expenditures could be regulated. *Id.* 494 U.S. at 664. This Court held that "[b]ecause the Chamber accepts money from for-profit corporations,

it could . . . serve as a conduit for corporate political spending, . . . [and it] does not possess the features that would *compel* the State to exempt it from restriction on independent political expenditures." *Id.* at 664-665 (emphasis added).

Although the facts of *MCFL* were deemed "essential" to this Court's holding, *MCFL*, 479 U.S. at 263, it was not until *Austin* that this Court held that protection for nonprofits' political speech is available *only* for those nonprofits to which *all* of the facts of *MCFL* apply, *see Austin*, 494 U.S. at 661-665. This interpretation of *MCFL* was overly restrictive, forcing nonprofits into a one-size-fits-all legal straightjacket. This Court's decision in *Austin*, which restricted political speech and served as a basis for the holding in *McConnell*, 540 U.S. at 205, cannot be justified.

1. Section 441b Is A Restriction On Political Speech, And It Is Subject To Strict Scrutiny

"Independent expenditures constitute expression at the core of our electoral process and of the First Amendment freedoms." *MCFL*, 479 U.S. at 251 (internal quotation marks omitted). Restrictions on independent expenditures, such as Section 441b, are unconstitutional unless the restrictions pass strict scrutiny – *i.e.*, unless the government can show that the restriction is both narrowly tailored and supported by a compelling state interest. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786

(1978) (*Bellotti*); *WRTL II*, 127 S.Ct. at 2664; *Austin*, 494 U.S. at 657; *see also MCFL*, 479 U.S. at 265 ("[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation").

2. The Statute Upheld In *Austin* Was Not Narrowly Tailored To Advance Any Purportedly Compelling State Interests, And The Decision In *Austin* Should Not Control The Treatment Of Independent Nonprofit Entities Under Section 441b

a. The "Specter Of Corruption" Is Not A Sufficient Reason To Prevent Independent Nonprofit Entities From Engaging In Political Speech

Until *Austin*, the "specter of corruption" was "'the only legitimate and compelling government interest[s] thus far identified for restricting campaign finances[.]'" *Austin*, 494 U.S. at 703 (Kennedy, J., dissenting) (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-497 (1985) (*NCPAC*)). There are no limits on a wealthy individual's independent expenditures, *Buckley v. Valeo*, 424 U.S. 1, 45 (1976), because such expenditures, not made in coordination with a campaign, have "no tendency to corrupt," *Austin*, 494 U.S. at 703 (Kennedy, J., dissenting). There are also no such limits on an

"*MCFL*-nonprofit," *see MCFL*, 479 U.S. at 263, or on a corporation spending money in connection with a referendum put to voters, *Bellotti*, 435 U.S. at 776-777. In *NCPAC*, 470 U.S. at 497-498, this Court held that "the mere hypothetical possibility that candidates may take notice of and reward political action committee (PAC) expenditures by giving official favors was insufficient to demonstrate that the threat of corruption justified the spending regulation," *Austin*, 494 U.S. at 703 (Kennedy, J., dissenting). *See also MCFL*, 479 U.S. at 263 ("[v]oluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form").

There is no principled reason why the "specter of corruption" should serve as a compelling state interest to restrict the independent political speech of nonprofit entities when such an interest did not serve to justify the restrictions in *Buckley*, *MCFL*, *Bellotti* or *NCPAC*. Where a nonprofit entity is acting independently of a candidate or campaign, there is no serious risk of corruption whether real or hypothetical.

b. The Concern Over "Aggregated Wealth" Does Not Apply In The Case Of Independent Nonprofit Entities

In *Austin*, this Court accepted another proffered compelling state interest: "the corrosive and distorting effects of immense aggregations of wealth that

are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660.[2] The concern is not the mere aggregation of wealth itself, but the fear that it will be used to impact the political process adversely: "Direct corporate spending on political activity raises the prospect that resources in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257.

Even if this concern were compelling in the context of for-profit corporations, it does not apply to independent nonprofit entities because they do not "amass" resources in the "economic marketplace." *Id.* There is a fundamental distinction between the for-profit corporation and the nonprofit: "resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas," whereas a nonprofit entity's resources reflect "its popularity in the political marketplace." *Id.* at 259. Thus, there is a correlation between even the rare nonprofit corporation that has "amassed wealth" and the public's support for its ideas.

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[2] This interest has been articulated in many ways: "the need to restrict 'the influence of political war chests funneled through the corporate form;' to 'eliminate the effect of aggregated wealth on federal elections;' to curb the political influence of 'those who exercise control over large aggregations of capital;' and to regulate the 'substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.'" *MCFL*, 479 U.S. at 257 (citations omitted).

Campaign finance laws such as Section 441b are supposedly designed to protect citizens from the effects of distorted political speech. What really distorts the "political marketplace," however, is the exclusion of the collective voice of citizens who join together as an independent nonprofit entity.[3] Vocal, vibrant and independent nonprofits represent grass-roots democracy at its best. Their political speech should be embraced, not shunned.

In *Austin*, Justice Kennedy stated that even if the "'corrosive and distorting effects of immense aggregations of wealth'" could "justify restricting political speech by for-profit corporations, it is certain that it does not apply to nonprofit entities." *Austin*, 494 U.S. at 703 (Kennedy, J., dissenting). Justice Kennedy reasoned further that a nonprofit entity's political speech should not be silenced merely because the nonprofit entity accepts corporate contributions:

> There is no reason that the free speech rights of an individual or of an association of individuals should turn on the circumstance that funds used to engage in the speech come

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[3] If the goal is to limit expenditures by corporations with "amassed" wealth, it would be a less restrictive alternative to limit "the expenditures of only those corporations with more than a certain amount of net worth or annual profit." *Austin*, 494 U.S. at 688 (Scalia, J., dissenting). By contrast, this Court has rejected the argument that the possibility of forming a PAC is an acceptable alternative means for a nonprofit to make independent expenditures. *MCFL*, 479 U.S. at 253-255; *see also Austin*, 494 U.S. at 708 (Kennedy, J., dissenting).

> from a corporation. Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest or salary. That does not provide a basis to deprive such individuals or associations of their First Amendment freedoms. The more narrow alternative of record-keeping and funding disclosure is available. A wooden rule prohibiting independent expenditures by nonprofit corporations that receive funds from business corporations invites discriminatory distinctions. The principled approach is to acknowledge that where political speech is concerned, freedom to speak extends to all nonprofit corporations, not the special favorites of a majority of this Court.

Id. at 707 (Kennedy, J., dissenting). *Amicus* advances a more modest approach that would apply to all independent nonprofit corporations, while leaving to another day consideration of whether regulation of the speech of for-profit corporations survives strict constitutional scrutiny.

The new standard proposed by *Amicus* resolves the concern that a nonprofit entity may be used as a conduit to funnel funds from for-profit corporations or unions to campaigns. In *MCFL*, this Court rejected the claim that "the inapplicability of § 441b to MCFL would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions." *MCFL*, 479 U.S. at 262. MCFL,

this Court ruled, posed no threat "at all" to warrant "regulation of political activity." *Id.* at 263.

Likewise, there is no threat posed by nonprofit entities that are not substantially controlled by business corporations or campaigns. In *Buckley*, this Court held that the "absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Buckley*, 424 U.S. at 47; *see also NCPAC*, 470 U.S. at 497-498. By parity of reasoning, there is little, if any, danger that an independent nonprofit entity – *i.e.*, one that does not prearrange or coordinate with for-profit corporations, unions or campaigns – will engage in corrupting practices.

c. This Court Repeatedly Has Rejected The Argument That The Government Has A Compelling State Interest In Restricting The Political Speech Of A Corporation In Order To Protect The Views Of Some Of Its Members

The Government has claimed that there is an interest in protecting those who contribute to nonprofit entities because those contributors, may not, for example, wish for their money to be used for electoral campaigns. *See MCFL*, 479 U.S. at 261. This Court dismissed such concerns in *MCFL*: "This concern can be met, however, by means far more narrowly tailored and less burdensome than § 441b's

restriction on direct expenditures: simply requiring that contributors be informed that their money may be used for such a purpose." *Id.*; *see also Bellotti*, 435 U.S. at 792-793 (rejecting the similar argument that a prohibition on speech was needed to protect corporate shareholders "by preventing the use of corporate resources in furtherance of views with which some shareholders may disagree"). There are additional less restrictive alternatives to muzzling a nonprofit entity's speech based on the professed desire to protect the disgruntled member of the nonprofit: "[t]o the extent that members disagree with a nonprofit corporation's policies, they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own." *Austin*, 494 U.S. at 710 (Kennedy, J., dissenting); *see also id.* at 687 (Scalia, J., dissenting).

3. *Austin* Should Be Overruled And Replaced With A New Standard In Order To Give Breathing Room To Nonprofit Entities' Political Speech

Amicus's proposed standard expands the political marketplace, while still allowing for the possibility that the government may be able to justify the regulation of some expenditures by for-profit corporations. Nonprofits must be free from restrictions on their political speech if they are independent of a regulated political campaign and are not substantially controlled by for-profit corporations or unions. For the vast majority of politically active nonprofits, this

formulation provides both clarity and a secure buffer against government intrusion.[4]

The government must bear the burden of demonstrating, with clear and convincing evidence, that a nonprofit organization is either substantially controlled by one or more for-profit corporations or unions or that it is coordinated with a campaign. This is, and should be, difficult to do. Even nonprofits whose biggest supporters are for-profit corporations regularly make decisions without regard to the wishes or perceived interests of those supporters. Some corporate contributors do not expect to wield influence over a nonprofit. Others may expect to, but are surprised to learn that they do not. Either way, the nonprofit's independence should be presumed and its right to speak respected absent clear and convincing evidence of substantial control of the nonprofit entity by one or more for-profit corporations or unions.

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[4] *Amicus* acknowledges that a standard based on who "substantially controls" a nonprofit entity does not provide a bright line as compared to the stringent components of the rare "*MCFL*-nonprofit" (*i.e.*, nonprofits sharing the characteristics of the nonprofit in *MCFL*). "[T]he desire for a bright line rule" does not, however, "constitute a *compelling* state interest necessary to justify any infringement on First Amendment freedom." *MCFL*, 479 U.S. at 263 (emphasis in original). *Austin*'s rigid adherence to the facts in *MCFL* as the only circumstance for permitting nonprofit entities' expenditures may be an easy rule in application, *see Austin*, 494 U.S. at 661-665, but it is not consistent with the First Amendment because it restricts too much speech.

The holding in *Austin* is not compatible with *Amicus*'s proposed standard or the First Amendment because *Austin* presumes that the political speech of nonprofit entities should be restricted, not protected. *Austin* should be overruled.

II. *McCONNELL* SHOULD BE OVERRULED TO THE EXTENT IT UPHOLDS THE FACIAL VALIDITY OF SECTION 203

A. On Its Face, Section 203 Is Unconstitutionally Overbroad

In *McConnell* this Court affirmed Section 203's prohibition of "electioneering communications" and advertisements that are the "functional equivalent of express advocacy" during critical times just before elections occur. *McConnell*, 540 U.S. at 203-209. This portion of *McConnell* should be overruled. On its face, Section 203 restricts the political speech of all corporations, including nonprofit corporations, in a manner that is unconstitutionally overbroad and is not narrowly tailored to any compelling state interest.

This Court has long recognized that "where statutes have an overbroad sweep" and prohibit more core political speech than necessary, "the hazard of loss or substantial impairment of those precious rights may be critical, since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 609

(1967) (internal citation and quotation marks omitted). In *NCPAC*, this Court struck down as unconstitutionally overbroad a statute that sought to subject political committees to the same restrictions on political speech that applied to for-profit corporations. *NCPAC*, 470 U.S. at 500. The Court so held because the statute "indiscriminately lump[ed]" the two groups together, and applied "a flat, across-the-board criminal sanction" to all political committees despite their not posing the same threat of corruption as for-profit corporations. *Id.* at 496, 500.

Here, Section 203 is guilty of the same type of indiscriminate lumping of dissimilar groups that this Court found unconstitutional in *NCPAC*. Restrictions on the speech of for-profit corporations and unions may be narrowly tailored to meet the government's interests in preventing *quid pro quo* corruption and the perceived distortion of the political marketplace through corporate fortunes amassed in the economic marketplace. *See McConnell*, 540 U.S. at 205. Section 203, however, goes much further.

Section 203 restricts the political speech of nonprofit entities that are neither controlled by for-profit corporations or unions nor coordinated with any campaign. As explained, *supra*, restrictions on these types of nonprofit entities are unconstitutionally overbroad because they do not serve any identified governmental interests, they are not narrowly tailored to ensure that the least restrictive means are used, and they have the practical effect of silencing political speech during the most critical

times in the electoral process. Indeed, "[i]f § 203 has had any cultural impact, it has been to undermine the traditional and important role of grassroots advocacy in American politics by burdening the 'budget-strapped nonprofit entities upon which many of our citizens rely for political commentary and advocacy.'" *WRTL II*, 127 S.Ct. at 2686 (Scalia, J., concurring) (quoting *McConnell*, 540 U.S. at 340 (Kennedy, J., concurring in part, dissenting in part)).

B. Section 203 Facially Violates This Court's Holding In *MCFL*

In *MCFL*, this Court held that Section 441b's restrictions on political speech violated the First Amendment rights of at least some nonprofit entities. *See MCFL*, 479 U.S. at 264-265. Despite this Court's constitutional command in *MCFL*, Congress enacted Sections 203 and 204 of the BCRA, which further expanded the scope of speech restrictions on nonprofit corporations and provided no statutory exceptions for any nonprofit corporations, even "*MCFL*-nonprofits".

While Section 203 of the BCRA was originally drafted to except a very narrow class of nonprofits from the speech restrictions,[5] Congress subsequently

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[5] Prior to the Wellstone Amendment, a portion of Section 203 known as the Snowe-Jeffords Amendment had created a limited exemption for nonprofits incorporated under Internal Revenue Code § 501(c)(4) and § 527(e)(1) so long as their political speech was paid for exclusively from funds from individuals

(Continued on following page)

enacted Section 204, the so-called "Wellstone Amendment," which ensured that all corporations – including, without exception, all nonprofit corporations – were subjected to the same prohibitions on political speech that apply to for-profit corporations, despite this Court's contrary holding in *MCFL*. *See* 2 U.S.C. § 441b(c)(6) (withdrawing even narrow class of exemptions for certain nonprofit corporations in the case of "targeted communications," which is defined coextensively with the broader meaning of proscribed "electioneering communications"); *see also McConnell*, 540 U.S. at 209-210; *see also id.* at 338-339 (Kennedy, J., concurring in part and dissenting in part); 147 Cong. Rec. S2846-S2847 (daily ed. Mar. 26, 2001). In enacting Sections 203 and 204, Congress ignored this Court's holding in *MCFL*, and placed facially unconstitutional restrictions on the political speech of all nonprofit entities.

C. An *MCFL* Exception Cannot Be Read Into Sections 203 And 204 Because An Express Purpose Of The Wellstone Amendment Was To Silence Nonprofit Entities

In *McConnell*, this Court acknowledged that Sections 203 and 204 did not, on their face, exempt even *MCFL*-type organizations, let alone a broader

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who were United States citizens, nationals or permanent residents. *See* 2 U.S.C. § 441b(c)(2).

range of nonprofit corporations whose First Amendment rights might otherwise be violated. *See id.* at 211. Nonetheless, this Court "presume[d] that the legislators who drafted [Section 204] were fully aware that the provision could not validly apply to *MCFL*-type entities," and then construed the statute to exempt such entities in order to avoid constitutional infirmities. *Id. Amicus* respectfully submits that the attempt to salvage Sections 203 and 204 through the constructional canon of constitutional avoidance was an error. Constitutional avoidance only applies where the statute in question is "genuinely susceptible to two constructions," and where construction to avoid constitutional infirmities would "maintain[ ] a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made." *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998).

The plain language of the BCRA, along with the legislative history surrounding the enactment of the Wellstone Amendment, demonstrate that Congress unambiguously chose not to exempt *MCFL*-type nonprofit corporations – or any other nonprofit entities – from speech restrictions that this Court found objectionable in *MCFL*. *See McConnell*, 540 U.S. at 209 n.90; *see also id.* at 339 (Kennedy, J., concurring in part and dissenting in part). Indeed, Senator Wellstone himself explained that the purpose of his eponymous amendment was to ensure that nonprofit entities such as "the NRA, it can be the Christian right, it can be the Sierra Club" would be subject to

the same restrictions on speech as for-profit corporations and unions. 147 Cong. Rec. S2846-S2847.

Thus, the BCRA "could be understood only as a frontal challenge to *MCFL*." *McConnell*, 540 U.S. at 339 (Kennedy, J., concurring in part and dissenting in part). Under these circumstances, the canon of constitutional avoidance should not have been applied, and the facial unconstitutionality of Sections 203 and 204 should have been remedied by striking down the objectionable portions of 2 U.S.C. § 441b.

CONCLUSION

To properly dispose of this case, the Court should overrule *Austin* and overrule the portion of *McConnell* addressing the facial validity of Section 203 of the BCRA.

Appellant Citizens United is a nonprofit entity that takes some money from for-profit corporations. Appellant's Br. at 5. Under the standard articulated by *Amicus*, Citizens United is presumptively free to disseminate films such as *Hillary: The Movie*. Distribution could be barred only if the government could meet its burden of showing, by clear and convincing

evidence, that Citizens United is substantially controlled by for-profit corporations that are themselves subject to regulation.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

**On Appeal from
the United States District Court
for the District of Columbia**

BRIEF OF AMICUS CAMPAIGN FINANCE SCHOLARS IN SUPPORT OF APPELLANT, CITIZENS UNITED

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE *AUTO WORKERS* OPINION HAS ALLOWED THIS COURT AND LOWER COURTS TO DEFER TO LEGISLATIVE JUDGMENTS WHEN CAMPAIGN FINANCE LAWS DESERVE SPECIAL SCRUTINY	5
II. RESTRICTIONS ON CORPORATIONS AND UNIONS IN POLITICS HAVE NOT BEEN THE PRODUCT OF CAREFUL LEGISLATIVE JUDGMENT, BUT INSTEAD HAVE BEEN A WEAPON DEPLOYED AGAINST POLITICAL RIVALS	6
A. The Roots of Corporate Campaign Finance Restrictions	7
B. Extending Campaign Finance Restrictions to Labor Unions	10
C. Congress Bans Corporate and Labor Expenditures	12
III. WHY DID THE COURT ADOPT THIS VERSION OF HISTORY?	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) 4, 6, 10, 18
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Page

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Page

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TABLE OF AUTHORITIES—Continued

Page

Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity, 57 Yale L.J. 806 (1948) 14

UAW Found Innocent of Charge of Illegal Electioneering in '54, Wall St. J., Nov. 7, 1957, at 8 16

UAW is Indicted for Election TV, Wash. Post & Times Herald, July 21, 1955, at 34 15

IN THE

Supreme Court of the United States

No. 08-205

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF AMICUS CAMPAIGN FINANCE SCHOLARS IN SUPPORT OF APPELLANT, CITIZENS UNITED

INTEREST OF THE *AMICUS CURIAE* [1]

Amicus are a group of scholars who study the role of money in politics. Each has published scholarly works on this topic. Amicus are concerned about the

[1] Counsel for all parties consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part. The expenses to produce this brief are borne entirely by Professor Hayward, and no other person or entity public or private has made any monetary or in-kind contribution to its preparation or submission.

broadening scope of regulation in this area, and the deleterious effects regulation has on democracy.

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[2] Affiliations are provided for each amici for identification purposes only, and the views contained herein should not be construed to reflect the views of the affiliated institutions.

Amicus intend to share with the Court the historic context behind federal campaign finance enactments. We believe this will help inform the Court's deliberations on whether Congress is entitled to deference when it regulates the political speech of non-governmental participants.

SUMMARY OF ARGUMENT

In *United States v. International Union United Automobile, Aircraft, and Agricultural Implement Workers of America*, 352 U.S. 567 (1957) [hereinafter *Auto Workers*], the landmark decision establishing congressional power to regulate political expenditures by labor unions, the Court described a history of Congress's reasonable and measured regulation of campaign finance. Subsequent decisions have relied heavily on this history to justify deference to Congress and state legislatures in this area.

This brief corrects the flawed history depicted in *Auto Workers* by illustrating how reforms have been dictated by political strategy. Legislators used reform to exploit public sentiment and reduce rivals' access to financial resources. These initiatives have been controversial, and the terms of that controversy have not changed much through the decades.

The Court should accordingly examine the appropriate scope and effect of campaign finance regulations and not defer to legislative choices. Undue deference permits political actors to curtail the exercise of protected political rights. Rejecting the flawed historical account is an essential step toward restoring appropriate scrutiny of campaign finance legislation.

ARGUMENT

The history of the corporate and labor expenditure ban is a history of political opportunism. The Court should consider this history in the context of the present claims in *Citizens United v. FEC*, and its review of its *Austin* and *McConnell* precedents, because the justification for barring corporate and union funds from electioneering communications rests on this same historical account.

If, out of misplaced respect for a flawed account of history, the Court upholds laws that unduly burden political activity, citizens and activists outside the bubble of congressional protection risk disproportionate punishment for exercising political rights. The political process becomes less responsive, representatives need be less "representative," and elections do a poorer job of reflecting public preferences for leadership and policy. Setting courts to the task of closely evaluating all these laws would go some distance to restoring proper checks upon campaign restrictions.

Not all campaign regulation is inappropriate. But any argument favoring the present broad and indiscriminate bans on the use of corporate or labor funds in politics must show that the law is tailored and justified. Thus far, that case has not been made. That argument must reflect an honest assessment of why these laws were enacted, what really happened, why it happened, and what effects were felt afterward. Only then can advocates make a convincing case that specific regulations are in fact the correct prescription for some real political ailment.

I. THE *AUTO WORKERS* OPINION HAS ALLOWED THIS COURT AND LOWER COURTS TO DEFER TO LEGISLATIVE JUDGMENTS WHEN CAMPAIGN FINANCE LAWS DESERVE SPECIAL SCRUTINY

The constitutional burdens imposed by restrictions on corporate and labor political activity should be reexamined. Revisiting the history of campaign finance reform articulated in this Court's *Auto Workers* decision is key. Thus far, the Court has adopted *Auto Workers* uncritically in several opinions, to show that lawmaking in this field has proceeded logically and reasonably toward the goal of reducing corruption in political campaigns.

This Court's opinion in *McConnell v. FEC*, 540 U.S. 93 (2003), is one example. In *McConnell*, the Court upheld against constitutional challenges the Bipartisan Campaign Reform Act of 2002 ("BCRA") Pub. L. No. 107-155, 116 Stat. 81 (2002). That opinion began with a recitation of the history of reform as presented in *Auto Workers*. *Id.* at 115-17. It commenced with an invocation of the "sober-minded Elihu Root," drawn directly from that opinion. *Id.* at 115. The Court included this extensive reference to *Auto Workers* to justify judicial deference: "Congress's careful legislative adjustment of the federal election laws, in a cautious advance step by step . . . warrants deference." *Id.* at 117.

The Court relied on the same historical account in *FEC v. Beaumont*, 537 U.S. 146, 152 (2003); *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 452 (2001); and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000). In *Beaumont*, the majority reasoned, a statutory prohibition on contributions by ideological non-profit

organizations fit comfortably within this legislative history, and such a "historic prologue would discourage any broadside attack on corporate campaign finance regulation." 537 U.S. at 156.

Auto Workers is also important to the Court's opinion in *FEC v. National Right to Work*, 459 U.S. 197, 208-09 (1982). Here, the Court considered whether federal law could restrict an ideological group from soliciting political contributions from certain donors. This opinion noted that the history in *Auto Workers* "is set forth in great detail" and concluded that it "need only summarize the development here." *Id.* at 208. Notably, when this Court in *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 661 (1990) relied on *National Right to Work* for showing "that the federal campaign statute, 2 U.S.C. 441b, 'reflect[ed] a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation'" it was citing, in reality, *Auto Workers* to justify deference.

II. RESTRICTIONS ON CORPORATIONS AND UNIONS IN POLITICS HAVE NOT BEEN THE PRODUCT OF CAREFUL LEGISLATIVE JUDGMENT, BUT INSTEAD HAVE BEEN A WEAPON DEPLOYED AGAINST POLITICAL RIVALS

Auto Workers opened by asserting that the first corporate contribution restrictions were a remedy for inadequate publicity laws. It explained the imposition of corporate contribution prohibitions as a logical step in the wake of the "failure" of publicity laws. 352 U.S. at 570-71. This passage stands as one of the most frequently cited, and thus most influential, in the *Auto Workers* decision. Yet it is not accurate.

A. The Roots of Corporate Campaign Finance Restrictions

Statutes banning corporate contributions were not a product of dissatisfaction with publicity laws. The first law requiring disclosure of campaign finance activity—especially expenditures—was part of a larger effort to thwart corrupt campaign practices, vote buying, bribery, and voter intimidation centered in the "machines"—parties and candidate campaigns. PERRY BELMONT, RETURN TO SECRET PARTY FUNDS: VALUE OF THE REED COMMITTEE 134 (1927); George Fox, *Corrupt Practices and Elections Laws in the Unites States Since 1890*, 2 PROCEEDINGS OF THE AM. POL. SCI. ASS'N 171, 177 (1905); Abram C. Bernheim, *The Ballot in New York*, 4 POL. SCI. Q. 151 (1889). Corporate contribution bans arose once particular corporations provoked the ire of legislators. *See* E. Dana Durand, *Political and Municipal Legislation in 1897*, 11 ANNALS OF AM. ACAD. POL. & SOC. SCI. 38, 43 (1898).

Since Elihu Root's address to the 1894 New York Constitutional Convention continues to receive favorable attention from the Court, one should take special care to appreciate the context of that speech. As *Auto Workers* notes, New York first considered a corporate contribution ban during this convention.

> As early as 1894, the sober-minded Elihu Root saw the need for more effective legislation. He urged the Constitutional Convention of the State of New York to prohibit political contributions by corporations:
>
> > The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggrega-

> tions of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public.

352 U.S. 570-71.[3] Root, a Republican leader at the convention, possessed great influence. Proposing a corporate contribution ban at the 1894 New York constitutional convention allowed the Republicans controlling the convention to score political points by exploiting another unpopular corporate activity—in this case the unfolding Sugar Trust scandal, to the embarrassment of Democrats. *See* SPECIAL COMMITTEE TO INVESTIGATE ATTEMPTS AT BRIBERY, S. REP. NO. 606 (2d Sess. 1894). Democratic Party leaders found themselves targets of public outrage, as that party had campaigned successfully against the "McKinley tariff" in 1892, only to succumb to the demands of the Sugar Trust. *The Democratic Failure*, HARPER'S WKLY, Aug. 25, 1894, at 794.

Yet Elihu Root called up his amendment banning corporate contributions out of order on Labor Day, when convention attendance was low. 3 REVISED RECORD OF CONSTITUTIONAL CONVENTION OF NEW YORK 876 (1900). The oft-quoted passage from his address castigating political activity by large corporations was made in response to other delegates worried about his amendment's impact on political groups. *Id.* at 894-95. In context, Root meant to

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[3] Root continued: " . . . the time has come when something ought to be done to put a check to the giving of $50,000 or $100,000 by a great corporation toward political purposes . . . " In 1894, $50,000 had the purchasing power of about $1.18 million in 2007 dollars. Inflation calculation courtesy of www.westegg.com/inflation, visited July 23, 2009.

draw a distinction between incorporated political organizations (that should not be limited) and large corporations like the Sugar Trust. Root was emphasizing his proposed amendment's limited scope.

Even with Root's central role in the convention's leadership, the amendment failed. The fatal blow came from a Republican colleague just one day after the vote to adopt it. 3 REVISED RECORD at 979. The full account of the parliamentary manipulation that led to this defeat, and Root's likely complicity, is beyond the scope of this brief.[4] In short, one should conclude that Root and the amendment's other supporters had not expected the corporate contribution ban to survive.

The *Auto Workers* version of the 1894 corporate contribution debate is deficient in several respects. First, it describes a logical progression not supported by any evidence. Corporate contribution laws were not advocated as a remedy for deficient publicity laws. Publicity laws were intended to expose bad acts by committees and candidates. Corporate contribution bans struck back at specific corporations and the "supply side" of political finance.

Second, *Auto Workers* quoted fragments from the 1894 constitutional convention debate out of context. Root's address meant to reassure the convention that his amendment would only affect large entities like the Sugar Trust spending enormous sums of money, not corporations formed for political purposes. Third, the *Auto Workers* account leaves the reader ignorant of the partisan implications, and why this issue would be appealing to Republicans. In any case, the

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[4] *See* Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. LEGIS 421, 434-40 (2008).

wave of corporate contribution legislation appeared over a decade afterwards, in the wake of the New York life insurance scandal, which resulted in the passage of several state bans, as well as a federal ban in the Tillman Act. Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 259–70 (1981).

B. Extending Campaign Finance Restrictions to Labor Unions

With the preceding "history of progress" in campaign finance regulation as prologue, *Auto Workers* then addresses the roots of the corporate and labor expenditure ban—the statute at issue in *Auto Workers*, and eventually in *Massachusetts Citizens for Life*, *Austin v. Michigan Chamber of Commerce*, and *Citizens United v. FEC*. Congress took its first step toward the expenditure ban in 1943, when it added a labor union contribution ban to federal law. As *Auto Workers* states:

> Thus, in 1943, when Congress passed the Smith-Connally Act to secure defense production against work stoppages, contained therein was a provision extending to labor organizations, for the duration of the war, § 313 of the Corrupt Practices Act. 57 Stat. 163, 167. The testimony of Congressman Landis (R-Ind.), author of this measure, before a subcommittee of the House Committee on Labor makes plain the dominant concern that evoked it:
>
> > [P]ublic opinion toward the conduct of labor unions is rapidly undergoing a change. . . . The public was aroused by many rumors of huge war chests being maintained by labor unions,

> of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials. . . .

352 U.S. at 578-79. Yet the 1943 extension of the contribution ban to unions is more persuasively traced to two political factors: the relative strength of anti-labor members in the 1943-44 Congress, and the staggering unpopularity of the United Mine Workers' 1943 strike. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS 153 (1988). The labor contribution ban was added not in committee (as the excerpt suggests), but on the floor during a flood of activity, and had been drafted mere hours before. 89 Cong. Rec. 5328 (1943). The subsequent vote on the bill was marked by procedural confusion. *Id.* at 5341-47. Moreover, "the provisions were not germane to the main purpose of the bill . . . [and] were inserted with little discussion of underlying issues." Louise Overacker, *Presidential Campaign Funds 1944*, 39 AM. POL. SCI. REV. 899, 919 (1945).

Roosevelt vetoed Smith-Connally in part because it included the labor contribution ban, which "obviously ha[d] no relevancy to a bill prohibiting strikes." S. Doc. No. 78-75, at 3 (1943). Noting that Congress had not focused on this section, Roosevelt added: "If there be merit in the prohibition, it should not be confined to wartime, and careful consideration should be given to the appropriateness of extending the prohibition to other nonprofit organizations." *Id.* Both Houses overrode Roosevelt's veto that same day, a mere three hours later, with something less than "full consideration." Arthur Sears Henning, *Pass Strike Law Over Veto*, Chi. Daily Trib., June 26, 1943, at 1.

After a careful look at the events surrounding the 1943 labor contribution ban, it is impossible to see any exercise of reasoned policy judgment. Congress's attention was focused on unpopular strikes and how to bring the UMW to heel. The contribution ban was a lucky stowaway swept into the law by the parliamentary footwork of certain House Republicans. If the Court's deference depends on Congress's use of reasoned legislative judgment, on this occasion such care was not evident.

Two weeks after enactment, the Congress of Industrial Organizations ("CIO") established the first political action committee. JOSEPH GAER, THE FIRST ROUND: THE STORY OF THE CIO POLITICAL ACTION COMMITTEE 60–63 (1944). The CIO PAC openly favored Democrats. Nicholas A. Masters, *The Politics of Union Endorsement of Candidates in the Detroit Area*, 1 MIDWEST J. OF POL. SCI. 136, 142–44 (1957). Union officers and counsel contended that the scope of "contribution" in Smith-Connally did not reach this union spending. Joseph Tanenhaus, *Organized Labor's Political Spending: The Law and Its Consequences*, 16 J. OF POL. 441, 447 (1954). On this point, the Department of Justice concurred with the unions. *Department of Justice Clears PAC*, 4 LAW. GUILD REV. 49 (1944) (quoting Department press release).

C. Congress Bans Corporate and Labor Expenditures

Unions' willingness to invest time, energy, and money in politics alarmed Republicans and anti-labor Democrats. After the 1946 election, Republicans dominated both houses of Congress, and the Labor Management Relations Act of 1947 (or "Taft-Hartley") moved up the legislative agenda. Section 304 of that Act made permanent the union contribution ban

and added an expenditure ban against both corporations and unions.

As the *Auto Workers* history described it:

> Shortly thereafter, Congress again acted to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power . . . this section gave rise to little debate in the House. . . . the Senate as a whole did not consider the provisions of § 304 until they had been adopted by the Conference Committee.

352 U.S. at 582-83. "Little debate" here meant that, over a three-day debate in the House, only one member, George P. Miller (D-Cal.), mentioned Section 304 at all, calling it "irrelevant" and "unnecessary." 93 Cong. Rec. 3522–23 (1947). One may sense a pattern by now, in which successful efforts to limit contributions and expenditures are enacted as obscure and little-debated provisions buried in hotly contested legislation.

The *Auto Workers* narrative suggested that extending this ban to expenditures was the only logical next step. But other approaches to reform, among them a proposal to remove limits and rely instead on publicity, were considered at the time. S. REP. NO. 79-101, at 80–83 (1945); Overacker, *supra* at 924–25. Reasoned congressional deliberation should include weighing the advantages of different approaches, or at least involve some debate, argument, and responsive amendments. Yet, again, only after the Taft-Hartley conference committee had met and submitted its report for final passage, *very* late in the legislative day, did members ponder the Taft-Hartley expenditure ban.

President Truman's Taft-Hartley veto message criticized the expenditure ban as a "dangerous intrusion on free speech, unwarranted by any demonstration of need, and quite foreign to the stated purposes of this bill." H.R. DOC. NO. 80-334 (1947) at 9. Truman noted that the Section 304 expenditure ban would extend as well to radio and newspaper corporations. *Id.* at 9-10. As the *Yale Law Journal* stated in a 1948 comment evaluating Taft-Hartley, "[T]he prohibition on 'expenditures' may be interpreted as placing drastic limitations upon the activity of any political group, such as, for example, the League of Women Voters, which happens to be corporate in structure." *Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity*, 57 YALE L.J. 806, 811 n.19 (1948).

Five days after Congress overrode Truman's veto, AFL counsel advised all affiliated unions to "affirmatively violate" the new law "to bring about a constitutional test of the law." *AFL to Scorn No-Strike Rule Pay Contracts*, WASH. POST, June 29, 1947, at M1. The first case arose quickly out of the endorsement of a candidate in a special election of July 1947 by the *CIO News*. The District Court dismissed the indictment, finding that the expenditure ban violated the First Amendment. *United States v. CIO*, 77 F. Supp. 355 (D.D.C. 1948). This Court concluded that Congress could not have intended Taft-Hartley to reach this activity and refused to consider the constitutional question. *United States v. CIO*, 335 U.S. 106, 121–22 (1948).

By the time the Department of Justice proceeded against the UAW in *Auto Workers*, federal prosecutors had litigated three other cases alleging union violations of Taft-Hartley's expenditure ban. *United*

States v. CIO, 335 U.S. 106; *United States v. Painters Local Union No. 481*, 172 F.2d 854 (2d Cir. 1949), *rev'g* 79 F. Supp 516 (1948); *United States v. Const. & Gen. Lab. Union No. 264*, 101 F. Supp 869 (W.D. Mo. 1951). As with the case against the *CIO*, none went well.[5] After these defeats, the Department of Justice declined to prosecute union political expenditures for about six years. The Department doubted that the Court would find the expenditure ban constitutional. After all, no Justice on the *CIO* Court signaled any inclinations in that direction. FEDERAL ELECTION ACT OF 1955: HEARING ON S. 636 BEFORE THE S. COMM. ON RULES AND ADMIN., 84th Cong. 201–10 (1955) (statement of Warren Olney III, Assistant Attorney General).

Yet times change, and in July 1955 the Eisenhower Administration's Justice Department empanelled a Detroit grand jury, seeking indictment of the United Auto Workers Union. The union had spent about $5,000 on four *Meet the UAW-CIO* broadcasts, part of a regular series covering unions news and activities on Detroit's WJBK-TV. The Department argued that these episodes contained "expressions of political advocacy . . . intended by defendant to influence the electorate generally, including electors who were not members of defendant union." *UAW is Indicted for Election TV*, WASH. POST & TIMES HERALD, July 21, 1955, at 34. .

The district court granted the UAW's motion to dismiss the indictment. Following what the court saw to be *CIO*'s clear precedent, it described the govern-

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[5] Similarly, a 1948 federal trial against Michigan auto dealers for making illegal corporate contributions ended with acquittal. *Cleared in Political Case*, N.Y. TIMES, Nov. 10, 1948 at 25.

ment's efforts to distinguish *CIO* and other adverse authority as "either futile or picayune." *United States v. UAW-CIO*, 138 F. Supp. 53, 58 (E.D. Mich. 1956).

The Government appealed under the Criminal Appeals Act to the Supreme Court, and this time prevailed, partially. 352 U.S. at 567. In *Auto Workers* this Court held that the facts could state a violation of the federal statute prohibiting labor expenditures in federal elections. The Court declined to reach whether prosecution would violate the union's constitutional rights. The constitutional issues avoided in this round of *Auto Workers* never matured. After a trial on the merits, on November 6, 1957, a jury found the union defendants not guilty. *UAW Found Innocent of Charge of Illegal Electioneering in '54*, WALL ST. J., Nov. 7, 1957, at 8.[6]

III. WHY DID THE COURT ADOPT THIS VERSION OF HISTORY?

After reviewing the context and legislative manipulation behind campaign finance regulation, in particular the ban on expenditures in federal elections, one may now wonder why Justice Frankfurter, writing for the Court's majority, included this long historical passage in the *Auto Workers* decision. As the opinion ultimately rests on the statute's text, it would seem a long discourse on history in defense of

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[6] The District Court's jury instructions noted that no union members objected when their dues were set in 1954, and that the jury should take this into account when deciding whether the money for the broadcasts was obtained on a voluntary basis. John F. Lane, *Political Expenditures by Labor Unions*, 9 LAB. L.J. 725, 733-35 (1958).

deference would be unnecessary to reach the Court's modest conclusion.

Two of Frankfurter's colleagues welcomed the additional history in the opinion enough to comment on it specifically. Justice Burton wrote in his note concurring with Justice Frankfurter's draft that "the legislative history is appropriate and extremely helpful," and Justice Reed called the draft "a fine example of the persuasiveness of the historical treatment." Hayward, *supra* at 468. The dissenters focused on the law's constitutionality, noting that "[u]ntil today, political speech has never been considered a crime." 352 U.S. at 594.

Moreover, the drafters found this history ready-made in an older brief to the Court. The Government briefed the history of campaign finance reform thoroughly, yet unsuccessfully, in its *CIO* brief. That brief is practically identical in many places to *Auto Workers*. Hayward, *supra*, at 464-65; Brief for the United States, *U.S. v. Congress of Industrial Organizations*, 335 U.S. 106 (1948) available at *The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832-1978*, www.gale.cengage.com. For instance, the precise quote from Elihu Root's 1894 address is in the Government's *CIO* brief (although deeming him "sober-minded" was Justice Frankfurter's flourish.) Hayward, *supra* at 464-65. One might be troubled when the Court uncritically adopts an advocate's account: "The lawyer's use of history is entirely pragmatic or instrumental. His history may be fiction from the standpoint of a scholarly historian, but if it produces victory it has served its purpose." CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 192 (1969).

Whatever the reason, the Court's invocation of this history has had important consequences. It has suppressed legitimate questions about the purpose, scope, and permissibility of legislative restrictions on corporations and unions in politics. In many other areas of the law, judges question regulations articulated by those who stand to benefit. This conflict of interest justifies greater scrutiny and less deference. In campaign finance, Congress's compromised position instead has been overshadowed by its claimed expertise in campaigns, justifying deference from the Court.

CONCLUSION

This Court may be persuaded that the *Auto Workers* history is unreliable and conclude that previous reliance on it was misplaced. Conversely, it might conclude that this argument, while potentially interesting, is of limited present relevance. Were this a stable area of constitutional law, this second perspective might be more persuasive. In this world, however, litigants continue to raise difficult questions about the propriety of restricting political speech, especially by incorporated advocacy groups or political groups supported by business corporations or unions.

Instead of relying on a flawed history of campaign reform "progress," defenders of political regulation must argue their positions on the merits, fully accounting for how similar reforms may have worked, or not, before. This Court should take a fresh look at the scope, tailoring, intent, and effects of the Taft-Hartley corporate and labor expenditure ban at issue in *Auto Workers*, *Massachusetts Citizens for Life*, *Austin* and *Citizens United*. Campaign finance regulation, like war, is politics by other means, with

serious implications for the constitutional rights of targeted individuals and groups.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Overturning *Austin* Would Invalidate Decades-Old Restrictions on Corporate Expenditures and Unleash a Flood of Corporate Money into Candidate Elections 3

A. For Over a Century, Restrictions on Corporate Campaign Activities Have Been a Cornerstone of American Election Law 3

B. Overturning *Austin* Would Radically Alter How Elections Are Conducted and Financed 6

II. A Decision to Overturn *Austin* Would Be Contrary to Decades of Supreme Court Precedent and Would Contravene Principles of *Stare Decisis* 8

A. This Court's Precedent Confirms that Far From Being an Anomaly, *Austin* Is Deeply Embedded in this Court's Campaign Finance Jurisprudence 9

1. Supreme Court Precedent Prior to *Austin* 9

2. The *Austin* Decision and Beyond ... 14

TABLE OF CONTENTS – Continued

Page

B. Principles of *Stare Decisis* Weigh Strongly Against Overruling *Austin* and *McConnell* 18

CONCLUSION 22

APPENDIX A ..... App. 1

APPENDIX B ..... App. 4

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. Rumsey, 467 U.S. 203 (1984) 18

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Davis v. FEC, 128 S. Ct. 2759 (2008) 19

FEC v. Beaumont, 539 U.S. 146 (2003) 15, 16, 17, 19, 20

FEC v. Masachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 12, 13, 14, 15, 20

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) ..... *passim*

FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) 1, 17, 18, 20

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 11, 20

Harris v. U.S., 536 U.S. 545 (2002) 18

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 8, 19, 20

Randall v. Sorrell, 548 U.S. 230 (2006) 18, 20

U.S. v. Congress of Industrial Organizations, 335 U.S. 106 (1948) 4, 5, 9, 10

U.S. v. United Automobile Workers, 352 U.S. 567 (1957) 4, 5, 10, 11, 20

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) 6, 16

Federal Corrupt Practices Act of 1925, 43 Stat. 1070 (1925) 4, 5, 9

Federal Election Campaign Act, 2 U.S.C. §§ 431, *et seq* 6

Taft-Hartley Act, § 304, 61 Stat. 159 (1947) 5, 6, 10

Tillman Act, ch. 420, 34 Stat. 864 (1907) 4, 6, 9, 10

War Labor Disputes Act, ch. 144, § 9, 57 Stat. 163 (1943) 4, 5

2 U.S.C. § 441b ..... *passim*

LEGISLATIVE MATERIALS:

H.R. REP. NO. 79-2739 (1946) 5

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TABLE OF AUTHORITIES – Continued

Page

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Table 761, *available at* http://www.census.gov/compendia/statab/tables/09s0761.pdf.....7

Adam Winkler, *"Other People's Money": Corporations, Agency Costs and Campaign Finance Law*, 92 GEO. L. J. 871 (2004).....3, 4

INTEREST OF *AMICI CURIAE*[1]

This *amici curiae* brief is filed on behalf of seven non-profit, non-partisan organizations that support effective campaign finance laws to ensure political participation and protect the integrity of government.[2]

SUMMARY OF ARGUMENT

For more than a half-century, American elections have been conducted without resort to the immense aggregated wealth in corporate treasuries. The laws effecting this restriction were upheld by this Court in *McConnell v. FEC*, 540 U.S. 93 (2003), and *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and approved as recently as the 2007 decision in *FEC v. Wisconsin Right to Life, Inc.* (*WRTL*), 127 S. Ct. 2652 (2007).

Appellant Citizens United requests that this Court now overturn *Austin* and part of *McConnell*. *Amici* respectfully submit that this Court should not take this radical step.

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[1] Letters consenting to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

[2] A description of the *amici curiae* is attached as Appendix A hereto.

First, overturning these decisions would effectively render unconstitutional the 60-year-old federal restriction on corporate and union expenditures in federal elections, *see* 2 U.S.C. § 441b, as well as the statutes in 24 states that prohibit or limit corporate spending in state elections.

Such action would also controvert the long line of Supreme Court decisions approving restrictions on corporate and union spending in candidate elections. Appellant's entire argument rests on its assertion that *Austin* was a "jurisprudential outlier," Supplemental Brief for Appellant ("Br.") at 10, but this claim is simply unsustainable. *Austin* explicitly based its holding on past Supreme Court decisions, and moreover, has been cited approvingly in all subsequent Supreme Court cases addressing restrictions on corporate campaign activities.

In sum, overturning *Austin* and *McConnell* would require a dramatic break from this Court's precedent, a dismissal of six decades of election law and a blunt rejection of principles of *stare decisis*. Appellant has presented no constitutional justification for such action.

ARGUMENT

I. Overturning *Austin* Would Invalidate Decades-Old Restrictions on Corporate Expenditures and Unleash a Flood of Corporate Money into Candidate Elections.

A. For Over a Century, Restrictions on Corporate Campaign Activities Have Been a Cornerstone of American Election Law.

The federal effort to prevent corporations from intervening in candidate elections dates back to the turn of the last century. At that time, the patronage system for financing political campaigns through "assessments" upon the salaries of officeholders was breaking down and corporate contributions were rapidly filling the vacuum. The possibility that corporations were purchasing influence over candidates and political parties alarmed citizens and public officials alike. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1-3, 176-77 (1988).

The issue came to a head in the 1904 presidential election, where the losing candidate, Alton Parker, publicly accused his opponent, Theodore Roosevelt, of secretly funding his campaign with contributions from life insurance companies. *See* Adam Winkler, *"Other People's Money": Corporations, Agency Costs and Campaign Finance Law*, 92 GEO. L. J. 871, 886 (2004). These accusations gained further force in

1905 when an investigation by the state of New York revealed that the three largest insurance companies had indeed made large contributions to Roosevelt's campaign and the Republican Party. *Id.* at 892. The public was outraged that the companies would divert policyholders' funds into candidate elections, particularly as the companies had sought legislation that would limit the ability of policyholders to sue managers for breach of fiduciary duty. *Id.* at 894-95. Congress responded by enacting the Tillman Act, ch. 420, 34 Stat. 864 (1907), which prohibited corporations and national banks from making "money contribution[s] in connection with any election to any political office." The Act was subsequently consolidated with other federal campaign finance regulations in the Federal Corrupt Practices Act of 1925, 43 Stat. 1070 (1925).

In 1943, Congress extended the corporate restriction to labor unions on a temporary basis. The impetus for the extension was the wealth and power that unions had accrued in the New Deal era, and their increasingly high profile in federal elections. *U.S. v. Congress of Industrial Organizations* (*CIO*), 335 U.S. 106, 115 (1948). Fearing that this new source of aggregated wealth would also have "untoward consequences for the democratic process," *U.S. v. United Automobile Workers* (*UAW*), 352 U.S. 567, 578 (1957), Congress required unions to comply with the campaign finance laws applicable to corporations for the duration of World War II. War Labor Disputes Act, ch. 144, § 9, 57 Stat. 163 (1943).

The War Labor Disputes Act was quickly deemed ineffectual. Following the 1944 election, reports surfaced that unions had circumvented the contribution restrictions by making independent expenditures to support their favored candidates. In order to plug this loophole, Congress enacted the Taft-Hartley Act, § 304, 61 Stat. 159 (1947), which amended the Federal Corrupt Practices Act to clarify that both contributions and *expenditures* by corporations and unions were prohibited by the law. This was the origin of the federal statutory language restricting corporate expenditures challenged in this case. *See* 2 U.S.C. § 441b.

Importantly, however, the intent of the Taft-Hartley Act was not to "extend greatly the coverage" of existing law, but rather to restore the law to its original intent. *CIO*, 335 U.S. at 122. The legislative history indicates that Congress believed that the Federal Corrupt Practices Act already prohibited both contributions *and* expenditures by corporations and unions. As Senator Taft explained, "the previous law prohibited any contribution, direct or indirect, in connection with any election," and his legislation "only make[s] it clear that an expenditure . . . is the same as an indirect contribution, which, in [his] opinion, has always been unlawful." 93 CONG. REC. 6594 (1947) (statement of Sen. Taft); *see also UAW*, 352 U.S. at 582, *citing* H.R. REP. NO. 79-2739, at 40 (1946) (stating that House Special Committee was "firmly convinced" that the "act prohibiting any corporation or labor organization from making any

contribution" "was intended to prohibit such expenditures").

Thus, federal law has sought to regulate corporate expenditures since the 1907 Tillman Act, and has explicitly done so since the enactment of the Taft-Hartley Act in 1947.

B. Overturning *Austin* Would Radically Alter How Elections Are Conducted and Financed.

Overturning *Austin* would in effect invalidate the federal restriction on corporate expenditures, upon which both the legislative and executive branches have relied for decades. Congress has enacted successive federal campaign finance laws to further regulate corporate and union expenditures, including both the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431, *et seq.*, and the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). The invalidation of *Austin* would cause a sea-change in election law, requiring major amendment of FECA and its implementing regulations, and the revision of decades of regulatory practice.

Overturning *Austin* would also throw into constitutional jeopardy the campaign finance statutes of the 22 states that prohibit the expenditure of corporate treasury funds and the two states that limit

such expenditures in state candidate elections.[3] Many of these state laws are longstanding. EARL R. SIKES, STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION 279-82 (1928).

Further, the invalidation of these statutory checks on corporate expenditures would, in turn, expose federal elections to the corrosive and distorting effects of corporate money for the first time in 60 years.

The enormous wealth that corporations have amassed in the economic marketplace has the potential to flood the political marketplace. In 2005, the Internal Revenue Service estimated that the total net worth of U.S. corporations was $23.53 trillion. U.S. CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 2009, at *Table 731, available at* http://www.census.gov/compendia/statab/tables/09s0731.pdf. Post-tax corporate profits in 2005 were similarly staggering, totaling almost $1 trillion. *Id.* at *Table 761, available at* http://www.census.gov/compendia/statab/tables/09s0761.pdf.

For the purposes of comparison, Democratic presidential nominee Barack Obama shattered all historic fundraising records and raised $745 million in the 2008 election cycle. CENTER FOR RESPONSIVE POLITICS (CRP), *Banking on Becoming President, at*

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[3] A chart of all state statutes regulating corporate expenditures is attached as Appendix B hereto.

http://www.opensecrets.org/pres08/index.php?cycle=2008. And the average House candidate and Senate candidate in the 2008 election cycle raised $711,000 and $2.44 million, respectively. CRP, *2008 Overview: Stats at a Glance*, *at* http://www.opensecrets.org/overview/index.php?cycle=2008&Type=A&Display=A. Given the disparity between corporate wealth and typical political fundraising, it is clear that corporations have the capacity to overwhelm all other political actors in elections, including the candidates and political parties who actually campaign in such elections.

II. A Decision to Overturn *Austin* Would Be Contrary to Decades of Supreme Court Precedent and Would Contravene Principles of *Stare Decisis*.

Appellant argues *Austin* should be overruled because it is "hopelessly at odds with well-settled tenets of this Court's First Amendment jurisprudence." Br. at 9. But just the opposite is true. *Austin* is not a constitutional outlier. Rather, it is the logical conclusion of a line of cases dating back a half-century that address the restrictions on corporate and union activity in candidate elections. Moreover, *Austin* has been cited approvingly in all recent Supreme Court decisions addressing corporate campaign finance restrictions, and therefore by no means can be considered a "mere survivor of obsolete constitutional thinking." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857 (1992).

Overruling *Austin* would mark a radical departure from both the Court's own precedent and from principles of *stare decisis*.

A. This Court's Precedent Confirms that Far From Being an Anomaly, *Austin* Is Deeply Embedded in this Court's Campaign Finance Jurisprudence.

For over a half-century, the Supreme Court has approved statutory restrictions on corporate and union contributions and expenditures in candidate elections. To now overrule *Austin* would not be a neat excision of a single case; rather it would plow up long settled, and well settled, ground.

1. Supreme Court Precedent Prior to *Austin*

The Tillman Act and Federal Corrupt Practices Act elicited few major legal challenges until they were extended to restrict union contributions and expenditures. Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contributions Cases*, 5 ELECTION L.J. 293, 293-94 (2006). The Supreme Court thus first considered the law in a challenge to the union expenditure restriction brought in the *CIO* case.

The *CIO* Court ultimately disposed of the case on statutory grounds. Importantly, however, the Court noted that the Tillman Act was the "antecedent" to the union restriction, 335 U.S. at 113, and provided

the first judicial articulation of the motivation behind the Act, namely: (1) "the necessity for destroying the influence over elections which corporations exercised through financial contribution," and (2) "the feeling that corporate officials had no moral right to use corporate funds for contributions to political parties without the consent of the stockholders." *Id.*

The Court expanded upon this analysis in *UAW*, where it held that a union's use of union dues for a television broadcast to influence congressional elections was covered by the federal union expenditure restriction. In considering the restriction, the Court recounted approvingly the history of "the circumstances that begot this statute." 352 U.S. at 570. It noted that the initial impetus for regulation was the "popular feeling" in the post-Civil War era "that aggregated capital unduly influenced politics, an influence not stopping short of corruption." *Id.* This sentiment, the Court said, drove the passage of the Tillman Act which aimed "not merely to prevent the subversion of the integrity of the electoral process," but also "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Id.* at 575. Because Congress subsequently found that the restrictions on corporate and union *contributions* were being circumvented by *expenditures* made by these entities, it enacted the Taft-Hartley Act to "plug the existing loophole" and thereby "protect the political process from . . . the corroding effect of money employed in

elections by aggregated power." *Id.* at 582 (citation omitted).

The Court first considered restrictions on corporate political activity in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The question there, however, was whether the state of Massachusetts could restrict the expenditure of corporate treasury funds to influence *ballot initiatives*. The Court carefully distinguished restrictions on corporate spending in *candidate elections*, which were enacted to prevent the "corruption of elected representatives through the creation of political debts," *id.* at 788, from spending on *ballot initiatives*, where, "the risk of corruption perceived in cases involving candidate elections . . . simply is not present." *Id.* at 790. Because the restrictions on corporate ballot initiative spending could not be justified by the government's anti-corruption interests, the Court struck down Massachusetts' law. Nothing in *Bellotti*, however, questioned the validity of the restrictions on corporate money in candidate campaigns.

In *FEC v. National Right to Work Committee* (*NRWC*), 459 U.S. 197 (1982), the Court first reviewed the federal restrictions on corporate activity in candidate elections. The case followed the enactment of FECA, which codified the preexisting federal restrictions on corporate and union campaign activities at 2 U.S.C. § 441b. *NRWC* reviewed a provision of the new law that required corporations to use a separate segregated fund to make political contributions and expenditures, and to solicit only

their "members" for contributions to such fund. *See* 2 U.S.C. § 441b(b)(4).

The Court emphasized that Congress' "judgment that the special characteristics of the corporate structure require particularly careful regulation" was entitled to deference. 459 U.S. at 209-10. It described the gradual "step by step" evolution of the federal regulation of corporate and union political spending, and affirmed that the "careful legislative adjustment of the federal electoral laws" "reflects a permissible assessment of the dangers posed by [corporations and unions] to the electoral process." *Id.* at 209.

The Court ultimately held that the PAC-requirement did not violate the First Amendment because the "associational rights" asserted by the corporation were "overborne by the interests Congress has sought to protect in enacting § 441b." *Id.* at 207. In so holding, it again explained that Congress had a compelling interest in (1) "ensur[ing] that substantial aggregations of wealth" amassed by corporations were not "converted to political 'war chests' which could be used to incur political debts from legislators," and (2) "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 207-08 (citations omitted).

The Court revisited the constitutionality of § 441b in *FEC v. Massachusetts Citizens for Life, Inc.*

(*MCFL*), 479 U.S. 238 (1986). At issue was whether the corporate expenditure restriction prohibited the non-profit corporation MCFL from distributing a newsletter urging readers to vote "pro-life" in the upcoming election. The Court held that this expenditure was indeed covered by the restriction, but found that MCFL should be exempted because the state interests justifying the restriction do not apply to an ideological non-profit corporation that has no shareholders, was not established by a corporation or union, and did not accept contributions from such entities. *Id.* at 263-64.

The Court began its analysis by narrating the history of the federal restriction on corporate expenditures, affirming that "Congress has long regarded it as insufficient merely to restrict payments made directly to candidates or campaign organizations." *Id.* at 246. Like the *NRWC* Court, it also acknowledged that Congress' decision to focus on the particular dangers posed by business corporations was a decision "to which we have said we owe considerable deference." *Id.* at 259 n.11 (citations omitted).

The Court then reviewed the governmental interests supporting the restriction, explaining: "Direct corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *Id.* at 257. It noted, however, that § 441b was intended to correct this distortion in electoral advocacy: "By requiring that corporate independent expenditures be financed

through a political committee expressly established to engage in campaign spending, § 441b seeks to prevent this threat to the political marketplace. The resources available to this fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee." *Id.* at 258. The corporate expenditure restriction is therefore justified because it "ensure[s] that competition among actors in the political arena is truly competition among ideas." *Id.* at 259.

The Court ultimately concluded that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL." *Id.* at 263. In exempting MCFL from § 441b, however, the Court at the same time affirmed "the legitimacy of Congress' concern" about "organizations that amass great wealth in the economic marketplace," thereby recognizing the validity of the interests underlying the expenditure restriction as applied to business corporations or other corporations that do not resemble MCFL. *Id.*

2. The *Austin* Decision and Beyond

Four years after the *MCFL* ruling, this Court decided *Austin*. As the foregoing section illustrates, the Court at that point had already amassed a significant body of case law analyzing the union and corporate expenditure restrictions. Far from making a "precipitous break with prior precedent," Br. at 10, *Austin* instead relied heavily upon this case law.

The *Austin* Court leaned particularly on *MCFL*, largely importing its analysis of the federal corporate expenditure restriction. It first quoted the decision to find that the state had an interest in ensuring that corporations did not deploy their "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 257). The Court went on to conclude that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." *Id.* (citing *MCFL*, 479 U.S. at 257). The *Austin* decision thus fits squarely into the chain of this Court's precedents on corporate and union spending in elections.

In all of its subsequent decisions in this area, this Court cited *Austin* in upholding the corporate regulation at issue.

In *FEC v. Beaumont*, 539 U.S. 146 (2003), the Court relied on *Austin* to hold that the federal restriction on corporate campaign contributions is constitutional even as applied to a nonprofit corporation.

As the Court did in many earlier cases, the *Beaumont* Court prefaced its consideration of the restriction by recounting a "century of congressional efforts to curb corporations' potentially deleterious influences on federal elections." *Id.* at 152 (internal quotations omitted). It concluded its review of the "continual congressional attention to corporate political activity," *id.* at 153, by highlighting again the

deference owed Congress in this area: "In sum, our cases on campaign finance regulation represent respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'" *Id.* at 155 (quoting *NRWC*, 459 U.S. at 209-10).

The Court then turned to the governmental interests supporting the contribution restriction, remarking that the "original rationales for the law" had endured. *Id.* at 154. Quoting *Austin*, the Court noted that corporations' "state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace." *Id.* at 154 (quoting *Austin*, 494 U.S. at 658-59) (internal quotations omitted). Reiterating past cases, it found that the corporate expenditure ban was intended to prevent "corruption or the appearance of corruption," and to "protect[ ] 'the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed.'" *Id.* at 154 (quoting *NRWC*, 459 U.S. at 208).

By the time this Court in *McConnell* considered the facial constitutionality of section 203 of BCRA, 2 U.S.C. § 441b, the law in this area was so settled that the Court recognized that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly

advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." 540 U.S. at 203.

Although the *McConnell* Court acknowledged that the plaintiffs did not contest the state's compelling interest in regulating corporate expenditures, it nevertheless highlighted that Congress' efforts in this sphere should be accorded deference. It noted that "our prior decisions regarding campaign finance regulation, which 'represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation'" "easily answered" the question "whether the state interest is compelling." *Id.* at 205 (quoting *Beaumont*, 539 U.S. at 155 (quoting *NRWC*, 459 U.S. at 209-10)). Quoting *Austin*, the Court explained that it had "repeatedly sustained legislation aimed at the 'corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *Id.* at 660 (quoting *Austin*, 494 U.S. at 660).

Finally, citing *Austin*, the Court's 2007 decision in *WRTL* also reaffirmed the constitutionality of BCRA's restriction on corporate expenditures for electioneering communications as applied to spending for express advocacy and the "functional equivalent of express advocacy." 127 S. Ct. at 2656. The Chief Justice's controlling opinion noted that the Court "has already ruled that BCRA survives strict scrutiny to

the extent it regulates express advocacy or its functional equivalent." *Id.* at 2664.

B. Principles of *Stare Decisis* Weigh Strongly Against Overruling *Austin* and *McConnell*.

Given that the constitutionality of the corporate expenditure restrictions has become "firmly embedded in our law," *McConnell,* 540 U.S. at 203, neither *Austin* nor *McConnell* can be overruled without fundamentally undermining this Court's First Amendment precedents and principles of *stare decisis*.

This Court has recognized that the doctrine of *stare decisis* is "of fundamental importance to the rule of law," *Harris v. U.S.*, 536 U.S. 545, 556-57 (2002), because it "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Randall v. Sorrell*, 548 U.S. 230, 243 (2006). Consequently, a departure from precedent is improper unless a "special justification" is shown, even where the case turns on constitutional questions. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

In considering whether a break from precedent is justified, the Court reviews several considerations, including "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine," "whether

facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," or "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling." *See Casey*, 505 U.S. at 854-55. Here, these considerations militate against overturning *Austin* and *McConnell*.

First, subsequent case law has in no way undercut the validity of *Austin* or the legal principles upon which the decision rests. To the contrary, *Austin* is deeply rooted in this Court's campaign finance jurisprudence, and has been relied upon by this Court in all of its subsequent decisions addressing restrictions on corporate campaign activities. *See, e.g.*, *Beaumont*, 539 U.S. at 154; *McConnell*, 540 U.S. at 166; *WRTL*, 127 U.S. at 2656. Indeed, the only subsequent case which appellant proffers as allegedly contrary to *Austin* is *Davis v. FEC*, 128 S. Ct. 2759 (2008). Br. at 3, 9. *Davis*, however, considered a statutory provision that affected a *candidate*'s expenditure of his personal funds in an election, not a *corporation*'s expenditure of treasury funds, and hence has no application here.

Appellant also argues that *Austin* was wrongly decided because it "effected a dramatic break" with cases that *preceded* it, specifically *Buckley* and

Bellotti.[4] Br. at 5. Even putting aside the obvious fact that this Court carefully considered these cases when it ruled in *Austin*, *see* 494 U.S. at 657-58, the foregoing review makes clear that *Austin* is entirely consistent with the decisions in this area: *Austin* relies on the same principles, and cites the same governmental interests as *UAW*, *NRWC* and *MCFL*. Indeed, the fundamental rationale for the corporate expenditure restriction upon which *Austin* relies – namely, that "the special characteristics of the corporate structure require particularly careful regulation" – has withstood decades of litigation. *Beaumont*, 539 U.S. at 155; *MCFL*, 479 U.S. at 256; *NRWC*, 459 U.S. at 209-10. And this Court has recognized that *stare decisis* applies with particular force where, as here, the precedent at issue "has become settled through iteration and reiteration over a long period of time." *Randall*, 548 U.S. at 234.

Nor has there been any showing that factual circumstances have changed so radically as to "rob" *Austin* "of significant application or justification." *Casey*, 505 U.S. at 854. As was true in 1990 when *Austin* was decided, business corporations still "accumulate" "immense aggregations of wealth . . . with the help of the corporate form . . . that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660.

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[4] As noted above, *Austin* is *not* in conflict with *Bellotti*, as the Court there specifically distinguished ballot initiative elections from candidate elections. 435 U.S. at 790.

The wealth available to business corporations has only increased, and corporations have remained active in candidate elections, as demonstrated by the *1,598* corporate PACs registered with the FEC today. FEC, *Number of Federal PACs Increases* (March 9, 2009), *available at* http://www.fec.gov/press/press2009/20090309PACcount.shtml. Also still salient is the concern that dissenting shareholders cannot adequately prevent corporations from using their investment dollars for political expenditures that they do not support. Indeed, the rise of mutual funds and employer-based retirement plans has further limited the choices available to the average investor, as well as the control exerted by such investors over corporate governance.

Finally, overruling *Austin* would disregard the considerable reliance that Congress and nearly half the states have placed upon it in enacting and enforcing campaign finance laws. Congress enacted BCRA only seven years ago, secure in the belief that *Austin* was good law and that the then almost 60-year-old federal corporate expenditure restriction was constitutional. Similarly, 24 states have relied upon the body of Supreme Court precedent approving restrictions on corporate spending. Moreover, candidates and political parties have also relied upon *Austin* and the federal expenditure restriction in developing their fundraising practices: their focus on raising contributions from individual donors reflects that American federal elections have been free of

corporate and union expenditures for well over a half-century. This Court should not lightly topple one of the fundamental legal pillars of American elections that has stood for three generations, and that has successfully prevented aggregated wealth from subverting the electoral system.

CONCLUSION

For all these reasons, the judgment of the district court should be affirmed.

July 2009

Respectfully submitted,

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APPENDIX A

The following groups constitute the *amici curiae* who submit the foregoing brief:

- **Americans for Campaign Reform** is a non-partisan, grassroots organization of citizens whose purpose is to help enact public funding of all federal elections – for the House, the Senate and the Presidency. Americans for Campaign Reform is about getting big money out of our political process so that our elected officials can represent the only special interest that matters: America.

- **The Asian American Legal Defense and Education Fund (AALDEF)** is a 35-year-old national civil rights organization that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy and community education. AALDEF seeks to ensure that Asian Americans have an equal opportunity to participate in the political process.

- **The Campaign Legal Center** is a non-profit, non-partisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing campaign finance and other election laws throughout the nation. It participates in rulemaking and advisory opinion proceedings at the FEC to ensure that the agency is properly enforcing federal election laws, and files complaints with the FEC requesting that enforcement actions be

taken against individuals or organizations that violate the law.

- **Common Cause** is a nonprofit, nonpartisan citizens' organization with approximately 300,000 members and supporters natior wide. Common Cause has been concerned with the growing problem of soft money in the federal political process, and has publicly advocated for appropriate regulation in order to restore integrity to the electoral system. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

- **Democracy 21** is a non-profit, non-partisan policy organization that works to ensure the integrity of our democracy. It supports campaign finance and other political reforms, and conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws and works to ensure that campaign finance laws are effectively and properly enforced and implemented.

- **The League of United Latin American Citizens (LULAC)** is the largest and oldest Hispanic Organization in the United States. LULAC advances the economic condition, educational attainment, political influence, health and civil rights of Hispanic Americans through community-based programs operating at more than 700 LULAC councils

nationwide. The organization involves and serves all Hispanic nationality groups.

- **U.S. PIRG** represents state Public Interest Research Groups ("PIRGs") at the federal level, including in the federal courts. U.S. PIRG and many state PIRGs have long been interested in campaign finance issues and the resolution of this case will assist them in their advocacy for effective and comprehensive campaign finance reforms.

APPENDIX B

CURRENT STATE STATUTES REGULATING CORPORATE EXPENDITURES IN CONNECTION TO STATE CANDIDATE ELECTIONS

Alabama	ALA. CODE §§ 10-2A-70, 10-2A-70.1
Alaska	ALASKA STAT. §§ 15.13.135, 15.13.400
Arizona	ARIZ. REV. STAT. ANN. § 16-920
Colorado	COLO. CONST. ART. XXVIII, § 3(4)(a)
Connecticut	CONN. GEN. STAT. § 9-613
Iowa	IOWA CODE § 68A.503
Kentucky	KY. REV. STAT. ANN. § 121.035
Massachusetts	MASS. GEN. LAWS, ch. 55, § 8
Michigan	MICH. COMP. LAWS §§ 169.251, 169.254
Minnesota	MINN. STAT. § 211B.15
Montana	MONT. CODE ANN. § 13-35-227(1)
New York	N.Y. ELEC. LAW § 14-116
North Carolina	N.C. GEN. STAT. ANN. § 163-278.19
North Dakota	N.D. CENT. CODE §§ 16.1-08.1-03.3, 16.1-08.1-03.5
Ohio	OHIO REV. CODE ANN. § 3599.03
Oklahoma	OKLA. STAT., TIT. 74, § 257:10-1-2
Pennsylvania	25 PA. CONS. STAT. ANN. § 3253

Rhode Island	R.I. GEN. LAWS § 17-25-10.1
South Dakota	S.D. CODIFIED LAWS § 12-27-18
Tennessee	TENN. CODE ANN. § 2-19-132
Texas	TEX. ELEC. CODE §§ 253.094, 253.104
West Virginia	W.VA. CODE § 3-8-8
Wisconsin	WIS. STAT. § 11.38
Wyoming	WYO. STAT. § 22-25-102

AMICUS CURIAE BRIEF

134

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IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF FOR AMICUS CURIAE CATO INSTITUTE IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. *Stare decisis* means following the law, not mechanically preserving every precedent or perpetuating erroneous decisions. 3

A. *Stare decisis* under the common law. 4

B. The policy of *stare decisis* is at its nadir in this case. 6

II. Overturning *Austin* and *McConnell* is consistent with *stare decisis*. 8

A. *Austin* and *McConnell* were wrongly decided and unfaithful to the First Amendment principles correctly stated in *Buckley*. 8

B. All other *stare decisis* factors—reliance, antiquity, and workability—support overruling *Austin* and *McConnell*. 16

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 6, 7

Austin v. Mich. Chamber of Comm.,
494 U.S. 652 (1990) ..... passim

Buckley v. Valeo,
424 U.S. 1 (1976) ..... passim

Cohen v. California,
403 U.S. 15 (1971) 9

Davis v. FEC,
128 S. Ct. 2759 (2008) 11

FEC v. Nat'l Conservative PAC,
470 U.S. 480 (1985) 10

FEC v. Wisc. Right to Life, Inc.,
127 S. Ct. 2652 (2007) 6, 7, 17

First Nat'l Bank v. Bellotti,
435 U.S. 765 (1978) 9

Harper v. Va. Dep't of Taxation,
509 U.S. 86 17

James B. Beam Distilling Co. v. Georgia,
501 U.S. 529 (1991) 3

Lawrence v. Texas,
539 U.S. 558 (2003) 17

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5 U.S. 137 (1803) 3

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540 U.S. 93 (2003) ..... passim

Michigan v. Jackson,
475 U.S. 625 (1986) 7

Montejo v. Louisiana,
129 S. Ct. 2079 (2009) 7, 17

Patterson v. McClean Credit Union,
491 U.S. 164 (1989) 3, 6

Payne v. Tennessee,
501 U.S. 808 (1991) 3, 6, 16

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 16-17

W. Va. Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 8

STATUTES, REGULATIONS AND ADMINISTRATIVE MATERIALS

5 Cong. Ch. 74, 1 Stat. 596 (1798) 11

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Nicholas G. Karembelas, *The Revised Uniform Limited Liability Act*, WASH. LAWYER, Feb. 2008 19

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OTHER AUTHORITIES

Oral Argument Transcript from *Austin*, 1989 U.S. Trans. LEXIS 109 (Oct. 31, 1989) 12

Intervenor-Defendants' Brief from *McConnell*, 2003 WL 21999280 (Aug. 5, 2003) 14

INTEREST OF THE AMICUS CURIAE[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for political speech and activity, which lies at the very heart of the First Amendment.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

Under the common law and this Court's jurisprudence, *stare decisis* does not require preserving either *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), or the part of *McConnell* upholding the facial validity of Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"). Both are incorrect statements of the law as expounded in *Buckley v. Valeo*, 424 U.S. 1 (1976), are of relatively recent constitutional vintage, and have produced an arbitrary, irrational, and increasingly unworkable campaign finance system; no reliance interests weigh against overruling either decision.

ARGUMENT

I. *STARE DECISIS* MEANS FOLLOWING THE LAW, NOT MECHANICALLY PRESERVING EVERY PRECEDENT OR PERPETUATING ERRONEOUS DECISIONS.

Stare decisis, an important policy in this Court's jurisprudence with deep roots in the common law, "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). A core principle underlying *stare decisis* is that courts do not make the law, but rather declare what the law is. *See, e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (although "judges in a real sense 'make' law . . . they make it *as judges make it*, which is to say *as though* they were 'finding' it – discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will tomorrow be.") (Scalia, J., concurring in the judgment); 1 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 51 (London, E. & R. Brooke 1797) (1642) ("it is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."); *cf. Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

Consequently, "precedents are not sacrosanct." *Patterson v. McClean Credit Union*, 491 U.S. 164, 172 (1989). *See also Payne*, 501 U.S. at 828 ("*Stare decisis* is not an inexorable command; rather, it is a principle

of policy and not a mechanical formula of adherence to the latest decision.") (citation and quotation marks omitted). This case, and the particular issues on which the Court ordered reargument, implicate the proper application of *stare decisis* when confronting fundamentally erroneous precedents that, in making new law, departed from the immutable core of the First Amendment.

A. *Stare decisis* under the common law.

Stare decisis reflects the common law's declaratory view of precedents, which are not law themselves, but rather evidence of the law. *See, e.g.*, MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 45 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1820) ("the Decisions of Courts of Justice . . . do not make a Law . . . yet they have a great Weight and Authority in Expounding, Publishing, and Declaring what the Law of this Kingdom is."). Indeed, the word "jurisdiction" itself "is composed of JUS and DICTIO, *juris dictio* or a speaking and pronouncing of the law." THE FEDERALIST NO. 81, at 488 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

As William Blackstone explained, *stare decisis* does not require courts to extend or preserve a prior decision that misstated or misapplied the law:

> [A judge is] not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to

> the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm as has been erroneously determined.

1 COMMENTARIES 69-70 (Univ. of Chicago Press 1979) (1765). Blackstone concluded "that *the law*, and the *opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." *Id.* at 71. In the same vein:

> I wish not to be understood to press too strongly the doctrine of *stare decisis* . . . . It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions are not always conclusive evidence of what is law . . . .

1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 477 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989)

(12th ed. 1873). Kent continued that precedent is worthy of adherence "unless it can be shown that the law was misunderstood or misapplied in that particular case." *Id.* at 475.

Stare decisis also derives from practical considerations of doctrinal stability; in Blackstone's words, "to keep the scale of justice even and steady." 1 COMMENTARIES 69. *Stare decisis* deference is appropriate in many cases because "[i]t is by the notoriety and stability of such rules that professional men can give safe advice . . . and people in general can venture with confidence to buy and trust, and to deal with one another." 1 KENT, COMMENTARIES 476. From its origins, therefore, *stare decisis* sought to balance reliance interests in doctrinal stability with the countervailing interest in clarification when in an earlier case "the judge may *mistake* the law." 1 BLACKSTONE, COMMENTARIES 71.

B. The policy of *stare decisis* is at its nadir in this case.

This Court recognizes the importance of having settled rules of law. *See Agostini v. Felton*, 521 U.S. 203, 235 (1997). But following the common law approach to *stare decisis* as a prudential policy rooted in the declaratory view of precedent, its underlying interests are not equally compelling for all areas of law. *See Payne*, 501 U.S. at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Patterson*, 491 U.S. at 172-73 ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in

the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Indeed, this "policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini*, 521 U.S. at 235. "Overruling a constitutional case decided just a few years earlier is far from unprecedented." *WRTL II*, 127 S. Ct. at 2685 (Scalia, J., concurring in part and concurring in the judgment) (citing cases).

For example, earlier this Term the Court overturned *Michigan v. Jackson*, 475 U.S. 625 (1986), rather than adopt "an unworkable standard" or force lower courts to make "arbitrary and anomalous distinctions." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2083 (2009). The Court explained, "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Id.* at 2088 (quoting *Payne*, 501 U.S. at 827). "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Id.* at 2088-89.

This case—like *Buckley*, *Austin* and *McConnell*—turns on issues of constitutional interpretation under the Free Speech Clause of the First Amendment, not on statutory construction or on property or contract rights. "This Court has not hesitated to overrule decisions offensive to the First Amendment (a 'fixed star in our constitutional constellation,' if there is one) – and to do so promptly where fundamental error was

apparent." *WRTL II*, 127 S. Ct. at 2685 (Scalia, J., concurring in part and concurring in the judgment) (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). Thus, the policy of *stare decisis* is at its nadir here.

II. OVERTURNING *AUSTIN* AND *MCCONNELL* IS CONSISTENT WITH *STARE DECISIS*.

A. *Austin* and *McConnell* were wrongly decided and unfaithful to the First Amendment principles correctly stated in *Buckley*.

Because *stare decisis* does not require preserving or extending precedents that misstate the law, it does not shield either *Austin* or *McConnell* from being reexamined and overturned. Those decisions were fundamentally erroneous and untrue to the core principles of the First Amendment.

1. *Austin* wrongly deviated from *Buckley* by embracing the goal of equalizing the relative volume of political speakers and by permitting censorship of an entity or individual's speech based on the government's perception of public support for the ideas expressed. *Buckley* held government may not decide political speakers' relative worth or proper position in the marketplace of ideas. "[E]qualizing the relative ability of individuals and groups to influence the outcome of elections" is not a cognizable governmental interest justifying restriction of independent political speech because

> the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Buckley, 424 U.S. at 48-49 (internal quotation omitted). Thus Congress may not "prescribe how much political speech is too much," using means-based censorship in a misguided effort to ensure "the 'fairness' of political debate." *Austin*, 494 U.S. at 680, 695 (Scalia, J., dissenting). In *Bellotti*, the Court re-emphasized the importance of this principle, cautioning that "the people in our democracy" are entrusted with the responsibility of judging and evaluating "the relative merits of conflicting arguments"—the obvious corollary being that the government must not usurp the people's prerogative. *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 791 (1978). *See also Cohen v. California*, 403 U.S. 15, 24-25 (1971) ("The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . . That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.").

But in *Austin* the Court deviated from *Buckley* by upholding Michigan's ban on corporate independent expenditures to "ensure[] that expenditures reflect actual public support for the political ideas espoused by corporations." 494 U.S. at 660. To reach this paternalistic result, the Court manufactured a new form of "corruption" to which the Michigan statute purportedly was tailored: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* Though the concern plainly was one of perceived unfairness, *Austin* creatively deemed it a form of "corruption" because the Court already had held "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985). But the corruption interest previously recognized was limited to "financial *quid pro quo*: dollars for political favors" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *Id.* at 497.

While claiming it was "a different type of corruption," the *Austin* Court more accurately described its newly minted compelling governmental interest as "eliminat[ing] the *distortion* caused by corporate spending." 494 U.S. at 660 (emphasis added). "Distortion," however, is not equivalent to corruption or even to its appearance, and is simply another way of saying corporations were speaking too

much relative to others. In fact, the Court exposed its true "equalizing" rationale when it conceded "[t]he desire to *counterbalance* those advantages unique to the corporate form is the State's compelling interest in this case." *Id.* at 665 (emphasis added). In sanctioning rationing of political speech as a compelling governmental interest, the Court permitted Michigan to suppress corporate speech in order to enhance other voices the Court viewed as more worthwhile. This was a fundamental error, perhaps chiefly because governmental actors are notoriously untrustworthy judges of the merit, or desired quantity, of potential critics, a fact amply demonstrated by the infamous Sedition Act of 1798, 5 Cong. Ch. 74, 1 Stat. 596 (expired 1801). *See also Austin*, 494 U.S. at 680 (Scalia, J., dissenting) (stating that the majority opinion is "incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate").

Demonstrating that *Austin* misinterpreted the law, the Court reinforced *Buckley* last Term in *Davis v. FEC*, holding that "[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election, [but] [t]he Constitution . . . confers upon voters, not Congress, the power to choose [its] Members[.]" 128 S. Ct. at 2774. The Court rejected the notion that the government has a legitimate interest in organizing the marketplace of ideas—not to ensure each speaker is heard, and certainly not (as Michigan's attorney proposed during the *Austin* oral argument) to prevent "the people . . .

[from getting] talked at too much." 1989 U.S. Trans. LEXIS 109, *13 (Oct. 31, 1989). *Davis*'s holding implicitly confirmed that *Austin* is inconsistent with the First Amendment and with *Buckley*.

2. *Austin* silently departed from *Buckley*, not just by inventing a form of "corruption" at odds with *Buckley*, but by ignoring the actual holding: *Buckley* overturned as unconstitutional a limitation on "persons," defined to include corporations, making independent expenditures. 424 U.S. at 23; *see also Austin*, 494 U.S. at 682-83 (Scalia, J., dissenting) ("Section 608(e)(1) of [FECA], which we found unconstitutional in *Buckley* . . . limited to $1,000 (a *lesser* restriction than the absolute prohibition at issue here) such expenditures not merely by 'individuals,' but by 'persons,' specifically defined to include corporations.") (citations omitted). Consequently, *Austin* does not deserve to be extended or preserved because it contradicted the actual holding of *Buckley*.

3. Section 203 and *Austin* rest upon the false premise that banning corporate independent expenditures can actually counter an appearance of corruption. While proponents of campaign finance regulation relentlessly cite this rationale, recent research proves the link between campaign finance regulation and improved governmental reputation is tenuous at best. *See, e.g.*, David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L. J. 23, 24 (2006); David M. Primo, *Public Opinion and Campaign Finance: Reformers vs. Reality*, 7 INDEP. REV. 207 (2002). Primo and Milyo, for example, conducted an

unprecedented study of state-level campaign finance laws and searched for a statistically significant connection between such laws and voters' faith in the political process. They concluded that judges and legislators "have long assumed that campaign finance reforms can and do influence public perceptions about the workings of democracy. . . . [but] our findings are in stark contrast to what has been accepted as the common sense and self-evident connection between campaign reform and the perceived integrity of the American democratic process." 5 ELECTION L. J. at 24.

According to their detailed and specific research—as opposed to *McConnell* and *Austin*'s vague generalities—the effect of campaign finance laws is "sometimes perverse, rarely positive, and never more than modest. Given the importance placed on public opinion for the development of campaign finance law, it is remarkable that we have found so little evidence that citizens are influenced by the campaign finance laws of their state." *Id.* Not only was the *Austin* Court's cited governmental interest a transparent rephrasing of the "equalizing" interest rejected in *Buckley*, but these studies suggest that interest is not even served by restricting corporations' independent political speech.

Beyond the lack of a causal relationship between campaign finance regulation and improved government reputation generally, proponents of Section 203 and defenders of *Austin* have never proven that such an "appearance of corruption" even exists. The *McConnell* Intervenor-Defendants argued in their brief that "the testimony of the true experts"—i.e., themselves—revealed "their constituents had become

as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." 2003 WL 21999280, *16 (Aug. 5, 2003) (internal citations omitted). Not only does this fail to address *Austin* "corruption"—expenditures uncorrelated to public support for the ideas expressed—but also, as the quotation itself might suggest, the *McConnell* record is devoid of any real examples of an "appearance of corruption" problem that was not directly traceable to the opinions, op-eds, or studies of the law's proponents themselves. Accordingly, the *McConnell* opinion does not provide any concrete examples of apparent corruption.

In this light, the true aim of "campaign finance reform" comes into focus; as Justice Scalia noted dissenting in *McConnell*, it is readily apparent in that "the most passionate floor statements during the debates on this legislation pertained to so-called attack ads, which the Constitution surely protects. . . . There is good reason to believe that the ending of negative campaign ads was the principal attraction of the legislation." 540 U.S. at 297. Or, as two well-known practitioners put it, "[t]he claim that Title II was aimed at curbing actual or apparent corruption is nothing more than a post hoc justification, mouthed by government lawyers seeking to recast the provision into a form more pleasing to the Court's campaign finance jurisprudence." Charles Cooper & Derek L. Shaffer, *What Congress 'Shall Make' The Court Will Take: How McConnell v. FEC Betrays the First Amendment in Upholding Incumbency Protection Under the Banner of 'Campaign Finance Reform'*, 3 ELECTION L. J. 223, 224 (2004). "The true *telos* of Title

II was openly proclaimed from its inception by the Members of Congress who sponsored and supported it." *Id.* To wit:

> Senator Cantwell: "[Section 203] is about slowing political advertising and making sure the flow of negative ads by outside interest groups does not continue to permeate the airwaves."
>
> Senator McCain: "[Negative attack ads] simply drive up an individual candidate's negative polling numbers and increase public cynicism for public service in general."
>
> Senator Wellstone: "I think these issue advocacy ads are a nightmare. I think all of us should hate them. . . . We could get some of this poison politics off television."
>
> Senator Jeffords: "[Issue ads] are obviously pointed at positions that are taken by you saying how horrible they are . . . . The opposition comes forth with this barrage [of ads] and you are totally helpless."
>
> Senator Boxer: "We have an opportunity . . . to stop [negative ads] and basically say, if you want to talk about an issue, that is fine, but you can't mention a candidate . . . ."

Id. (citing additional statements).

This candid fear of dissent or criticism—an "interest" clearly not recognized by this Court at any point in its history—is the true animating force behind Section 203. And it is indisputable that bald incumbent protection is antithetical to the true "corruption and appearance of corruption" rationale articulated in *Buckley*, or, for that matter, even to the dubious "corruption by amassment of wealth" rationale contrived in *Austin*.

Because they are unfaithful to the core protections of the First Amendment, as correctly articulated in *Buckley*, neither *Austin* nor *McConnell* are correct statements of law. Following the policy of *stare decisis*, the Court should "declare[], not that [either decision] was *bad law*, but that it was *not law*." 1 BLACKSTONE, COMMENTARIES 70.

B. Other *stare decisis* factors—reliance, antiquity, and workability—support overruling *Austin* and *McConnell*.

1. *Austin* and *McConnell* have not engendered the kind of reliance interests that *stare decisis* contemplates protecting. The reliance interests at stake in "cases involving property and contract rights" understandably weigh in favor of adhering to precedent. *Payne*, 501 U.S. at 828; *see also* 1 KENT, COMMENTARIES 443 (*stare decisis* helps ensure "people in general can venture with confidence to buy and trust, and to deal with one another."). But such concerns are irrelevant here. Certainly no one has "ordered their thinking and living" in reliance on the continued viability of either *Austin* or *McConnell*. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833,

856 (1992). On the contrary, both decisions have had a chilling effect on the exercise of the constitutional right to freedom of speech. In other words, no one is relying on having less freedom of speech, *see Lawrence v. Texas*, 539 U.S. 558, 577 (2003), so no reliance interests weigh in favor of extending or preserving either case.

2. Another "relevant factor" under *stare decisis* is "the antiquity of the precedent." *Montejo*, 129 S. Ct. at 2088-89. *See also WRTL II*, 127 S. Ct. at 2685 ("Overruling a constitutional case decided just a few years earlier is far from unprecedented."). But both *Austin* and *McConnell* are of relatively recent constitutional vintage, such that *stare decisis* does not mandate extending either erroneous decision. In fact, *Austin* "is so unancient that [three] of the current Members of this Court [were] sitting" when it was decided. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 106 (Scalia, J., concurring; joined by Kennedy, J.) (one justice sitting for precedent). *Six* members of this Court were sitting for *McConnell*. Accordingly, *stare decisis* does not counsel that this Court follow either decision.

3. By deviating from the First Amendment principles clearly stated in *Buckley*, *Austin* and *McConnell* bred an unworkable regulatory regime riddled with increasingly arbitrary exemptions, which are irreconcilable with the "corruption-as-distortion" interest conceived in *Austin*. The validity of the "corrosive and distorting effects of immense aggregations of [corporate] wealth" rationale for banning corporate speech in *Austin* and *McConnell*,

respectively, was belied *ab initio* by the media exemption. Since then, the media exemption has been exposed as fallacious by more recent exemptions for incorporated Internet entities and LLCs. These exemptions, by which entities enjoying the same state-conferred benefits and wealth aggregation are permitted to speak without the restrictions imposed on corporations generally, demonstrate the fallacy of that purported governmental interest. All American corporations should be permitted to engage unfettered in constitutionally protected political speech.

Without any attempted distinction from the general corrupting influence of corporate spending articulated in *Austin*, certain corporations are permitted to make expenditures on the Internet, even expenditures coordinated with a candidate or committee. *See* 11 C.F.R. § 100.155; VoterVoter.com, Op. FEC 2008-10 (Oct. 24, 2008). Surely the "distortion" threat that concerned the *Austin* Court is equally implicated by corporate Internet communication, as no forum is more egalitarian, easier to access, and inexpensive to use than the Internet. Some 74% of Internet users, representing 55% of the entire adult population, went online in 2008 to get involved in the political process or to get news and information about the election.[2] Yet, though possessing all of the characteristics used to justify regulation in *Austin*, these Internet corporations are

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[2] *See* Pew Internet & American Life Project, *The Internet's Role in Campaign 2008* (Apr. 2009), *available at* http://www.pewinternet.org/~/media//Files/Reports/2009/The Internets_Role_in_Campaign_2008.pdf (last accessed July 30, 2009).

permitted to spend corporate dollars freely on unrestricted political speech, exposing *Austin* as based on a results-driven fabrication rather than a truly compelling governmental interest.

Similarly, an LLC not treated as a corporation by the IRS is permitted to make contributions and independent expenditures. *See* 11 C.F.R. § 110.1(g). Although *Austin* justified restricting corporations' political speech because of "the special benefits conferred by the corporate structure," 494 U.S. at 661, the benefits conferred by state law upon those LLCs equal and even exceed corporations' benefits. *See* Nicholas G. Karembelas, *The Revised Uniform Limited Liability Act*, WASH. LAWYER, Feb. 2008, at 34. Additionally, because single-member LLCs can make unlimited independent expenditures, The True Patriot Network, LLC, Op. FEC 2009-02 (Apr. 17, 2009), an individual (whose wealth undoubtedly originated in a corporation) can expend unlimited funds to influence a federal election—though he enjoys identical state-conferred benefits and his speech has "little or no correlation to the public's support for [his] political ideas." *Austin*, 494 U.S. at 660. The increasing prevalence of LLCs and single-member LLCs, without a concomitant devastating "distortion" of the political process, further exposes the fallacy of *Austin*-style "corruption."

The media exemption, codified since FECA's inception and specifically approved in *Austin* and *McConnell*, is the ultimate inconsistency showing the *Austin* corruption interest was arbitrary and unworkable from the start. Under this exemption,

corporations "in the regular business of imparting news to the public," like Fox News or the New York Times, may "routinely endorse candidates," despite sharing all of the wealth-amassing characteristics that justified banning corporate speech in *Austin*. *Internet Communications*, 71 Fed. Reg. 18589, 18609-10 (Apr. 12, 2006) (quoting *McConnell*, 540 U.S. at 208) (codified at 11 C.F.R. §§ 100.73 & .132). Incorporated bloggers now fall within the media exemption and may even make expenditures coordinated with candidates and committees, *id.*, thus the emergence of the new media is further eroding any meaningful distinction between those corporations the government deems worthy of speaking and those it chooses to silence under the guise of "distortion."

CONCLUSION

For the foregoing reasons, the Court should overturn both *Austin* and the part of *McConnell* upholding the facial validity of Section 203.

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July 31, 2009

AMICUS CURIAE BRIEF

134 (44)

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. CORPORATE POLITICAL SPEECH IS AN INTEGRAL PART OF DEMOCRATIC LIFE AND THE CONSTITUTIONAL REGIME ESTABLISHED BY THIS COURT IN *CAROLENE PRODUCTS*	4
II. *AUSTIN*'S ANTI-DISTORTION RATIONALE IS BADLY OUT OF STEP WITH FREE SPEECH JURISPRUDENCE	7
III. PROTECTING MINORITY SHAREHOLDERS' INTERESTS CANNOT TRUMP MAJORITY SHAREHOLDERS' FIRST AMENDMENT RIGHTS	10
IV. THE PEDIGREE OF THE POLITICAL ACTIVITY BAN IS EXAGGERATED, PARTICULARLY IN REGARD TO INDEPENDENT EXPENDITURES	11
V. *AUSTIN* CAN BE REPEALED AND REPLACED WITH A WORKABLE STANDARD THAT ACCORDS PRECEDENT, AND CURES *AUSTIN*'S IMPROPER IMPLICATIONS	14

TABLE OF CONTENTS—Continued

Page

VI. SECTIONS 201 AND 311 OF BCRA ARE UNCONSTITUTIONAL AS-APPLIED TO ISSUE ADVOCACY, BUT SHOULD BE FACIALLY INVALIDATED WITH THE REPEAL OF *AUSTIN*, AS CORPORATE EXPRESS ADVOCACY CAN BE DISCLOSED UNDER FECA 17

CONCLUSION 19

TABLE OF AUTHORITIES

CASES Page

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
Colo. Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604 (1996) 10
Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 224 (1949) 5
Davis v. Federal Election Comm'n, 554 U.S. _, 128 S. Ct. 2749 (2008) 8
Federal Election Comm'n v. Beaumont, 539 U.S. 146 (2003) 11, 15, 16
Federal Election Comm'n v. Colo. Republican Federal Campaign Comm., 533 U.S. 431 (2001) 15
Federal Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) 13
Federal Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 10
Federal Election Comm'n v. National Right to Work Comm'n, 458 U.S. 197 (1982) 11, 16
Federal Election Comm'n v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) 3, 17
First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 16
Gonzales v. Raich, 545 U.S. 1, 33 (2005) 5
McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003) 3
Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 4
NAACP v. Alabama, 357 U.S. 449 (1958) 18

TABLE OF AUTHORITIES—Continued

Page

Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000) 15
Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U.S. 1 (1986) 17
Renne v. Geary, 501 U.S. 312 (1991) 7
Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 7
Randall v. Sorrell, 548 U.S. 230 (2006) 14
Speiser v. Randall, 357 U.S. 513 (1958) 9
United States v. Carolene Products Co., 304 U.S. 144 (1938) 2, 4, 5, 6, 7
United States v. CIO, 335 U.S. 106 (1948) 12, 13, 15
United States v. UAW-CIO, 352 U.S. 567 (1957) 4, 5, 6, 11, 13

STATUTES

2 U.S.C. § 434(f) (BCRA § 201) 3, 17, 18
2 U.S.C. § 441a 15
2 U.S.C. § 441a(a)(7)(B) & (C) 16
2 U.S.C. § 441b 15, 17
2 U.S.C. §§ 441b(b)(2) & (c) (BCRA § 203) .3, 4, 18
2 U.S.C. §§ 441d(a) & (d) (BCRA § 311) ...3, 17, 18
Bipartisan Campaign Reform Act (BCRA), Pub. L. 107-155, 116 Stat. 81 (2002) 3
Labor Management Relations Act, ch. 120, § 304 61 Stat. 159 (1947) 12

REGULATIONS

Electioneering Communications, 72 Fed. Reg. 72,899 (Dec. 26, 2007) (codified at 11 C.F.R. pt. 104, 114) 17, 18

TABLE OF AUTHORITIES—Continued

OTHER

Page

Allison R. Hayward, *Revisiting the Fable of Reform*, 45 HARV. J. LEGIS 421 (2008).5, 6, 13

Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform*, (2001)..... 10, 12

David N. Mayer, *The Myth of Laissez Faire Constitutionalism: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L. Q. 217 (2009) 4

J. Skelly Wright, *Politics and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609 (1982)..... 6

Jan Witold Baran, *Election Law Primer for Corporations* (5th ed. 2008)..... 14

Mark Schmitt, *Mismanaging Funds: How Small Dollar Fundraising Can Save Campaign Finance Reform*, DEMOCRACY: A JOURNAL OF IDEAS, Spring 2004, *available at* http:www.democracyjournal.org/article2.php?ID=6516&limit=0&limit2=1500&page=1..... 6

PEW'S CENTER ON THE STATES & GOVERNING MAGAZINE, GRADING THE STATES 2008 (2008), *available at* http:www.pewcenteronthestates.org/gpp_report_card.aspx..... 15

Stephan Katrowicz, *Ben Tillman and the Reconstruction of White Supremacy* (2001)..... 12

Supp. Brief of Appellee, *Citizens United v. Federal Election Comm'n*, 08-205 (July 24, 2009)..... 10, 11

IN THE

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No. 08-205

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SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS IN SUPPORT OF APPELLANT

INTEREST OF *AMICUS CURIAE* [1]

The Center for Competitive Politics ("CCP") is a non-profit 501(c)(3) organization founded in August 2005. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional

[1] This brief is filed with the written consent of all parties. Appellant filed a letter of consent with this Court, and Appellee consented in writing to the filing of this *amicus* brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communication that will hinder political competition and information flow.

SUMMARY OF THE ARGUMENT

1. After the Judicial Revolution of 1937, this Court assured Americans that a lower level of scrutiny for economic liberties would not lead to violations because an open political process would allow all to advocate how Congress should direct tax resources and regulate commerce. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938). That assurance must again match reality with the repeal of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

2. *Austin*'s "anti-distortion" rationale is deeply flawed and badly out of step with this Court's line of speech cases.

3. *Austin*'s other interest, protecting minority shareholders unwilling to fund corporate messages, is a matter of corporate governance, and cannot trump the First Amendment rights of the majority.

4. The pedigree of the corporate activity ban is weak in regard to the banning of independent expenditures. Robust corporate and union political activity exists in several of America's best governed states, and this Court has, until *Austin*, treated independent expenditure bans with considered caution and a healthy skepticism.

5. A clear and workable standard and return to first principles can be achieved by drawing the line at

independence and leaving for another day the constitutionality of corporate or union *contribution bans* (rather than *contribution limits*). Drawing the line at independence would accord precedent and cure *Austin*'s many improper implications, most notably its unnerving treatment of media corporations.

6. The Court should not permit the compelled disclosure of "genuine issue advocacy," even if it falls with the statutory definition of "electioneering communication." *See Federal Election Comm'n. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL II*). If this Court correctly repeals *Austin*, however, BCRA §§ 201 and 311 should be invalidated. The disclosure of corporate or union independent expenditures (express advocacy) can be achieved in a workable manner, under the Federal Election Campaign Act, of 1971 (as amended) to further "informational" interests. *See Buckley v. Valeo*, 424 U.S. 1, 81 (1976).

ARGUMENT

To properly dispose of this case, and prevent an unending train of tenuous exemptions to a corporate and union expenditure ban built of faulty assumptions, this Court should repeal *Austin* and, in doing so, repeal that portion of *McConnell v. FEC*, 540 U.S. 93 (2003) that upheld § 203 of the Bipartisan Campaign Reform Act (BCRA), Pub. L. 107-155, 116 Stat. 81 (2002), a hopelessly overbroad funding prohibition for "electioneering communications." 2 U.S.C. §§ 441b(b).

Additionally, the three ads the government stipulated are issue advocacy under *Federal Election Comm'n. v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL II*) should not be subject to compelled disclosure under BCRA §§ 201 and 311. *Amicus* will

not address the overbreadth of BCRA § 203, but will confine its brief to the question of *Austin*'s overruling.

I. CORPORATE POLITICAL SPEECH IS AN INTEGRAL PART OF DEMOCRATIC LIFE AND THE CONSTITUTIONAL REGIME ESTABLISHED BY THIS COURT IN *CAROLENE* PRODUCTS

In our constitutional system predicated upon the sovereignty of the People, the most essential function of the First Amendment is to preserve the public's right to discuss the qualifications and conduct of their elected representatives in order to exercise their right to self-government. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (First Amendment has "fullest and most urgent application" in context of elections). "It is therefore important—vitally important—that all channels of communication be open to the [people] during every election, that no point of view be restrained or barred, and that the people have access to the views of every group in the community." *U.S. v. UAW-CIO*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting).

Prior to the Civil War and for many decades thereafter, government played a minimal role in the economy. During this period, the Court reviewed alleged violations of economic and civil rights on the same plane. David N. Mayer, *The Myth of Laissez Faire Constitutionalism: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L. Q. 217, 228-248 (2009). As economic regulation grew in the late 19th and early 20th century, the Court sought a new paradigm of review, famously summarized in footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), which suggested that "exacting

scrutiny" would be applied only to alleged violations of civil liberties, while economic liberties would be protected in "political processes, which can ordinarily be expected to bring about repeal of undesirable legislation." *Id.*[2] ("[L]egislation which restricts those political processes . . . is to be subjected to more exacting judicial scrutiny under the general prohibitions of the [First and] Fourteenth Amendment[s] than are most other types of legislation.")

But if such fundamental political processes are allowed to be prohibited by the very government to which they are directed, then the promise of political checks as adequate substitutes for constitutional checks rings hollow. The Constitutional regime since *Carolene Products* presumes that individuals—whether organized in a corporation, a partnership or an unincorporated group, or speaking individually—may not be lightly shut out of the political process. It is in such instances that exacting scrutiny most urgently applies. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

Rather than protect the speech of unpopular groups of citizens (corporations), as promised in *Carolene*, this Court instead has adopted a highly questionable history of "reform" recounted by Justice Frankfurter in *United States v. UAW-CIO*, 352 U.S. 567 (1957) (*Auto Workers*); *see also* Allison R. Hay-

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[2] *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (rejecting commerce clause challenge and suggesting resort to "the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress"); *Daniel v. Family Sec. Life Ins. Co.*, 336 U.S. 220, 224 (1949) (rejecting due process challenge and holding that the "forum for the correction of ill-considered legislation is a responsive legislature.").

ward, Revisiting *The Fable of Reform*, 45 HARV. J. LEGIS. 421 (2008) (discussing political opportunism unmentioned in the history of reform recounted by Justice Frankfurter). It has since used that questionable interpretation of history to justify deference to the legislature in precisely the area where *Carolene*'s footnote 4 assured citizens that scrutiny would be greatest.

Justice Frankfurter's review of the history of "reform" led him to the conclusion "that aggregated capital unduly influenced politics." *Auto Workers*, 352 U.S. at 570-71. But "unduly" compared to what? Indeed, there is an instrumentalism in "reform." Various reformers have long believed that campaign finance reform is the one reform that makes all other reforms possible. *See e.g.* J. Skelly Wright, *Politics and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality*, 82 COLUM. L. REV. 609, 618-19 (1982) (campaign finance reform is needed to obtain "windfall profits tax on oil companies, hospital cost containment, . . . a superfund for victims of toxic chemicals, or any other legislation that affects powerful interests"); *see also* Mark Schmitt, *Mismanaging Funds: How Small Dollar Fundraising Can Save Campaign Finance Reform*, DEMOCRACY: A JOURNAL OF IDEAS, Spring 2004, *available at* http://www.democracyjournal.org/article2.php?ID=6516&limit=0&limit2=1500&page=1 ("After several years on Capitol Hill working on education, urban development, welfare reform, and taxes, I became convinced that we were spinning our wheels. . . . [C]ampaign finance would be the reform that made all other reforms possible.")

This Court assured Americans that its lower level of scrutiny for economic liberties would not lead to

violations because an open political process would allow all to advocate how Congress should direct tax resources and regulate commerce. *Carolene Products*, 304 U.S. 144, 152 n.4 (1938). That assurance must again match reality. "'If [this Court] chooses to tap . . . the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.'" *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)) (citation omitted). All Americans, including those who have joined together in common enterprise using the corporate form, must be allowed to speak.

II. *AUSTIN'S* ANTI-DISTORTION RATIONALE IS BADLY OUT OF STEP WITH FREE SPEECH JURISPRUDENCE

The "corruption" discussed in *Austin* is not that of *Buckley*, where the Court held that Congress may enact reforms that diminish legislative *quid pro quos* or their appearance. *Buckley v. Valeo*, 424 U.S. 1 (1976). Rather *Austin*'s "corruption," known as the "anti-distortion" rationale, is the supposedly "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

When reduced to its essence, *Austin*'s anti-distortion premise is that some persons domiciled permanently in the United States, and bound by its laws, can be banned from its political processes because their speech, left unchecked, might persuade others.

Despite the protestations of its majority opinion, *Austin*'s concern for "distort[ions]" and "corrosi[on]" merely decries the absence of relatively equal resources for speech, and has nothing to do with preventing "corruption" of candidates and officeholders as the Court has elsewhere defined it. In short, *Austin* advances a rationale "wholly foreign to the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 49 (1976); *see also Davis v. FEC*, 554 U.S. __, 128 S. Ct. 2749 (2008), and should be repealed.

Austin's other anti-distortion prongs fare no better, and combining them accomplishes little. *See Austin*, 494 U.S. at 680-81 (Scalia, J., dissenting). The concern for "immense aggregations of wealth" on the "political process" is overinclusive, underinclusive and, therefore, poorly tailored. If aggregations of wealth were the harm to be hindered, wealthy individuals and unincorporated associations would be included in the ban—though they are not, *see Buckley*—and corporations that possess less "immense" aggregations would escape the prohibition entirely. Yet, they do not. *Austin*, 494 U.S. at 680-81 (Scalia, J., dissenting). Why should an individual who has amassed wealth through the corporate form be able to spend it by withdrawing it from a corporation? The *Buckley* and *Davis* opinions affirmed the right of even wealthy individuals to deploy wealth in the political marketplace, though the individuals presumably earn their wealth in the economic marketplace. *Buckley*, 424 U.S. at 49-50; *Davis*, 128 S. Ct. at 2771-72. Just as there is no reason to prohibit the independent individual or unincorporated association, there is no reason to prohibit the independent corporate speaker.

It is true that state law grants corporations special advantages, "[b]ut so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies." *Austin*, 494 U.S. at 680-81, (Scalia, J., dissenting). Even for substantial advantages, the government cannot demand in exchange the forfeiture of First Amendment rights. *Speiser v. Randall*, 357 U.S. 513 (1958).

Finally, there is no reason why campaign expenditures should match popular support for the ideas expressed—quite the opposite: change is often brought about by intensity and determination. "[C]orrelati[ng]" quantities of speech to "public support" has no basis in our constitutional system. *Buckley*, 424 U.S. at 48-49. It is not popular ideas that are in urgent need of expression. Indeed, this Court should, "reject any argument" that corporations "and their views are not of importance and value to the self-fulfillment and self-expression of their members." *Austin*, 494 U.S. at 711 (Kennedy, J., dissenting).

Even if, as this Court has held, a PAC's speech reflects the actual support of its individual members, *Austin*, 494 U.S. at 660-61, the fact remains that the PAC is not the corporation. Not only does the funding ban sacrifice the corporation's speech rights for no discernible benefit to the PAC members, valuable voices are lost to the political debate. Indeed, in *Austin* itself, the Michigan Chamber of Commerce offered a unique voice, "speaking as the voice of the larger Michigan business community, rather than a narrow group of businesses, a corporate PAC, or an individual. No substitute existed for the Chamber's unique position and voice. Thus, a law

intended to restrict certain voices perceived to 'dominate' the debate merely kept a highly relevant voice from being heard." Bradley A. Smith, *Unfree Speech: The Folly of Campaign Finance Reform*, 150 (2001).

In its Supplemental Brief, the government all but abandons the "anti-distortion" rationale of *Austin*, arguing instead that independent spending by corporations is inherently corrupting. Supplemental Brief of Appellees at 8-9. In doing so, the government launches an uninvited frontal assault on *Buckley*'s core distinction between contributions and independent expenditures, 424 U.S. at 45-46, one reaffirmed regularly, *see Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996). The Court asked, in this case, for supplemental briefing on overruling *Austin*—not *Buckley*. Any claim that corruption exists in independent expenditures, contrary to *Buckley*, would seem, at a minimum, to require some basis in evidence which is not in the record here. If the government's case truly relies on overruling *Buckley*, the government must lose.

III. PROTECTING THE INTERESTS OF MINORITY SHAREHOLDERS CANNOT TRUMP MAJORITY SHAREHOLDERS' FIRST AMENDMENT RIGHTS

As the government argues, this Court has held in *Austin* and elsewhere that the bans on corporate or union expenditures and contributions have "always done further duty in protecting 'the individuals who have paid money into a corporation or union . . . from

having that money used to support political candidates to whom they may be opposed.'" *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 154 (2003), quoting *Federal Election Comm'n. v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *see also Austin*, 494 U.S. at 663.

The protection, however, of minority shareholders unwilling to fund certain messages urged by the majority should be a matter of corporate governance, not campaign finance law. Corporations, for example, fund a wide variety of speech, including gifts to museums that may run controversial exhibits, theatre companies that perform controversial plays, and universities that invite controversial speakers. States may wish to alter their corporate laws to protect minority interests, but they may not simply demand that the majority of shareholders who wish the corporation to engage in speech of one kind or another be silenced. *See United States v. UAW-CIO*, 352 U.S. 567, 596 (1957) (*Auto Workers*) (Douglas J., dissenting). ("Perhaps minority rights need protection. But this way of doing it is, indeed, burning down the house to roast the pig. All union expenditures for political discourse are banned because a minority might object").

IV. THE PEDIGREE OF THE POLITICAL ACTIVITY BAN IS EXAGGERATED, PARTICULARLY IN REGARD TO INDEPENDENT EXPENDITURES

The government maintains that the corporate political activity ban enjoys a long and noble pedigree, with "corporate money in electoral politics" first banned "more than a century ago." Supp. Brief of Appellee, at 7. This pedigree is neither strong nor

noble in the banning of independent expenditures, but rather weak and spotty.

The original statute of which the government speaks did not ban corporate independent expenditures, but only direct contributions to candidates. *Id.* Nor was it noble in origin: it was sponsored by a racist South Carolina Senator, "Pitchfork Ben" Tillman, who depised the corporations that opposed his agrarian, segregationist agenda. Stephan Kantrowicz, *Ben Tillman and the Reconstruction of White Supremacy* (2001).

It is true that in 1947 the Taft-Hartley Act renewed the contribution ban and also barred both corporations and unions from using their treasury funds for 'expenditure[s]' on federal elections. Labor Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159. The very next year, however, this Court expressed skepticism that Congress intended to ban a wide swath of political expenditures, noting that the term "'expenditure' was added to eradicate the doubt that had been raised as to the reach of 'contribution,' not to extend greatly the coverage of the section." *United States. v. CIO*, 335 U.S. 106, 122 (1948). Indeed, union attorneys at the time interpreted the earlier contribution ban of the Smith-Connally Act as not covering expenditures, even *coordinated* expenditures which, functionally speaking, are indirect contributions. *See Smith, supra*, at 28.

The *CIO* Court was "unwilling to say" that Congress "intended to outlaw" independent publications to the membership and "d[id] not think § 313['s ban] reache[d] such a use of corporate or labor organization funds." *CIO*, 335 U.S. at 123-24. Justice Rutledge noted in dissent that the Court held "the section inapplicable" to independent expenditures

"because applying [the ban] to this type of expenditure would raise 'the gravest doubt' of the section's constitutionality." *CIO*, 335 U.S. at 131 (Rutledge, J., dissenting).

Nine years later, in *Auto Workers*, the Court acknowledged that Congress probably intended, with Taft-Hartley, to ban independent speech by corporations and unions. 352 U.S. at 589. Justice Frankfurter, writing for the majority, cited every possible basis for ennobling the reform movement by detailing its alleged history. *See* Hayward, *supra*, 45 HARV. J. LEGIS. 421 (2008). Still, the Court refused to consider the constitutionality of an outright ban on independent expenditures. *Auto Workers*, 352 U.S. at 590-94.

Some 39 years after Taft-Hartley, this Court recognized that the Auto Workers Court had acknowledged Congress' intent to ban independent corporate or union expenditures to the public, but did not address the constitutionality of the overall expenditure ban. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 247-48 (1986) (MCFL). Rather, the Court invalidated the ban on narrower grounds, as-applied to what is now known as the "MCFL" corporation. *Id.*

Thus, this Court never before *Austin* (1990) recognized any basis for banning independent political speech. Where the Court once went well out of its way to dodge the thorny issue of independent speech bans in *Auto Workers* and *CIO*, or to avoid reaching it on other grounds in *MCFL*, in *Austin* it ratified for the first time a statutory reach *beyond* contributions and coordinated expenditures to ban independent communications made by corporations and unions. 494 U.S. at 659. The Court should undo this unwise ratification and restore the principal that indepen-

dent political speech is protected for all speakers save government.[3]

V. *AUSTIN* CAN BE REPEALED AND REPLACED WITH A STANDARD THAT IS WORKABLE, IN ACCORDANCE WITH PRECEDENT, AND CURES *AUSTIN*'S IMPROPER IMPLICATIONS

A. The workable standard and meaningful distinction found in every case from *CIO* in 1948 through *Buckley* in the mid-1970s to the *Randall* opinion of today, *Randall v. Sorrell*, 548 U.S. 230 (2006) (expenditure limits unconstitutional), is that independent political speech is to be protected for all speakers save governments. This standard can easily be restored by repealing *Austin* and *McConnell*, the only exceptions to the standard.

It important to note, first, that the government lacks an evidentiary basis for banning corporate or union independent expenditures. Such expenditures in the several states suggest that corporate and union participation in politics increases the depth of voter knowledge and, far from corrupting the political process, coincides with some of the best governed states in the nation. Twenty-eight states and the District of Columbia allow not just corporate independent expenditures, but direct corporate contributions to candidates, apparently with no deleterious effects. Jan Witold Baran, *Election Law Primer for Corporations*, p. 287 (5th ed. 2008). These include

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[3] Nothing in *Buckley* limited to individuals the Court's discussion of independent expenditures and their inability to corrupt candidates and officeholders. The *Buckley* holding should, therefore, apply equally to independent expenditures of groups that avail themselves of the corporate form. *Austin*, 494 U.S. at 682 (Scalia J., dissenting).

Utah, Virginia, and Washington, which were recently rated the best governed states in the nation. PEW'S CENTER ON THE STATES & GOVERNING MAGAZINE, GRADING THE STATES 2008 (2008), *available at*: http://www.pewcenteronthestates.org/gpp_report_card.aspx.

Second, it is of no consequence that the anti-distortion and minority-shareholder-protection interests of *Austin* have justified bans on corporate contributions in other opinions beginning with *United States v. CIO*, 335 U.S. 106, 122 (1948). The constitutionality of corporate *contribution bans* (as opposed to the constitutionality of corporate *contribution limits* already upheld for all entities in *Buckley*) is a question not before the Court in this case.

Indeed, in *Federal Election Comm'n. v. Beaumont*, 539 U.S. 146 (2003) the Court held that, "quite aside from war-chest corruption, . . . restricting contributions by various organizations hedges against their use as conduits 'for circumvention of [valid] contribution limits.'" *Id.* at 155, (quoting *Federal Election Comm'n. v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456, and n.18 (2001)). But "circumvention" is not a problem in independent expenditures. Corporate and union contributions to candidates and political party committees will remain banned or, perhaps in a future case, subject to applicable limits.[4] *See* 2 U.S.C. §§ 441b & 441a.

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[4] It would seem that speech egalitarianism, "anti-distortion," or "war-chest corruption" does not justify contribution bans (over contribution limits) any more than it justifies bans on independent expenditures. The "less rigorous review" the Court gives to contribution restrictions, *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), may lead to the conclusion that corporate contribution *limits* prevent *quid pro quo* corruption and better protect associational rights than do bans. Nonethe-

Coordinated expenditures still will be treated as contributions. *See* 2 U.S.C. §441a(a)(7)(B) & (C).

Third, this Court's upholding of corporate-solicitation bans for nonprofit and for-profit corporations, alike, in *Federal Election Comm'n. v Nat'l Right to Work Comm.*, 459 U.S. 197 (1982), also is no barrier to repealing *Austin*. The workable standard to be drawn in this case is not between for-profit and not-for-profit corporations. Rather the standard is between independent political expenditures and direct or indirect political contributions. *Beaumont*, 539 U.S. at 163-64 (Kennedy, J. concurring) (voting to uphold a ban on contributions by non-profit corporations while rejecting the anti-distortion and minority-shareholder-interest rationales found in *Austin* and other cases.)

B. The line between independent expenditures and direct or indirect contributions has proven workable for at least thirty years. *See Buckley*, 424 U.S. at 45-46. Moreover, the line would accord the long-held principal that corporations enjoy the same speech rights as other entities. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("If the speakers here were not corporations, no one would suggest the State could silence their proposed speech. It is . . . speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation.") It would accord the principle that speech jurisprudence turns on the nature of the speech in question and not on the iden-

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less, the Court should leave for another day the constitutionality of corporate and union contribution bans in the absence of the anti-distortion rationale, and affirm now that all independent political speakers deserve constitutional protection.

tity of the speaker. *Pacific Gas & Elec. Co. v. Public Util. Comm'n. of Cal.*, 475 U.S. 1, 8 (1986) ("identity of speaker . . . not decisive in determining whether speech is protected"). Focusing on independence would remedy, by removing, the unnerving proposition that Congress may exempt media corporations from otherwise applicable expenditure bans despite the Equal Protection Clauses, *see Austin*, 494 U.S at 666-68, and replace it with a much wiser, more workable standard, this time on First Amendment grounds: government cannot prohibit media corporations (or any other corporation) from engaging in independent political speech, period.

VI. SECTIONS 201 AND 311 OF BCRA ARE UNCONSTITUTIONAL AS-APPLIED TO ISSUE ADVOCACY, BUT SHOULD BE FACIALLY INVALIDATED WITH THE REPEAL OF *AUSTIN*, AS CORPORATE EXPRESS ADVOCACY CAN BE DISCLOSED UNDER FECA

Prior to this Court's opinion in *WRTL II*, *supra*, there was no need for corporations to disclose disbursements for "electioneering communications" because such disbursements could never be made: BCRA § 203 banned corporate disbursements for such communications entirely. Of course, corporate express advocacy was likewise banned. 2 U.S.C. §441b; *Austin*, 494 U.S. at 661. After *WRTL II* exempted certain corporate communications from the funding prohibitions of § 203, 551 U.S. 449 (2007), the FEC required those corporate issue-advocacy communications that fell within the electioneering-communication definition to be disclosed under BCRA §§ 201 and 311. *See Electioneering Communications*,

72 Fed. Reg. 72,899, 72901 (Dec. 26, 2007) (codified at 11 C.F.R. pt. 104, 114.[5]

If this Court repeals *Austin*, and invalidates § 203 as unconstitutional, it should make equally clear that non-express advocacy communications are not subject to reporting under §§ 201 and 311, and, indeed, should strike those sections entirely. In *Buckley*, this Court recognized the burden that compelled disclosure places on issue advocacy, *see Buckley*, 424 U.S. at 64 (citing *NAACP v. Alabama*, 357 U.S. 449 (1958)), and held that disclosure could apply only to express advocacy and disbursements by "political committees." 424 U.S. at 78-79.

If *Austin* is repealed, corporations and unions making independent expenditures (as opposed to issue ads) would be subject to the disclosure requirements of 2 U.S.C. §§ 434(c) and 441d(a). The FEC already has proven that a workable method exists for corporations to disclose and disclaim these communications.[6]

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[5] The FEC required disclosure of issue-advocacy communications carved from the source prohibition by *WRTL II* largely because plaintiff Wisconsin Right to Life did not challenge BCRA §§ 201 and 311.

[6] *See* Electioneering Communications 72 Fed. Reg. at 72911.

CONCLUSION

For the foregoing reasons, the Court should overrule *Austin v. Michigan Chamber of Commerce*, overrule the relevant portion of *McConnell v. FEC* supporting BCRA § 203, and reverse the United States District Court for the District of Columbia.

Respectfully submitted,

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AMICUS CURIAE BRIEF

134 (33)

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In the
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMITTEE,

Appellee.

On Appeal from
the United States District Court
for the District of Columbia

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QUESTION PRESENTED

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND
INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I THE TYPE OF MESSAGE AT ISSUE IN THIS CASE—PORTRAYING AN ELECTED OFFICIAL IN A NEGATIVE LIGHT—FOLLOWS A LONG-STANDING PRACTICE IN AMERICAN POLITICS STRETCHING BACK TO THE ELECTION OF 1800 2

II CONTROL OF MEDIA AND CONCENTRATION OF WEALTH ARE NOT NEW PHENOMENA 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 6-9

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 1

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 1

Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 6

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 1

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334 (1995) 5

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 4-5, 8

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 1

United States v. Morrison, 529 U.S. 598 (2000) 1

Zelman v. Simmons-Harris, 536 U.S. 639 (2002) 1

Other Authorities

Ambrose, Douglas & Martin, Robert,
The Many Faces of Alexander Hamilton: The Life and Legacy of America's Most Elusive Founding Father (2006) 4

History of Congress, February, 1799 4

Knudson, Jerry W.,
Jefferson and the Press (2006).....7

Martin, Shannon E. & Hansen, Kathleen,
Newspapers of Record in a Digital Age (1998).....7

Scher, Richard, *The Modern Political Campaign: Mudslinging, Bombast, and the Vitality of American Politics* (1997) 3

Rules of Court

U.S. Sup. Ct. R. 37.3(a) 1

37.6.....1

United States Constitution

U.S. Const. amend. I ..... passim

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the important issue raised in this case of free expression on political issues. The Center is led by John Eastman, Dean of the Chapman University School of Law, and the Honorable Edwin Meese III serves as the honorary chair. The Board of Advisors for the Center includes a number of distinguished academics such as Hadley Arkes, Henry Jaffa, Douglas Kmiec, and John Yoo—just to name a few.

The Center participates in litigation defending the principles embodied in the United States Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The Center believes the issue before this Court is one of special importance to political freedom protected by the First Amendment.

SUMMARY OF ARGUMENT

"Congress shall make no law . . . abridging the freedom of speech, or of the press." The courts have agreed that at a minimum this restriction on congressional power prohibits attempts to criminalize criticism of the party in power. Amicus submits that it also prohibits attempts to criminalize speech on issues and candidates based on the identity of the speaker. Unequal distribution of wealth, concentration of media power, and negative campaigning existed since the founding of the republic. Yet there is no evidence that the First Amendment was originally understood to authorize Congress to prohibit speech related to an election based on any of these factors.

ARGUMENT

I

THE TYPE OF MESSAGE AT ISSUE IN THIS CASE—PORTRAYING AN ELECTED OFFICIAL IN A NEGATIVE LIGHT—FOLLOWS A LONG-STANDING PRACTICE IN AMERICAN POLITICS STRETCHING BACK TO THE ELECTION OF 1800

The appellee brief for the United States describes the content of the movie at issue as a negative portrayal of then Senator (now Secretary of State) Clinton, attacking her character and fitness for office. Appellee Brief at 19-20. In this, Secretary Clinton is in good company. American elections have

rarely been defined by genteel discussion of philosophical issues. For instance, the presidential election campaign between John Adams and Thomas Jefferson, featured full-throated attacks of the type few politicians would dare make in today's elections. One newspaper noted that if Jefferson were elected, "Murder, robbery, rape, adultery and incest will all be openly taught and practiced, the air will be soaked with blood, and the nation black with crimes." Richard Scher, *The Modern Political Campaign: Mudslinging, Bombast, and the Vitality of American Politics* 31 (1997) (quoting the Connecticut Courant). Another writer published:

> Can serious and reflecting men look about them, and doubt that if Jefferson is elected, and the Jacobins get into authority, that those morals which protect our lives from the knife of the assassin—which guard the chastity of our wives and daughters from deduction and violence—defend our property from plunder and devastation, and shield our religion from contempt and profanation, will not be trampled upon and exploded?

Id.

Adams too was the target of attacks with one writer describing him as a "fool, hypocrite, criminal, and tyrant . . . his presidency was one 'continued tempest of malignant passions.'" *Id.*

The rhetorical attacks continued unabated after the election. The famous duel between Alexander Hamilton and Aaron Burr was purportedly sparked after Burr read a letter in a newspaper; a letter attributed to Hamilton characterizing Burr as "a

dangerous man, and one who ought not to be trusted with the reins of government" Douglas Ambrose & Robert Martin, *The Many Faces of Alexander Hamilton: The Life and Legacy of America's Most Elusive Founding Father* 10 (2006).

This Court has noted that these "negative campaign" advertisements have continued throughout the history of the republic. *New York Times Co. v. Sullivan*, 376 U.S. 254, 273 n.14 (1964). Yet Congress' one early attempt to regulate speech about office holders met with an immediate outcry that the regulation was contrary to the First Amendment.

In the Sedition Act of 1798 Congress outlawed publication of "false, scandalous, and malicious writings against the Government, with intent to stir up sedition." The supporters of the law argued that it was needed to carry out "the power vested by the Constitution in the Government." *History of Congress*, February, 1799 at 2988. Opponents rejected that justification as one not countenanced by the First Amendment. In an earlier debate over the nature of constitutional power, Madison noted "'If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.' 4 Annals of Congress, p. 934 (1794)." *New York Times Co.*, 376 U.S. at 275.

The Virginia Resolutions of 1798 also condemned the act as the exercise of "'a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto.'" *Id.* at 274. The particular evil in the Sedition Act, according to the Virginia General

Assembly, was that it was "'levelled against the right of freely examining public characters and measures, and of free communication among the people thereon.'" *Id.*

The Sedition Act expired by its own terms in 1801 and the new Congress refused to extend or reenact the prohibitions. For his part, Jefferson pardoned those convicted and fines were reimbursed by an act of Congress based on Congress' view that the Sedition Act was unconstitutional. *Id.* at 276.

This Court in *New York Times Co.*, noted that "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* More important than the "court of history," is the apparent political judgment at the time that the enactment was inconsistent with the Constitution. Where one Congress attempted to insulate itself from criticism, the subsequent Congress immediately recognized that attempt as contrary to the First Amendment. Congress and the President did not merely allow the law to lapse—they took affirmative action to undo its effects through repayment of fines and pardons. This is the clearest indication we have of the original understanding of the First Amendment's speech and press clauses. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J. concurring) (evidence of original understanding of the Constitution can be found in the "practices and beliefs held by the Founders").

In this case, the Court is again confronted with an act of Congress that is "leveled against the right of freely examining public characters and measures, and the free communication among the people

thereon." This law does not seek to regulate the content of the communication, as was the case with the Sedition Act, but instead regulates who may speak.

II

CONTROL OF MEDIA AND CONCENTRATION OF WEALTH ARE NOT NEW PHENOMENA

This Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), identified a new compelling interest to justify government prohibition of free speech. Previously, the Court had recognized the prevention of corruption or the appearance of corruption as "'the only legitimate and compelling government interests thus far identified for restricting campaign finances,'" *Austin*, 494 U.S. at 658 (*quoting Fed. Elections Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)). In addition to the concern over quid pro quo corruption that may occur with direct contributions, this Court in *Austin* also found compelling restrictions on independent election expenditures to combat "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. Although the use of "immense aggregations of wealth" by individuals to influence elections are also unrelated to the "public's support" for the political message, the Court in *Austin* apparently limited this interest to restrictions on corporate expenditures. The *Austin* Court permitted the state to extend the prohibition

on independent expenditures to a nonprofit expressive corporation if the corporation received contributions from business corporations—without regard to whether those contributions were made possible by "immense aggregations of wealth." *Id.* at 660 (citation omitted).

This restriction on political speech is not supported by the original understanding of the First Amendment. Uneven distribution of wealth is not a new phenomenon, nor is the use of wealth to broadcast an individual's political sentiments. In the founding era, the methods of communicating political ideas were much more limited. This served to emphasize differences in wealth as political partisans used their wealth to fund newspapers that would further their political viewpoint. Jerry W. Knudson, *Jefferson and the Press* 2-4 (2006); Shannon E. Martin & Kathleen Hansen, *Newspapers of Record in a Digital Age* 21 (1998). Thomas Jefferson funded the National Gazette as a means of publicizing the "republican" viewpoint on politics, while Alexander Hamilton founded the New York Evening Post to help publicize his political point of view. Knudson, *supra*, at 2-3.

Even with this dominance of the channels of available communication, Congress' one attempt to regulate the press in that era—the Sedition Act—was widely understood to violate the First Amendment. There was no suggestion that Congress had the power to regulate newspapers because they were funded by individuals who had managed to accumulate more wealth than others (whether from business transactions or from inheritance) and there is no suggestion that the First Amendment allows

regulation in order to ensure that the amount spent on a message is proportional to the public support for the viewpoint.

The Report on the Virginia Resolutions notes the purpose of the First Amendment is to maximize the information made available to the electorate. *New York Times*, 376 U.S. at 275 n.15. "The value and efficacy of this right [of electing public officials] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively." *Id.* (citation omitted). The goal was to design "a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular." *Austin*, 494 U.S. at 693 (Scalia, J., dissenting).

In contrast to the founding era, access to mass communication is readily available to individuals and groups of limited means. Anyone with access to a computer and the internet has the opportunity to add their voice to a debate and have their voice heard throughout the nation. No longer is the means of mass communication held in the hands of the few who choose to use their wealth to support their personal political viewpoint. If there was no basis for regulating speakers in the founding era in order to "equalize" rather than "maximize" political debate, there is even less of a reason to do so today. The rationale of *Austin* cannot stand as a matter of original understanding of the First Amendment.

CONCLUSION

Elections have rarely been polite affairs in American History. Yet the First Amendment was designed to maximize information available to the public. The Founders were interested in ensuring that the government had no power to censor political debate. The Court's decision in *Austin* does not serve that goal and the decision should, therefore, be overruled.

DATED: July, 2009.

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AMICUS CURIAE BRIEF

No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF THE CENTER FOR INDEPENDENT MEDIA, CALITICS.COM, EYEBEAM, ZACK EXLEY, LAURA MCGANN, AND THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. BCRA's Electioneering Provisions Maintain a Longstanding Distinction Between Corporate Campaign Contributions and Expenditures and Other Forms of Political Speech. 6

II. BCRA's Narrowly Crafted Electioneering Communications Provisions Leave More Than Ample "Breathing Room" for Political Speech to Flourish. 9

III. Section 203 Does Not Chill the First Amendment Activities of Journalists and Commentators in Either Traditional or New Media. 11

IV. By Congressional Design, BCRA's Electioneering Communications Regulations Apply Only to Broadcast Advertisements, and Exclude Other Forms of Media from the Scope of Regulation. 12

V. BCRA's Media Exemption Is Sufficiently Flexible to Protect the Speech of Journalists in Both Traditional and New Media. 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 4, 8, 11, 13, 14

Buckley v. Valeo,
424 U.S. 1 (1976) 7

FEC v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986) 9, 14

FEC v. Wisconsin Right to Life,
551 U.S. 449 (2007) 9

McConnell v. FEC,
540 U.S. 93 (2003) ..... *passim*

Randall v. Sorrell,
548 U.S. 230 (2006) 6

STATUTES

2 U.S.C. § 434(f)(3) 9

2 U.S.C. § 434(f)(3)(B)(i) 8

2 U.S.C. § 441b 4, 9

Tillman Act, ch. 420, 34 Stat. 864 (1907) 7

Federal Corrupt Practices Act, ch. 368, § 301, 43
Stat. 1070 (1925) 7

Smith-Connally Act, ch. 144, § 9, 57 Stat. 163 (1943) 7

Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) 7

Federal Elections Campaign Act of 1971, Pub.L. No. 92-255, tit. III, § 316, 86 Stat. 3 (1972) . . . 7

144 Cong. Rec. S974 (1998) 13

REGULATIONS

11 C.F.R. § 100.29(c)(1) 13

11 C.F.R. § 100.73 15

11 C.F.R. § 100.94(d) 16

11 C.F.R. § 100.132 15

11 C.F.R. § 100.155(d) 16

71 Fed. Reg. 18589 15

OTHER

2007-20 Ad. Op. FEC 1-2 (2007) 14

2003-34 Ad. Op. FEC 1-2 (2003) 14

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H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. (1974) 15

STATEMENT OF INTEREST[1]

Amici the Center for Independent Media, Calitics.com, Eyebeam, Zack Exley and Laura McGann are institutions and individuals who use new technologies, including the Internet, to produce, create, and/or distribute news stories, commentary and editorials about politics, including federal elections. They share an interest in campaign finance regulations that protect the rights of journalists and new media content providers to report and comment on federal elections through the use of new technologies.

Founded in 2006, the Center for Independent Media is a non-partisan, non-profit organization that operates an independent on-line news network. The impetus for creation of the organization was the hypothesis that a melding of blog technology with the standards of professional journalism could produce original news and information, which in turn would contribute to diversifying public debate around issues of importance. To this end, the Center for Independent Media enhances the stability of independent media by working with on-line journalists and blogs to support their ability to inform public debate through journalism that adheres to the highest standards of

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[1] The parties have consented to the filing of this brief. Appellant's letter of consent has been lodged with the Clerk of Courts. Appellee has granted a blanket consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission

the profession. The Center operates a new journalist training program and a new journalist editorial program. As a result of these programs, over 41,884 original reports have been generated, reaching over 16.4 million Americans.

Calitics.com is an on-line, open source news organization that posts news stories, commentary and editorials on California and national politics, including federal elections. The site features reports and commentary by Calitics.com's seven-member Editorial Board and blog posts from members of the public who are invited to register with the site.

Eyebeam is a non-profit organization that provides artists and technologists the space to use state-of-the-art technologies to engage with culture, addressing the issues and concerns of our time. Since 1997, Eyebeam has supported more than 125 fellowships and residents who use new media to engage in both social and political commentary. Eyebeam's artists have used broadcast media to engage in such commentary, including a project that aggregates Internet content on broadcast television through a low-power analog transmitter. The project acts as an aggregator of on-line video content, encouraging the public to create shows, vote on the shows, and participate in the process.

Zack Exley is a leader in the use of new technology and federal election reporting and commentary. He is currently a writer for the Internet newspaper, the HuffingtonPost.com, where he covers politics, including federal elections. Consequent to his early use of the Internet as a medium for political commentary, representatives of then Governor George

W. Bush filed an FEC complaint in 1999 that Mr. Exley's political Web site, GWBush.com, violated campaign finance regulations. Mr. Exley is also an expert in the use of new technologies in campaigning. He was Director of On-line Organizing and Communications at Kerry-Edwards 2004 and has served as Organizing Director at MoveOn.org.

Laura McGann is an experienced journalist whose work has been featured in both traditional and new media outlets. She is currently the editor of *The Washington Independent*, an on-line newspaper of politics and policy. Her work has also been featured in traditional media, such as the Dow Jones Newswires, the Associated Press's national wire and *The Wall Street Journal*.

Amicus curiae the Brennan Center for Justice at NYU School of Law ("Brennan Center") is a non-partisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center's Campaign Finance Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution. Through legislative efforts and litigation, the Brennan Center actively supports strong federal campaign finance laws that meet constitutional standards and encourage broad candidate participation in federal elections. The Brennan Center served as co-counsel to Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords in *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld the provisions of the Bipartisan Campaign Reform Act ("BCRA") that Appellant now challenges.

SUMMARY OF THE ARGUMENT

The Court requested supplemental briefing on the question of whether the Court should "overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?"

Amici respectfully submit that the answer to that question is no. In this case, the Court's decision to expand the scope of inquiry from a narrow, fact-driven, as-applied challenge to encompass facial constitutional questions undeveloped in the record below has the potential to transform a relatively straightforward case – readily resolved on narrow grounds – into a far more problematic one. Appellant and its supporting *amici* invite the Court to decide this case based, not upon the narrowly tailored statutes and regulations before it, but as a preventative measure against hypothetical action Congress or federal regulators might someday take. The Court should pull back from the brink of this unwarranted expansion of judicial power and should, instead, resolve the issues using deeply embedded and time-worn distinctions that have allowed political speech by all speakers to flourish while reducing the risk of corruption and the appearance thereof.

Appellant, in its supplemental brief, devotes much of its attention to the extemporaneous responses of government counsel to a series of hypothetical questions posed by the Court. At oral argument, the Court raised questions with regard to whether Section 203's limitation to broadcast media was

constitutionally required. In responding to these queries, government counsel suggested that the Constitution would not necessarily bar such expansion of the electioneering communications regulation to other forms of media. (Tr. Oral Argument at 26:20-27:22.) In so responding, counsel was answering within the context of the Court's hypothetical – his answer had no application to the statutory text of BCRA or the FEC regulations and opinions interpreting it.

Using this oral argument colloquy as a straw man, Appellant now invokes the threat of government censorship: "When the government of the United States of America claims the authority to *ban books* because of their *political speech*, something has gone terribly wrong." (Appellant's Supplemental Br., (dated July 24, 2009), at 2.) Yet few threats could be more untethered from the current state of legal practice and settled law.

By focusing on speculative hypotheticals rather than the specifics of this case, Appellant ignores the very steps that Congress and the FEC have taken to ensure that Appellant's Orwellian scenario of federal "superintendence of printed political speech," *id.* at 1, never comes to pass. In essence, Appellant's argument is a slippery slope – it claims that it is infeasible to draw the dividing line between corporate campaign advertisements and other political speech. However, the statutory language and regulations at issue here, as well as the history of campaign finance regulation in this country, demonstrate that this slippery slope is fictitious.

In submitting this brief, *amici* seek to restore the Court's attention to the actual statute and regulations at issue here. The lines separating corporate-funded campaign advertisements from other forms of political speech are largely unproblematic. Indeed, these categorical determinations have proven sufficiently adaptable to exempt new and developing forms of political speech from the regulation of corporate campaign advertisements. Appellant has provided no basis for this Court to take the extraordinary step of overruling key precedents, or the functioning system of campaign finance regulation predicated upon them. *See, e.g.*, *Randall v. Sorrell*, 548 U. S. 230, 244 (2006). ("[T]he rule of law demands that adhering to our prior case law be the norm.").

Moreover, by asking this Court, in effect, to issue an advisory opinion against some future law that Congress might someday pass or some future regulation the FEC might someday promulgate, Appellant suggests that this Court should overstep the most significant check on its power – Article III's limitation of federal judicial power to actual cases and controversies.

ARGUMENT

I. BCRA's Electioneering Provisions Maintain a Longstanding Distinction Between Corporate Campaign Contributions and Expenditures and Other Forms of Political Speech.

Throughout the history of campaign finance reform, lawmakers and courts have consistently maintained the First Amendment line between regulating

corporate contributions and expenditures, on the one hand, and other forms of political speech deemed to bear a lesser risk of corruption, on the other. Since the early twentieth century, Congress has exercised its constitutional authority to regulate elections by seeking to prevent corporations and unions from exerting undue influence or the appearance thereof over federal candidates. *See, e.g.*, Tillman Act, ch. 420, 34 Stat. 864 (1907) (prohibiting corporate contributions of "money . . . in connection with" any federal election); Federal Corrupt Practices Act, ch. 368, § 301, 43 Stat. 1070 (1925) (extending the prohibition in the Tillman Act to "anything of value" and making the acceptance of a corporate contribution a crime); Smith-Connally Act, ch. 144, § 9, 57 Stat. 163, 167 (1943) (extending the prohibitions to unions); Taft-Hartley Act, ch. 120, 61 Stat. 136 (1947) (prohibiting expenditures by corporations and unions). In 1972, Congress enacted the Federal Elections Campaign Act (FECA), a law that reenacted earlier statutes prohibiting corporations from using general treasury funds for contributions and expenditures in federal elections, while permitting such entities to make contributions and expenditures through separate segregated funds. Federal Elections Campaign Act of 1971, Pub. L. No. 92-255, tit. III, § 316, 86 Stat. 3 (1972). After *Buckley v. Valeo*, 424 U.S. 1 (1976), was decided, Congress amended FECA to take into account this Court's holdings.

The next major development in the regulation of corporate political spending was the passage of BCRA in 2002. This Court upheld nearly every major aspect of BCRA against facial challenge in *McConnell*, including Section 203, which was crafted to plug a loophole that permitted corporations to use

electioneering communications to circumvent FECA's regulatory structure. *McConnell*, 540 U.S. at 204. Rather than being "outliers," as Appellant suggests, this Court's decisions in *Austin* and *McConnell* are deeply embedded in the case law and federal campaign finance reform framework.

While advancing the important anti-corruption goals of campaign finance reform by regulating undue corporate influence over federal elections, both lawmakers and courts have consistently crafted statutes, regulations, and case law to ensure that such campaign finance regulations do not extend to political speech that lacks similar potential for corruption. For example, as the supplemental brief *amicus curiae* for the Reporters Committee for Freedom of the Press (hereafter "Reporters Committee") sets out, for more than 50 years, in enacting and interpreting campaign finance statutes and regulations, lawmakers, courts, and regulators have respected the special position of the news media in First Amendment law. (Reporters Committee Supplemental Br., (dated July 24, 2009), at 6-9.)

Indeed, BCRA's media exemption codified this protection of the news media with respect to the regulation of electioneering communications, *id.* at 6; 2 U.S.C. § 434(f)(3)(B)(i), following this same clear distinction between corporate-funded campaign advertisements and other forms of political speech. By Congressional design, electioneering communications regulations apply only to that narrow subset of communications that Congress deemed most likely to raise the specter of corruption or the appearance of corruption – namely, corporate or union broadcast advertisements that clearly identify a candidate for

federal office, are aired within a certain time period prior to an election, and target a significant portion of the relevant electorate. 2 U.S.C. §§ 434(f)(3), 441b(b)(2). Following this Court's decision in *Wisconsin Right to Life II*, to be subject to BCRA's funding restrictions, the advertisement, on its face, must also allow for no reasonable interpretation other than as an appeal to vote for or against a given candidate. *FEC v. Wisconsin Right to Life ("WRTL II")*, 551 U.S. 449, 469-70 (2007).

This narrow subset of electioneering communications is itself subject to a number of crucial exemptions that ensure that BCRA's regulation of corporate and union broadcast electioneering communications neither extends to nor chills political speech. These exemptions include, but are not limited to, the *MCFL* political non-profit exemption, *FEC v. Mass. Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 263-64 (1986), as well as BCRA's statutory exemption for news media, which we discuss in greater depth in Section III, *infra*.

II. BCRA's Narrowly Crafted Electioneering Communications Provisions Leave More Than Ample "Breathing Room" for Political Speech to Flourish.

Far from constituting a *ban*, as Appellant mischaracterizes BCRA's regulations, the regulations at issue merely require corporations and unions to use PACs, rather than general treasury funds, to pay for electioneering communications. To call this regulation a *ban* is mere hyperbole – a citizen might just as well state that she is *banned* from contributing more than $200 to a federal candidate if she fails to provide the

requisite contribution disclosure form. Citizens United and other corporations remain free to fund *Hillary: The Movie* and other forms of electioneering through segregated funds.

More importantly, Appellant's use of the word "ban" obscures the fact that *Hillary: The Movie* only fell under the FEC's regulatory purview to the extent that it was being broadcast through cable within 30 days of a federal primary election. Citizens United was able to sell the DVD of the movie during that period and would have been able to distribute *Hillary: The Movie* through multiple channels without falling within BCRA's definition of an electioneering communication. (Appellant's Br., (dated Jan. 8, 2009), at 5.) This narrowly crafted regulation bears no resemblance to Appellant's specter of government censorship.

Indeed, it is worth noting that, contrary to the dark picture of government suppression painted by Appellant, in the years since BCRA was enacted, political speech has flourished. Non-candidate entities spent more money on election-related communications in 2008 than in any previous election cycle. David B. Magleby, *The Change Election: Money, Mobilization, and Persuasion in the 2008 Federal Election* 59 (2009). Corporations and unions engaged in unprecedented levels of political communications, including broadcast advertisements. For example, the U.S. Chamber of Commerce ran broadcast advertisements mentioning federal candidates by name that totaled millions of dollars in spending in 2008 Senate races. Labor unions also spent millions of dollars on broadcast advertising directed at federal races. *Id.* at 80. In light of the healthy levels of involvement in elections by outside

groups – including those falling within the scope of BCRA's electioneering communications provisions – as well as the lack of evidence that there has been any chilling effect on political speech by either *McConnell* or *Austin*, this Court has no reason to overrule its prior precedent.

III. Section 203 Does Not Chill the First Amendment Activities of Journalists and Commentators in Either Traditional or New Media.

Given the rapidly evolving landscape of media technology, where blogs and "viral" videos compete for public attention with the traditional news media, there is some confusion among "content providers," legal commentators, and the general public as to how pre-Internet legal concepts and frameworks apply in a post-Internet world. Indeed, in its initial brief *amicus curiae*, the Reporters Committee expressed concern that since the text of BCRA's news media exemption explicitly exempts only speech that "[a]ppears in a news story, commentary, or editorial distributed through the facilities of [a] broadcast, cable, or satellite television or radio station," it might not protect journalists who distribute their work in other forms or media. (Reporters Committee Br., (dated Jan. 15, 2009), at 10.)

As a threshold matter, it is important to recognize that the scope of the media exemption is not properly before the Court on the facts of this case. Citizens United – which purchased air time for *Hillary: The Movie* as an advertiser would for an "infomercial" – is not a new or traditional media organization, nor has it

suggested at any point that mere production of a film, without more, should transform it into such an entity.

Moreover, the Reporters Committee's concerns regarding the scope of the media exemption ignore two crucial facts: First, the scope of regulation of BCRA's electioneering communications provision is expressly limited to broadcast advertisements, which Congress deemed to pose the greatest risk of corruption and the appearance of corruption. Second, lawmakers and regulators have consistently interpreted the media exemption – which has been recognized in campaign finance law since the early 1970s – to give the broadest and most flexible possible protection to journalists and other content providers, given the rapid evolution in media technology and institutions.

IV. By Congressional Design, BCRA's Electioneering Communications Regulations Apply Only to Broadcast Advertisements, and Exclude Other Forms of Media from the Scope of Regulation.

In enacting BCRA, Congress's concern was to counter the risk of corruption inherent in the proliferation of "sham issue" advertisements. *McConnell v. FEC*, 540 U.S. 93, 128-129 (2003) (citing record evidence that candidates requested "maxed-out" donors to give additional funds to non-profit corporations to spend on 'issue' advocacy"). In seeking to combat this corrupting practice, Congress chose to regulate only electioneering communications in the broadcast medium, where it deemed the greatest potential for corruption to lie.

Additionally, the legislative history indicates that Congress specifically considered and rejected the inclusion of Internet communications within the scope of electioneering communications. 144 Cong. Rec. S974 (1998) (statement of Sen. Snowe, sponsor of an early version of BCRA, stating that the definition of an electioneering communication would not include the Internet). Later, in a move consistent with legislative history, the FEC excluded "communications over the Internet, including electronic mail," from the definition of electioneering communications. 11 C.F.R. § 100.29(c)(1).

Thus, the limitation of the scope of the electioneering communication to broadcast media is no mere "qualifier" that can be changed by "a mere 'legislative fix,'" as the Reporters Committee mistakenly contends. (Reporters Committee Supplemental Br. at 5 n.3.) Instead, the broadcast limitation was specifically considered by Congress, and there is no reason to believe that Congress would perform an about-face and extend the scope of BCRA to other forms of media.

V. BCRA's Media Exemption Is Sufficiently Flexible to Protect the Speech of Journalists in Both Traditional and New Media.

In the campaign finance reform context, courts and lawmakers have consistently recognized that media entities that devote "their resources . . . to the collection of information and its dissemination to the public" play a "unique role" that distinguishes them from other corporations. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667-68 (1990). Thus, even

in enacting narrowly tailored campaign finance regulations such as BCRA, Congress has taken pains to craft specific exemptions for media entities. This Court has upheld such exemptions at least three times. *See McConnell v. FEC*, 540 U.S. 93, 207-09 (2003); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 666 (1990); and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986). This "belt and suspenders" approach assures the news media that even if statutory language or regulations were to change, their protections would remain unabated.

Appellant's claim that the media exemption applies only to the "institutional media" is unfounded. (Appellant's Supplemental Br. at 1.) Federal regulators have interpreted the scope of BCRA's media exemption to remain in step with advancements in media technology and with changes in media institutions. As evidenced by the FEC's advisory opinions, the FEC has consistently construed the media exemption to apply to a variety of non-traditional media. *See, e.g.*, 2007-20 Ad. Op. FEC 1-2 (2007) (national satellite radio channel featuring content by bloggers and podcasters exempt under media exemption); 2003-34 Ad. Op. FEC 1-2 (2003) (production company's reality television show simulating a presidential campaign and related Web sites exempt under media exemption). Thus, in the event that new developments in media technologies or institutions cause journalists, bloggers, or other media producers uncertainty with regard to the scope of the exemption, they may always seek an advisory opinion from the FEC.

Moreover, the FEC has interpreted the precursor to BCRA's media exemption provision – a parallel media exemption provision under FECA – to offer broad and flexible protection to non-traditional media, including Internet communications. The FECA media exemption was crafted to "assure[] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. at 4 (1974). Accordingly, the FEC issued a rule clarifying that it was Congress's intent to extend FECA's "media exemption to forms of media that did not exist or were not widespread when Congress enacted the exemption." Internet Communications, Final Rules and Explanation and Justification, 71 Fed. Reg. 18589, 18608 (April 12, 2006). As such, the FEC was to construe FECA's media exemption to protect "news stories, commentaries, and editorials no matter in what medium they are published." *Id.* Thus, in 2006, the FEC amended its media exemption regulations to include "any Internet or electronic publication," 11 C.F.R. §§ 100.73, 100.132.

Finally, in addition to exempting new forms of media technology, the FEC has also afforded non-traditional media institutions broad protection. The FEC has interpreted the media exemption to take account of the changing structure of media institutions, so that non-traditional media entities, in addition to "institutional media," fall within the scope of the media exemption. Indeed, as part of its 2006 Internet rulemaking, the FEC explicitly created an Internet exemption for:

> any corporation that is wholly owned by one or more individuals, that engages primarily in

> Internet activities, and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities.

11 C.F.R. §§ 100.94(d), 100.155(d). Thus, regardless of the rapid pace of technological and institutional evolution in the realm of political speech, the media exemption has consistently proven sufficiently adaptable and has extended flexible coverage to both new and traditional media technologies and institutions.

CONCLUSION

That the rapid advent of new media technologies and institutions – including the "Video-on-Demand" technology used in the present case – has left certain gray areas in which Congress and regulators have yet to act does not provide this Court with any reason to overturn an entire body of established constitutional precedent. To the extent that the Court is concerned about the treatment of communications that are available to the viewer on-demand, it should, at minimum, permit the FEC in the first instance to conduct a rulemaking to determine the appropriate contours of a new exemption.

But even if this Court decides to rule on the merits of the narrow factual issue presented by this as-applied challenge, we would ask the Court to limit its opinion to the specific facts and carefully crafted statutory scheme and regulations before it, rather than reaching into the realm of hypothetical speculation. Both Appellant and the Reporters Committee call on this Court to provide "clarity" as a safeguard against the unlikely occurrence that Congress will perform an

about-face on decades of deference to First Amendment freedoms in the area of campaign finance regulation. *Amici* respectfully urge the Court to reject this invitation to invade legislative prerogatives; it is not the role of Article III courts to provide prophylactic opinions.

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AMICUS CURIAE BRIEF

No. 08—205

IN THE
Supreme Court of the United States

CITIZENS UNITED,
Appellant,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE CENTER FOR POLITICAL ACCOUNTABILITY AND THE CAROL AND LAWRENCE ZICKLIN CENTER FOR BUSINESS ETHICS RESEARCH AT THE WHARTON SCHOOL AS *AMICI CURIAE* IN SUPPORT OF APPELLEE ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. OVERTURNING *AUSTIN* AND *MCCONNELL* WILL DRAMATICALLY ALTER THE CAMPAIGN FINANCE LANDSCAPE 4

A. Corporations' Ability to Amass Capital Will Distort the Political Process 5

B. Profit Maximization Promotes Unrestrained, Indiscriminate Political Spending 8

C. Corporate Centralized Management Facilitates Rent-Seeking Behavior by Managers 12

II. CORPORATE POLITICAL SPENDING PROHIBITIONS ARE THE ONLY MEANINGFUL SAFEGUARDS AGAINST CORRUPTION 14

A. Coordination Rules Cannot Isolate Independent Expenditure Committees 14

B. Objecting Shareholders and Directors Cannot Check Corporate Political Activity 16

III. THE COURT SHOULD NOT REVERSE ITS DEFERENCE TO CONGRESS 19

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page(s)**

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STATEMENT OF INTEREST

The Center for Political Accountability ("CPA") and the Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School of the University of Pennsylvania ("The Zicklin Center") submit this supplemental brief as *amici curiae* in support of the Appellee.[1] *Amici* refer the Court to, and incorporate by reference, the statement of interest set forth in their prior *amici* brief submitted on the merits in this case.

SUMMARY OF ARGUMENT

The ability of corporations to amass capital, focus on maximizing shareholder value, and centralize management has contributed immensely to the nation's economic well-being. For more than a century, Congress and state legislatures have recognized that those same attributes, which are the engines of economic growth, may have a corrosive impact on the functioning of our democratic institutions. The ability to accumulate capital enables corporations to deploy immense, tax-advantaged resources in pursuit of their political objectives. Focusing on maximizing shareholder value allows corporations to disregard the larger societal and economic consequences of their political engagement. Centralized management vests in managers near complete power to engage in rent-seeking behavior through political channels.

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[1] CPA and The Zicklin Center submit this brief pursuant to the written consent of the parties. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than CPA and The Zicklin Center has made a financial contribution to its preparation or submission.

Over the last century, a series of political scandals involving corporations has led Congress to recognize that the economic advantages of the corporate structure pose a danger in the political realm. Congress, along with numerous state legislatures, has chosen to limit corporate influence in elections. The law does not ban all corporate political activity, but requires corporations to play under the same rules as other actors in the process.

The question before the Court is whether those legislative efforts should be thwarted. In asking whether *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), or *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003),[2] should be overruled, the Court asks whether the historic and widely shared judgment of our elected officials, who have first-hand knowledge of the dangers posed by unlimited corporate political spending, should be set aside. It will be those elected officials who will be asked to resist, using the legally limited campaign resources at their disposal, the political pressure that will accompany unlimited corporate political spending.

Austin and *McConnell* recognize that corporations, created by the state, are capable of amassing billions of dollars, some of which can readily be made available for political purposes. One example illustrates how overturning *Austin* and *McConnell* would fundamentally rework our campaign finance system. In the last election cycle, ExxonMobil, the nation's largest corporation, raised

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[2] To the extent that it addresses Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b.

$950,434 in voluntary political contributions from its employees and shareholders. During that same election cycle, ExxonMobil's profits were $85 billion, or more than 560 times the amount raised by all corporate political action committees ("PACs") combined. ExxonMobil need only use a very small percentage of those corporate funds to secure a politically favorable legislative landscape.

Restrictions on coordination provide one check against unlawful independent expenditures by corporations. But these restrictions alone are inadequate, in part because corporations can achieve their political ends without legally coordinating their activities. Officeholders are well aware that a massive influx of independent expenditures by a single corporation could determine their fate at the ballot box and will feel compelled to weigh that corporation's interests heavily when they conflict with less organized and less funded interests that must operate under the limitations of existing campaign finance law.

Incumbent federal officeholders currently enjoy a nearly twenty-to-one advantage over challengers in the receipt of corporate PAC contributions. This advantage will only be magnified if corporations are able to reward their legislative allies with unlimited spending from corporate coffers. It stands to further close the political marketplace to competition.

Experience shows us the impact unrestrained corporate political spending will have on corporate behavior. Slashing restraints on corporate spending will generate internal and external pressures on corporations to engage in unrestrained political spending that may bear little or no relation to

shareholder value. Corporations will feel compelled to keep up with their competitors, particularly in the face of a shakedown by elected officials who write the laws and regulations that corporations must follow on a daily basis. Managers will engage in rent-seeking behavior, spending corporate funds for personal gain or to advance management's personal political preferences. Most important, political spending will be used to secure and maintain unwarranted competitive advantage in regulation with severe consequences on the openness, dynamism, and operation of markets.

The Court should not lightly set aside the well-reasoned, long-standing, and broadly shared judgment of legislators that unchecked corporate political spending corrupts our politics and distorts our economy.

ARGUMENT

I. OVERTURNING *AUSTIN* AND *MCCONNELL* WILL DRAMATICALLY ALTER THE CAMPAIGN FINANCE LANDSCAPE

The corporate structure allows economic activity to be organized efficiently to pursue private profit. The ability to amass capital, centralize management, and focus on maximizing shareholder value enables corporations to contribute immensely to our nation's economic success. Congress and numerous state legislatures have recognized that these same attributes can compromise our democratic institutions and distort our market economy. The ability of corporations to accumulate capital puts at

their disposal quantities of money and influence that dwarf all other available sources of political contributions. The focus on maximizing profit leads corporations to seek to reduce economic competition and to privatize public goods through political action. Finally, centralized management enables corporate managers to engage in rent-seeking political behavior.

A. Corporations' Ability to Amass Capital Will Distort the Political Process

President Theodore Roosevelt's message to Congress in 1905 recognized the central role that corporations assumed in American life: "The corporation has come to stay, just as the trade union has come to stay. Each can and do and has done great good. . . . But each should be sharply checked where it acts against law and justice." 40 Cong. Rec. 91. Against this backdrop, and given his own experience with corporate political spending, President Roosevelt urged Congress to take action:

> All contributions by corporations to any political committee for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes . . . . [T]he national and the several State legislatures [should] forbid any officer of a corporation from using the money of the corporation in or about any election . . . .

40 Cong. Rec. 96 (*partially quoted in United States v. United Auto. Workers*, 352 U.S. 567, 572 (1957)).

The oversized role that corporations played in the financing of the presidential elections of 1896, 1900, and 1904 compelled President Roosevelt to action. Every major trust had contributed at the urging of political "bosses" such as Mark "Boss" Hanna. Standard Oil alone gave $250,000 to the presidential campaigns in 1896 and 1900. Louise Overacker, MONEY IN ELECTIONS 107 (1932). President Roosevelt's 1904 campaign accepted $150,000 from companies controlled by J. P. Morgan and $100,000 from Standard Oil, along with corporate money from International Harvester, Bethlehem Steel, and General Electric, among others. Robert E. Mutch, CAMPAIGNS, CONGRESS, AND COURTS 3 (1998). A former Republican national party treasurer explained "that corporations had furnished 73.5 percent of the 1904 presidential campaign fund." *Id.*

Congress responded by enacting legislation prohibiting corporate spending in federal elections. *See, e.g.*, Act of Jan. 26, 1907, ch. 420, 34 Stat. 864 (the Tillman Act); *see also* 2 U.S.C. § 441b(a). Today, as a result of an unbroken series of amendments strengthening the limits on corporate funds in campaigns, candidates, political parties, and political committees may not raise money from corporations, nor may corporations make independent expenditures.[3] Corporations must participate in the political process under essentially the same rules as other actors in the process by forming separate

[3] Candidates, political parties, and PACs can only raise money through limited contributions from individuals, permanent residents of the United States, and non-governmental contractors. *See* 2 U.S.C. §§ 441c(a), 441e(a), 441i(a).

segregated funds, commonly referred to as PACs, which may solicit and accept voluntary contributions from corporate employees and individual shareholders. 2 U.S.C. § 441b(b)(2)(C). PACs are an important, but not dominant, source of political funds.

Overturning *Austin* and *McConnell* would radically change campaign financing. Throwing open the process to corporate treasury funds – a mix of domestic and foreign monies, earnings from government contracts, and general profits – would undermine the system of limited, voluntary contributions. All political committees, including candidate committees, derive their funds from individuals.[4] Without restrictions on corporate political spending, it stands to reason that lawmakers would seek to level the playing field by repealing the restrictions on candidate, party, and other political committees, opening the system to the very corruption that current law seeks to contain.

The financial resources controlled by a single large corporation dwarf the funds available to all other electoral participants combined. As noted earlier, in the last election cycle, ExxonMobil's PAC raised $950,434 in voluntary political contributions from its employees and shareholders.[5] All corporate PACs combined raised a total of approximately $150

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[4] A controlling shareholder could use corporate funds to make a political expenditure, a dissenting minority would first need to receive a taxable dividend.

[5] Fed. Election Comm'n, Summary Report for ExxonMobil Corporation Political Action Comm. (C00121368), 2007-08 Cycle.

million for contested congressional races. By stark contrast, ExxonMobil's profits during the same period were $85 billion,[6] or over 560 times the amount collected by all corporate PACs. A fraction of ExxonMobil's profits from a single year would be sufficient to fundamentally alter the terms of legislative debate over serious national issues.

There is no reason to believe that the imbalance in resources will not impact campaign financing, candidate and party platforms, legislation, and market efficiency.

B. Profit Maximization Promotes Unrestrained, Indiscriminate Political Spending

The drive to maximize shareholder profit leads corporations to seek to prevent or reduce competition, to privatize public goods, and to minimize taxation. Corporations often pursue these goals without regard for the larger societal or economic costs of their success.

A 2006 study of PAC contributions found that, for some firms, political spending pays handsomely:

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[6] Robert Bryce, *Exxon, Big Oil Profits Evil Only Until You Weigh Their Tax Bills*, U.S. NEWS & WORLD REP., Feb. 11, 2009, *available at* http://www.usnews.com/articles/opinion/2009/02/11/exxon-big-oil-profits-evil-only-until-you-weigh-their-tax-bills.html (last accessed July 28, 2009); Marianne Lavelle, *Exxon's Profits: Measuring a Record Windfall*, U.S. NEWS & WORLD REP., Feb. 1, 2008, *available at* http://www.usnews.com/articles/business/economy/2008/02/01/exxons-profits-measuring-a-record-windfall.html (last accessed July 28, 2009).

> [O]ur results imply that firms participate in the political system not from the standpoint of consuming a patriotic consumption good . . . but rather from the standpoint of creating positive net present value investments.

Michael J. Cooper et al., *Corporate Political Contributions and Stock Returns*, Oct. 24, 2006, at 24, *available at* http://ssrn.com/abstract=940790 (last accessed July 28, 2009). The specific benefits derived from political spending may include favorable tax treatment, winning government contracts, the imposition of tariffs or penalties on competitors, and favorable regulatory changes. *Id.* at 5. Even when the benefits are unclear, a corporation may feel obligated to make political expenditures to keep up with competitors who are doing the same.

> It is advantageous for ABC Corporation to invest in lobbying for regulations that secure its market position while harming that of its rival, XYZ Corporation. Given the size and scope of the regulatory structure in Washington, failure to engage in such activity can be detrimental to a firm's long term survival.

Ronnie J. Clayton et al., *Enron: Market Exploitation and Correction*, FINANCIAL DECISIONS, Spring 2002, at 13.

Recently, news surfaced that the non-profit American Conservative Union ("ACU") allegedly offered political support to FedEx in a clash with UPS over labor legislation, in exchange for a $3.4

million contribution to ACU. Neil A. Lewis, *A Conservative Organization is Accused of Offering Help in a Labor Dispute for a Price*, N.Y. TIMES, July 17, 2009, at A10. When FedEx declined ACU's offer, the organization's chairman allegedly threw his support behind UPS. *Id.* If *Austin* and *McConnell* are overturned, ACU could use corporate money secured in this manner to support its own preferred candidates.

In the years following Watergate, investigators uncovered illegal corporate campaign contributions to President Richard Nixon's re-election committee, including payoffs involving corporations subject to heavy regulation. The Watergate Special Counsel's report documents how major corporations discovered that political spending was in their financial interest. Examples of illegal corporate contributions include $150,000 from defense contractor Northrop Corporation, $100,000 each from Gulf, Phillips, and Ashland oil companies, and $55,000 and $40,000 from American Airlines and Braniff Airways, respectively. *Scandals: A Record of Corporate Corruption*, TIME, Feb. 23, 1976, *available at* http://www.time.com/time/magazine/article/0,9171,918067-1,00.html (last accessed July 28, 2009). Another political payoff at that time involved the largest dairy farmer's association, Associated Milk Producers, Inc., which "pledge[d] more than $2 million . . . in return for higher milk prices and other favors." *The Nation: The High Price of Higher Milk Prices*, TIME, June 10, 1974, *available at* http://www.time.com/time/magazine/article/0,9171,911381,00.html (last accessed July 28, 2009).

One of the most serious examples of political payoffs involved International Telephone & Telegraph ("ITT"). At the time, ITT was under investigation by the Justice Department for antitrust violations. In exchange for a $400,000 contribution to help finance the 1972 Republican presidential convention, President Nixon saw to it that the Department of Justice dropped its investigation. *See* Fred Emery, WATERGATE: THE CORRUPTION OF AMERICAN POLITICS AND THE FALL OF RICHARD NIXON 101 (1995).

The money trail does not always run in a straight line. As this Court noted in *Austin*, even non-profit organizations can exploit their status to amass corporate funds, thus enabling them to circumvent the restrictions on corporate political expenditures. *See Austin*, 494 U.S. at 664. The sordid tale of convicted lobbyist Jack Abramoff and his many powerful political allies illustrates the "laundering" of corporate money at its most egregious. Extensive investigations into Abramoff's dealings revealed how he secretly routed clients' funds to politicians through willing tax-exempt organizations. *See, e.g.*, Susan Schmidt and James V. Grimaldi, *Nonprofit Groups Funneled Money For Abramoff*, WASH. POST, June 25, 2006, at A1; R. Jeffrey Smith, *The DeLay-Abramoff Money Trail*, WASH. POST, Dec. 31, 2005, at A1.

Striking down *Austin* would remove restraints against conduit spending, effectively eliminating any restriction on corporate political uses of treasury funds. Indeed, the United States Chamber of Commerce ("Chamber"), writing as *amicus curiae* on the merits for Citizens United, has declared its

intention to spend millions on electioneering communications ("ECs") if allowed to mask corporate donor identities. (Chamber Br. at 6, 12).[7]

What is more consequential, individual firms will spend politically, as they have done historically, to maximize each firm's own profits, at times to the detriment of the overall economy and the health and well-being of the nation.

C. Corporate Centralized Management Facilitates Rent-Seeking Behavior by Managers

Political giving is not always motivated by profits; it may also be a matter of private rent-seeking. Empirical research reveals that corporate managers frequently engage in political spending for personal gain, under the guise of benefiting the corporation.

> An alternative reason why companies may donate is that, while companies do not have political preferences per se, their managers do. In this view, political donations need not be associated with firm performance and, in fact, subtract from firm value as they represent a cash outflow with no corresponding benefit to the firm's shareholders. *The political donations are a form of perquisites*

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[7] The Chamber reports spending $15.7 million on ECs in 2008. Biannual EC reports filed with the FEC show total corporate EC expenditures of $119.5 million in 2008. The Chamber was the largest spender with $24.3 million total, including $8.6 million for a Chamber sub-entity called "Americans for Job Security." These figures were compiled by the FEC at the request of CPA and The Zicklin Center.

> *consumption for the firm's managers, one that is often not transparent or visible to shareholders.*

Rajesh K. Aggarwal et al., *Corporate Political Contributions: Investment or Agency?*, Jan. 30, 2007, *available at* http://ssrn.com/abstract=972670 (last accessed July 28, 2009) (emphasis added).[8]

A 2006 survey of public company shareholders commissioned by *amicus* CPA found that 73 percent of respondents believe that corporate political giving is undertaken to advance corporate managers' private political agendas. Aaron Bernstein, *When Political Giving Doesn't Pay: Investor Groups Want Greater Board Oversight and Disclosure of the Political Contribution Process*, DIRECTORSHIP, June 1, 2008, *available at* http://www.politicalaccountability.net/index.php?ht=display/ArticleDetails/i/1416/pid/188 (last accessed July 28, 2009).

Enron was renowned in the corporate world for its adept political "investments." *See* Ronnie J. Clayton et al., *supra*, at 13. In 1999 and 2000, Enron hedged its risks by giving $426,500 to the Republican party and $362,000 to the Democratic party. Richard L. Berke, *Enron Pursued Plan to Forge Close Ties to Gore Campaign*, N.Y. TIMES, Feb. 18, 2002, at A1. Enron also gave $250,000 to the Republican National Convention's host committee and hired a

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[8] A common example of rent-seeking involves corporate managers spending corporate funds to influence personally beneficial tax changes. *See generally* Sanjay Gupta and Charles W. Swenson, *Rent-Seeking by Agents of the Firm*, 46 J. L. & ECON. 253 (April 2001).

Democratic strategist to help with "Democratic political outreach in the 2000 presidential election." *Id.*

The company itself gained from these donations initially (*see* Clayton, *supra*, at 13-15), but as the company's profits declined precipitously, executives such as Ken Lay, Jeffrey Skilling, and Andrew Fastow continued to reap the personal financial benefits obtained with shareholders' funds. *See, e.g.*, Carrie Johnson, *Enron's Fastow Gets 6 Years: Finance Chief's Sentence Reflects His Help Convicting Lay, Skilling*, WASH. POST, Sept. 27, 2006, at D1.

Private rent seeking sacrifices shareholder value to the financial and political agendas of corporate managers. The practice will only increase if this Court removes existing restraints on corporate political spending.

II. CORPORATE POLITICAL SPENDING PROHIBITIONS ARE THE ONLY MEANINGFUL SAFEGUARDS AGAINST CORRUPTION

A. Coordination Rules Cannot Isolate Independent Expenditure Committees

Coordination defines the line separating independent expenditures and contributions to candidate committees. *See* 2 U.S.C. §§ 431(17)(B), 441a(a)(7)(B)(i); *Buckley v. Valeo*, 424 U.S. 1, 47 (1976), 11 C.F.R. §§ 109.20-109.23. Any coordination between independent expenditure and campaign committees could render the expenditure a

contribution. *See Shays v. Fed. Election Comm'n*, 414 F.3d 76, 97 (D.C. Cir. 2005).

Should corporations be able to conduct independent expenditure campaigns, the Federal Election Commission's coordination rules will not be enough to prevent corruption. Even with tight regulation, "tacit coordination" between independent expenditure campaigns, run by seasoned political consultants who know how to execute a successful independent expenditure campaign, and candidate committees is easier than one might suspect:

> [T]acit coordination is easy. Those making independent expenditures can hire the pollsters and political consultants who work for a candidate's campaign, or mutual friends can guide "independent" expenditures in the direction desired by a candidate.

Jeffrey A. Miron, *Campaign Finance Regulation*, LIBRARY OF ECONOMICS AND LIBERTY, Jan. 2, 2001, *available at* http://www.econlib.org/library/Columns/Mironcampaign.html (last accessed July 28, 2009).

Sensitive to the associational interests that arise, the Federal Election Commission's coordination rules only prohibit coordination with respect to specific expenditures. 11 C.F.R. § 109.21(c). More general offers of support do not transgress the rules. Corporate representatives will have no difficulty under the rules conveying the objects of a corporate political spending program.

Even with more tightly drawn coordination rules, independent expenditure committees could effectively assist a candidate without any direct,

overt lines of communication between the two. Instead, tacit coordination arises when the independent expenditure committee hires former candidate staffers, including both political and congressional staffers, pollsters or public relations firms shared with the candidates, or by simply repeating the candidate's message.

Even if the coordination rules were up to the task, they would be insufficient to guard against the most pernicious form of corruption. Both bribes and extortion can corrupt the legislative process. Extortion is the greater danger, however, because it often leaves no trail. Nothing is given; the threat is sufficient. The threat of massive independent spending will often be sufficient to secure the regulatory forbearance or action sought.[9]

B. Objecting Shareholders and Directors Cannot Check Corporate Political Activity

Corporations are not proxies for their shareholders. While corporate managers may spend freely with expectations of reaping shareholder returns, or of simply avoiding political backlash, shareholders and directors themselves are much

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[9] Similar is the expansion of political parties' role in elections following *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), which demonstrates the broad ramifications to the campaign finance landscape that follow from a change in independent expenditure rules. *See* Campaign Finance Institute, *Party Independent Spending Soars*, Nov. 11, 2004, *available at* http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=55 (last accessed July 28, 2009).

more skeptical of the value of corporate political involvement. *See* Aaron Bernstein, *supra*. Yet shareholders and directors often cannot effectively voice their dissent.

The views of a large public corporation and its individual officers or managers do not mirror those of shareholders and employees, who often represent a diverse cross-section of the public. Though many individual shareholders and directors vocally oppose questionable uses of corporate funds, they lack the means to significantly influence corporate political spending decisions. The vast majority of stock in the United States – approximately 66 percent – is owned by institutional investors. *See*, Colin Diamond et al., *New Media and Retail Shareholder Participation*, BLOOMBERG LAW REPORTS, Apr. 6, 2009, at 1.[10] Consequently, it is highly unlikely that aggregate corporate political spending represents the collective will of the individual or beneficial shareholders.

The voluntary contributions that a corporate PAC receives from its shareholders and employees are a more accurate measure of support of the corporation's political program. They operate under the same legal constraints as other players in the process, thus avoiding the distorting effects of the "state-conferred corporate structure that facilitates the amassing of large treasuries," which preoccupied the Court in *Austin*. *Austin*, 494 U.S. at 660.[11]

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[10] Keeping with their fiduciary responsibility, institutional investors hesitate to express their political preferences.

[11] *See also Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 163 (2003) ("The [PAC] option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of

When corporations make political expenditures without knowing how or why those expenditures yield benefits, political spending is at best a costly gamble.[12] Many corporations and active shareholders recognize that better corporate governance is associated with lower levels of political donations. *See* Aggarwal et al., *supra*, at 2. It may be this concern that has shareholders wanting more internal controls over corporate political giving. CPA's 2006 poll of shareholders shows that "[m]ore than 90% of respondents backed more disclosure and 84% wanted board oversight and approval of such giving." Jeanne Cummings, *Investors Seek Clarity on Campaign Giving: Pressure Grows on Corporations to Improve How They Disclose and Track Political Donations*, WALL ST. J., Apr. 5, 2006, at A4 (reporting on CPA's shareholder poll).

The Court's other concern in *Austin*, conduit spending by corporations, also impairs the ability of shareholders and directors to effectively monitor corporate political activity. The use of conduits obscures the amount of corporate political contributions and their true nature and purpose. Shareholders and directors cannot act as a check on such potentially criminal behavior by their

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some shareholders or members, and it lets the Government regulate campaign activity through registration and disclosure.").

[12] Indeed, corporations frequently make political donations without even knowing exactly where the money is going. *See* Jeanne Cummings, *Investors Seek Clarity on Campaign Giving: Pressure Grows on Corporations to Improve How They Disclose and Track Political Donations*, WALL ST. J., Apr. 5, 2006, at A4.

corporations if the campaign finance system allows corporate donors to operate in the dark.

III. THE COURT SHOULD NOT REVERSE ITS DEFERENCE TO CONGRESS

Congress and state legislatures, acting at the behest of voters, have identified corporate political spending in candidate elections as a threat to our electoral processes. In *Federal Election Commission v. National Right to Work Committee*, this Court held that the "careful legislative adjustment of the federal election laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations *warrants considerable deference*." 459 U.S. 197, 209 (1982) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937)) (second citation omitted) (emphasis added). The Court acknowledged the "actual and apparent corrupti[ve]" effects of corporate money on elections and the political system, and "accept[ed] Congress's judgment" and upheld the challenged limitation on corporate PAC solicitations. *Id.* at 209-10; *accord Beaumont*, 539 U.S. at 155.

This Court has recognized efforts to instill public confidence in government, even when doing so involves First Amendment interests. One example is *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973), which upheld political prohibitions on certain executive agency employees. *Id.* at 564-65. The Court balanced the employees' First Amendment interests against the government's interests in promoting merits-based public employment. *Id.* at

557; *see also id.* at 567 ("Neither the right to associate nor the right to participate in political activities is absolute. . . . Nor are the management, financing, and conduct of political campaigns wholly free from governmental regulation.") (footnote and citations omitted); *see also Nat'l Right to Work Comm.*, 459 U.S. at 207-08 ("[W]e conclude that the associational rights asserted by respondent may be and are overborne by the interests Congress has sought to protect in enacting § 441b.").

* * *

As President Roosevelt reminded Congress:

> The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign—that is, to the Government, which represents the people as a whole—some effective power of supervision over their corporate use.

40 Cong. Rec. 91. This holds true in both the economic and political marketplaces.

Competition in the political marketplace is inextricably linked to competition in the economic marketplace. A competitive marketplace is an open, dynamic, and efficient one. When corporations are able to secure through politics what they cannot achieve through economic competition, oligopolies and monopolies result, which may pose as great a detriment to our economy as corruption is to our body politic.

These time-honored principles are no different today than they were at the turn of the 20th century. Our nation's leaders have always understood the dangers that unchecked corporate political spending pose to our democracy and market economy. Answering this Court's question, *Austin* and *McConnell* should be affirmed.

CONCLUSION

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AMICUS CURIAE BRIEF

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Supreme Court, U.S.
JUL 31 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iv
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	5
I. THE GOVERNMENT MUST PROVE THAT ANY RESTRICTION ON CORPORATE ELECTORAL ADVOCACY IS NARROWLY TAILORED TO MEET A TRULY COMPELLING NEED.	5
II. *AUSTIN*'S ASSUMPTION THAT IMMENSE CORPORATE WEALTH DISTORTS ELECTIONS WAS FACTUALLY UNSUPPORTED AND IS UNSUPPORTABLE.	6
A. *Bellotti* Held That *Austin*'s Theory Of Corruption Could Not Even Be Considered Without A Supporting Demonstration.	7

Contents

Page

B. Readily Available Evidence Does Not Support The Compelling Interest Assumed To Exist In *Austin*. 8

C. *Austin*'s Professed Concern With Preventing "Distortion" Really Is A Constitutionally Forbidden Effort To "Level The Playing Field." 12

D. *Austin*'s Professed Interest In Limiting Corporate Speech To Ideas The Public Supports Is Contrary To The First Amendment. 13

III. *AUSTIN*'S CATEGORICAL BAN ON CORPORATE ADVOCACY IS NOT NARROWLY TAILORED TO PREVENT GREAT WEALTH FROM DISTORTING ELECTIONS. 14

IV. THIS IS A PROPER CASE IN WHICH TO OVERRULE *AUSTIN*. 19

CONCLUSION 21

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Agostini v. Felton,
521 U.S. 203 (1997) 20

Associated Press v. United States,
326 U.S. 1 (1945) 5, 14

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494 U.S. 652 (1990) ..... *passim*

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424 U.S. 1 (1976) 5, 12

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Page

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Page

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Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b i

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Page

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INTEREST OF THE AMICUS[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest not-for-profit business federation, representing an underlying membership of over 3,000,000 businesses and business associations. For almost a century, the Chamber has played a key role in advocating on behalf of its membership, which is composed mostly of business corporations. The Chamber's interests in this case are set out in more detail in its initial brief in this action. *See Brief of Amicus Curiae Chamber of Commerce of the United States of America in Support of Appellant* ("Chamber Br.") at 1-3.

SUMMARY OF ARGUMENT

On December 7, 1911, President (later Chief Justice) William Howard Taft called for a national organization to increase involvement of American business in national governance, particularly government policies affecting foreign commerce. 48 Cong. Rec. 75 (1912). A year later, the Chamber was founded.

Unfortunately, government has not always shared President Taft's openness to business participation. At all levels of government, elected officials who oppose

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1. All parties have consented to the filing of this amicus curiae brief as indicated by letters of consent filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

business viewpoints have sought to keep them from being expressed, particularly when their reelections are at stake. Rather than explicitly taking an anti-business stance, these restrictions often target speech by "corporations" to suppress the business viewpoint.[2] Corporate speech is suppressed even though it is independent of any candidate, campaign, or political party and presents no threat or appearance of quid pro quo corruption. (The viewpoints of other groups, such as labor unions, often have been similarly suppressed.)

That categorical suppression of corporate electoral advocacy rests on *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). There, for the first time, a divided Court sustained a wholesale statutory ban on corporate candidate advocacy. *See* Brief for the Appellee at 33 n.11 (no prior cases so held).

Austin rests in fundamental conflict with *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which rejected a categorical ban on corporate advocacy concerning ballot initiatives. Strikingly, *Austin* did not rely on the involvement of candidates to distinguish *Bellotti*. Instead, it held that, because all corporations have the structural potential to achieve immense wealth,

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2. Speaking broadly, a "corporation" is an association that is treated in law as a "person" with existence, interests, and powers distinct from its owners, founders, or members. *See Black's Law Dictionary* (9th ed. 2009); *Hancock v. Louisville & N. R. Co.*, 145 U.S. 409, 415-16 (1892). Many limited liability companies ("LLCs") are treated as corporations by the FEC. *See* 11 C.F.R. § 110.1(g). An LLC has those basic corporate attributes and, for purposes of this brief, is considered a corporation.

which could distort elections, there was a compelling need to ban all public corporate communications expressly advocating for or against a candidate. 494 U.S. at 659-60. It based this ruling on mere assertion, even though *Bellotti* had held that, in the absence of a factual demonstration, a theory of distortion caused by corporate wealth could not even be considered. 435 U.S. at 789.

As years passed and *Austin* proved impossible to reconcile with basic First Amendment principles, one member of the *Austin* majority disavowed his vote, *McConnell*, 540 U.S. 350 (2003) (Rehnquist, C.J., dissenting) (adopting Justice Kennedy's opinion in full), and other Justices expressed willingness to reconsider the case. Nevertheless, *Austin* became the foundation for sweeping restrictions on the speech of business corporations. In particular, the electoral advocacy of the Chamber – a not-for-profit corporation – and of millions of its corporate members has been suppressed. This has occurred even though 96% of Chamber members are businesses with fewer than 100 employees, far from the immense aggregations of wealth hypothesized in *Austin*. Suppression has been imposed even when candidates have directly attacked business interests and when corporations have unique and valuable insight into the likely consequences of electing or defeating particular candidates. Although this Court has protected the ability of corporations to discuss "issues," that is no substitute for direct and explicit speech about candidates. Nor is the clumsy and expensive "PAC" option equivalent to the right to publicly, swiftly, and freely address candidates and campaigns. *See Austin*, 494 U.S. at 652; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252-54 (1986) ("*MCFL*").

The Court now has asked if *Austin* should be overruled. Strongly interested in restoring free corporate speech, the Chamber submits this amicus brief urging this Court to overrule *Austin* and hold that the corporate form of a speaker is not a constitutional basis for banning core speech. *Austin* should be overruled because:

- *Austin* erroneously allowed the Government to assume, rather than prove, that independent corporate candidate advocacy will distort elections when, in fact, the experience of the majority of states – which allow free independent advocacy by corporations – is to the contrary, and the Government now has abandoned *Austin*'s distortion rationale.

- *Austin*'s professed interest in eliminating "distortions" due to "wealth" boils down to an attempt to "equalize" speech through suppression that is forbidden by the First Amendment.

- *Austin*'s categorical ban on corporate speech is not narrowly tailored to prevent the effects of immense wealth because (a) the great majority of corporations are not and never become wealthy, and (b) wealthy individuals spend freely on candidate advocacy, even if their wealth derives from corporations.

This is a proper case in which to overrule *Austin* because the Government relied exclusively on *Austin* to carry its burden of justifying suppression of Citizens

United's speech. Overruling *Austin* will both provide full relief to Citizens United and correct ongoing First Amendment public injury flowing from *Austin*'s erroneous holding.

ARGUMENT

I. THE GOVERNMENT MUST PROVE THAT ANY RESTRICTION ON CORPORATE ELECTORAL ADVOCACY IS NARROWLY TAILORED TO MEET A TRULY COMPELLING NEED.

A "major purpose of [the First Amendment] was to protect the free discussion of government affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally . . . ." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976). Indeed, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). First Amendment protection for such speech serves the interests of the entire country, not just would-be speakers. "[S]elf-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.'" *Bellotti*, 435 U.S. at 777 n.12 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

"The inherent worth of [such] speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777. Thus, before the government can suppress corporate

speech (or spending for speech) concerning public issues or candidates, it must prove a "compelling" need will be met by means that are "closely drawn." *Id.* at 786 (collecting authority); *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (controlling opinion) ("*WRTL II*").[3]

Austin paid lip-service to these settled principles. 494 U.S. at 654, 657. Thus, it held the test was whether a statute banning independent express advocacy by corporations was "narrowly tailored to serve a compelling state interest." *Id.* at 657. But having recognized the test, *Austin* failed to properly apply it.

II. *AUSTIN*'S ASSUMPTION THAT IMMENSE CORPORATE WEALTH DISTORTS ELECTIONS WAS FACTUALLY UNSUPPORTED AND IS UNSUPPORTABLE.

The statute at issue in *Austin* banned *independent* corporate advocacy, as opposed to speech coordinated with a candidate or campaign. The *Austin* majority did not attempt to justify the ban as necessary to avoid the quid pro quo "corruption or appearance of corruption" that were "the only legitimate and compelling government interests" that had been accepted as a

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3. Proof is necessary. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129-30 (1989). If legislative findings are proffered, the record must prove that the legislature "has drawn reasonable inferences based on substantial evidence." *Turner*, 512 U.S. at 666; *see also Sable*, 492 U.S. at 129; *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) (no deference to "legislative finding" unsupported by "actual facts").

sufficient basis to limit core First Amendment speech. 494 U.S. at 658-59 (quoting *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)); *see also Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008).

Instead, *Austin* relied on "a different type of corruption." *Id.* at 660. This "corruption" was said to result from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id. Austin* was mistaken.

A. *Bellotti* Held That *Austin*'s Theory Of Corruption Could Not Even Be Considered Without A Supporting Demonstration.

Austin's theory that corporate wealth would distort and impair the integrity of elections previously had been asserted in *Bellotti* in an effort to justify forbidding corporations to support or oppose ballot initiatives. In *Bellotti*, the State had claimed corporate "participation would exert an undue influence on the outcome of a referendum vote, and – in the end – destroy the confidence of the people in the democratic process and the integrity of government." 435 U.S. at 789. The State asserted "corporations are wealthy and powerful and their views may drown out other points of view." *Id.* But *Bellotti* responded by demanding proof:

> [T]here has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any

> threat to the confidence of the citizenry in government.

Id. at 789-90 (footnote omitted). Since there was no proof, *Bellotti* held that the asserted compelling interest did not even "merit our consideration." *Id.* at 789.

Austin cited *Bellotti* for the proposition that "a legislature might demonstrate" that corporate wealth is corruptive. But *Austin* then failed to require such a demonstration; instead it was content that "the State has articulated a sufficiently compelling rationale." *Id.* at 660. By disregarding *Bellotti*'s demand for a *demonstrated* need – a holding supported by abundant other authority[4] – *Austin* committed fundamental error.

B. Readily Available Evidence Does Not Support The Compelling Interest Assumed To Exist In *Austin*.

There was and is no reason for the government to rely on assertion instead of proof. At least 26 states and the District of Columbia permit corporations (as well as labor unions, and similar groups) to engage freely in independent electoral advocacy on the same basis as individuals.[5] If *Austin* were correct in speculating that

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4. *See supra* p. 5-6 and note 3.

5. The following twenty-seven jurisdictions permit both direct corporate contributions to candidates and unlimited corporate independent expenditures: Arkansas, California, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, (Cont'd)

corporate speech would result in distortions due to the deployment of immense corporate wealth, such effects should appear in these states. The Government offered no such demonstration, nor has the Chamber identified any. Instead, the two reports identified by the Chamber and discussed below show no basis for suppressing corporate speech.

California allows corporations (and labor and other groups) to engage freely in independent campaign advocacy. In June 2008, the California Fair Political Practices Commission ("FPPC") issued a report entitled *Independent Expenditures: The Giant Gorilla in Campaign Finance.*[6] The report was hostile to all independent expenditures, portraying them as a "loophole" that "circumvent[s] state limits on direct campaign contributions." *Id.* at 6. It speculated that candidates may tend to favor those whose independent speech supports them, but it did not suggest that this concern applies more to corporations than to other speakers. To the contrary, it reported that the highest-

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(Cont'd)

Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey (for corporations in non-regulated industries), New Mexico, Oregon, South Carolina, Utah, Vermont, Virginia, and Washington. Research identified no statutory or regulatory prohibition on corporate independent advocacy in these states, and that research was confirmed by telephoning the state regulatory bodies. The Supplemental Brief for the Appellee (at 18 n.3) reports a consistent count. This demonstrates that overruling *Austin* would not affect a majority of the states.

6. Available at http://www.fppc.ca.gov/ie/IEReport2.pdf.

spending independent group received 80% of its funding from two wealthy individuals. *Id.* at 11. And it found that none of the primary supporters of the three highest spending independent advocacy groups were corporations. *Id.* at 11-12. Instead, they were individuals, Indian tribes, and labor unions. *Id.* None of its five recommendations involved banning independent candidate advocacy by corporations. *Id.* at 82-83.

All 80 California Assembly districts and 20 Senate districts held elections in 2008, http://www.joincalifornia.com/election/2006-11-07. The report discussed the ten state legislative primary races in 2008 in which the highest levels of independent spending occurred. *Id.* at 61-67. Those ten races accounted for 78% ($9.4 million) of the statewide total of $12 million in independent expenditures on the primary races. Thus, in the great majority of these legislative races (90 of 100), there was little independent spending by corporations or anyone else. Strikingly, in six of the ten analyzed races, the candidate who received the highest level of independent advocacy support lost. *Id.* at 62-67.

California held over one thousand legislative and executive elections between January 1, 2001, and December 31, 2006.[7] The report analyzed twelve races where total independent spending from all sources exceeded candidate/campaign spending. *Id.* at 23-36. In seven of those twelve, the candidate who benefited from the highest level of independent spending lost the election. *Id.* at 26, 27, 30-32, 35, 36. In four of those seven races, the winner had less than approximately 1/3 the independent

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7. This information is available from the Secretary of State's website at: http://www.sos.ca.gov/elections/elections_elections.htm.

advocacy support of the loser. *Id.* at 26, 30, 31, 36. Indeed, in the 2004 general election in the 76th Assembly District, the winner was supported by only $24,108 in independent spending, while the loser benefited from $906,145, or forty times more. *Id.* at 30.

The report identified just three races in which independent spending allegedly "may" have provided the margin of victory. *Id.* at 37-40. It apparently reasoned that, because these races were close, the large independent expenditures may have swayed enough voters to tip the outcome. If this tenuous inference were accurate, it would not matter since "the fact that advocacy may persuade the electorate is hardly a reason to suppress it." *Bellotti*, 435 U.S. at 790-91. There was no claim or showing that, in these races, other voices were not also heard. In short, the report does not show – and actually refutes – any claim that corporate wealth dominates or distorts California elections.

The aggregate numbers in California tell a similar story. According to a 2009 FPPC report entitled *The Billion Dollar Money Train* (at 10, 24),[8] California candidates and officeholders raised over $721 million for their campaigns from January of 2001 until December of 2008. During that same period, independent expenditures from all sources amounted to less than one-sixth of that amount, or approximately $110 million.

The State of Washington also allows independent corporate campaign advocacy. Washington's Public Disclosure Commission collected data on spending in 2008

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8. Available at: http://www.fppc.ca.gov/reports/billion_dollar_money_train.pdf.

legislative and executive elections.[9] Legislative candidate campaigns spent $21,127,152. By comparison, total independent expenditures from all sources supporting or opposing candidates was $2,179,447. State executive candidates and campaigns spent $31,693,004. Independent expenditures supporting and opposing candidates totaled $21,279,612. As with California, there was no showing that corporate spending dominated or distorted the elections.

In sum, for the 19 years since *Austin*, a majority of the states have continued to allow corporations to spend freely on independent candidate advocacy. Contrary to *Austin*'s hypothesis, there is no evidence that elections in those states have been corroded and distorted by immense corporate wealth. Indeed, the Government's supplemental brief no longer defends a distortion rationale.

C. *Austin*'s Professed Concern With Preventing "Distortion" Really Is A Constitutionally Forbidden Effort To "Level The Playing Field."

Austin never clearly explained the "distorting effects" that it feared from advocacy funded by "immense aggregations" of corporate wealth. 494 U.S. at 660. Its basic concern, however, was that corporations could "unfairly" dominate "in the form of independent expenditures." *Id.* In other words, some speakers and ideas would receive more support than others.

However, efforts to "level the playing field" by hobbling speakers with greater assets are forbidden by the First Amendment. *Buckley* rejected any compelling

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9. The data is available at: http://www.pdc.wa.gov/QuerySystem/candidates.aspx.

governmental interest "in equalizing the relative ability of individuals and groups to influence the outcome of elections." 424 U.S. at 48-49. Its holding was strongly reaffirmed in *Davis v. FEC*, 128 S. Ct. 2759 (2008) (noting the "ominous implications" of leveling). *See* Samuel Gedge, Comment, *"Wholly Foreign to the First Amendment": The Demise of Campaign Finance's Equalizing Rationale in* Davis v. Federal Election Commission, 32 Harv. J. L. & Pub. Pol'y 1197 (2009).

Davis is striking because the imbalance involved candidate spending central to the campaign. By contrast, this case involves independent speech, not coordinated with any candidate. Moreover, in *Davis* the candidate's great wealth derived from his successful corporation – I Squared R Element Co. *See id.* at 1206. Yet his benefit from exploiting the corporate structure was not proffered as a reason to subject him to "leveling."

Thus, *Austin*'s speculative "compelling interest" boils down to "leveling," which the First Amendment forbids.

D. *Austin*'s Professed Interest In Limiting Corporate Speech To Ideas The Public Supports Is Contrary To The First Amendment.

Austin comments that corporate advocacy may "have little or no correlation to the public's support for the corporation's political ideas" and praises the speech ban for "ensur[ing] that expenditures reflect actual public support for the political ideas espoused by corporations." 494 U.S. at 660. Throughout history, many governments have sought to limit independent speech to ideas the public

already supports.[10] But the First Amendment's vision assures competing views on public issues from "diverse and antagonistic sources." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). *Austin*'s endeavor to ensure that corporations say only those things the public already supports is another reason it should be overruled.

III. *AUSTIN*'S CATEGORICAL BAN ON CORPORATE ADVOCACY IS NOT NARROWLY TAILORED TO PREVENT GREAT WEALTH FROM DISTORTING ELECTIONS.

The "compelling" interest *Austin* relies upon is "the corrosive and distorting effects of immense aggregations of wealth . . . when it is deployed in the form of independent expenditures." 494 U.S. at 660. Yet the remedy it approves is not narrowly tailored to address such wealth.

After all, most corporations are of modest size and wealth. According to the Small Business Administration, 56% of new employer businesses close within four years, and more than 70% close within seven years.[11] If the mere

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10. *Austin* does not find that protecting dissenting shareholders is a compelling interest. 494 U.S. at 663. It mentions that issue only to distinguish *MCFL*, 479 U.S. at 263, in which the basic rule later adopted by *Austin* was not challenged. Proper use of corporate assets is a matter of internal corporate governance. The government has shown no compelling need to resort to categorical bans on core corporate speech. *Bellotti*, 435 U.S. at 794-95. Given the wide range of political corporate speech protected by *Bellotti* and *WRTL II*, a ban on candidate advocacy is underinclusive and untailored.

11. U.S. Small Business Administration, *FAQs: Frequently Asked Questions*, Sept. 2008, at 1, http://www.sba.gov/advo/stats/sbfaq.pdf.

fact of incorporation guaranteed vast wealth, those figures would be very different. Few of the successful florists, retail shops, restaurants, service stations, and myriad other commonly incorporated businesses that surround us have aggregated immense wealth. The same is true of the 96% of the Chamber's members that have fewer than 100 employees. In short, immensely wealthy corporations are very much the exception, rather than the rule.

At the same time, immensely wealthy individuals play a significant role in our political process.[12] For example, during the 2003-04, 2005-06, and 2007-08 election cycles, the following individuals made the following donations to other organizations to fund their independent advocacy, drawing on personal wealth derived from business corporations:

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12. This Court recently dealt with issues arising from large sums spent by an individual in a state judicial race. *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009). Although that individual's wealth derived from a corporation, the Court did not suggest that the speech should or could have been banned. Instead, it adopted the tailored remedy of judicial disqualification.

Spending By Wealthy Individuals For Independent Advocacy 2003-08[13]

Donor	Amount 2003-08	Corporation
George Soros	$36,600,000	Soros Fund Management LLC
Peter Lewis	$25,000,000	Progressive Casualty Insurance Company
Stephen Bing	$19,000,000	Shangri-La Entertainment
Bob Perry	$18,900,000	Perry Homes
Herbert & Marion Sandler	$13,700,000	Golden West Financial Corporation
Jerrold Perenchio	$10,200,000	Univision
Linda Pritzker	$5,900,000	Hyatt & Marmon
Alida Messinger	$5,000,000	Rockefeller heir (Standard Oil)
Sheldon Adelson	$4,300,000	Las Vegas Sands Corp.
Carl Lindner	$4,000,000	American Financial Group

13. Matt Kelley and Fredreka Schouten, *Wealthy Few Provide Cash for Independent Political Groups*, USA Today, July 22, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-07-21-donorinside_N.htm. In this and the next table, listed corporations are those commonly identified as the foundation of the donor's wealth, though many wealthy persons have complex investments.

Similarly, this table lists some candidates with corporation-based wealth and their personal spending directly on identified campaigns:

Personal Funds Spent By Wealthy Candidates[14]

Name	Race	Amount	Corporation
Jon Corzine	2000 Sen. N.J. 2005 Gov. N.J.	$63,000,000 $43,000,000	The Goldman Sachs Group, Inc.
Michael Bloomberg	2001 NYC Mayor 2005 NYC Mayor	$73,000,000 $85,000,000	Bloomberg L.P.[15]

14. *10 Candidates Who Spent Giant Sums of Their Personal Wealth*, Real Clear Politics, July 9, 2009, http://www.realclear politics. com/lists/candidate_ spenders. This list is not exhaustive. Other candidates for state office have spent more than $20 million on their campaigns, including: Tom Golisano ($100 million on three New York gubernatorial bids, plus $5 million for other state campaigns, Paychex, Inc.); Tony Sanchez ($60 million in a 2002 bid for Texas Governor, Sanchez Oil & Gas Corporation); and Al Checchi ($40 million in the 1998 California Democratic primary for Governor, Northwest Airlines). Tom Precious, *Golisano Bids to Finance Reforms*, Buffalo News, July 9, 2008; R.G. Ratcliffe, *Millionaires Gave a Third of All Money Raised for '06 State Races*, Houston Chronicle, Sept. 27, 2007; Norman Solomon, *Calculating How Much Candidates Spend for Every Vote*, Cleveland Plain Dealer, June 5, 1998.

15. It is an interesting question whether *Austin*'s holding applies to a limited partnership. In any event, Bloomberg L.P. holds ownership interests in business corporations.

Jay Rockefeller	1984 Sen. W. Va.	$9,000,000	Rockefeller heir (Standard Oil)
Jared Polis	2008 Cong. CO	$5,992,550	Provide Commerce, Inc.
Herb Kohl	1988 Sen. WI 1994 Sen. WI 2000 Sen. WI 2006 Sen. WI	$7,491,000 $6,500,000 $5,000,000 $6,000,000	BATUS Inc. & Kohl's
Michael Huffington	1994 Sen. CA	$28,000,000	Huffco
Ross Perot	1992 President	$63,500,000	EDS
Steve Forbes	1996 President 2000 President	$37,900,000 $38,700,000	Forbes, Inc.
Ned Lamont	2006 Sen. CT	$12,700,000	J.P. Morgan & Co. (heir)
Blair Hull	2004 Sen. IL	$28,000,000	Hull Trading Company

In short, banning speech by corporations is not a tailored way to address the effects of wealth on elections, assuming "distortion" is a compelling justification for a ban. Attempting a work-around, *Austin* stated that all corporations benefit from "the unique state-conferred corporate structure that facilitates the amassing of large treasuries [and this] warrants the limit." 494 U.S. at 660. On that theory, *Austin* ruled that the categorical ban was "precisely targeted to eliminate the distortion caused by corporate spending." *Id.*

But immense wealth cannot distort until it first has been aggregated and spent. *Austin* actually recognizes as much, saying that "corporate wealth can unfairly influence elections when it is *deployed*." *Id.* (emphasis added). Banning all corporate candidate advocacy because some corporations some day may become wealthy is not a tailored response to distortions caused by the spending of great wealth.

IV. THIS IS A PROPER CASE IN WHICH TO OVERRULE *AUSTIN*.

To defeat this "as applied" challenge, "the *Government* must prove that applying [the challenged statute to Citizens United] furthers a compelling interest and is narrowly tailored . . . ." *WRTL II*, 127 S.Ct. at 2664. The Jurisdictional Statement brought that issue before this Court, asking if Citizens United's speech was properly "subject to regulation as an electioneering communication," and it now has been fully briefed. To meet its burden, the Government argued that, because Citizens United is a corporation and received corporate funds, suppressing its speech is justified by the compelling interest and categorical ban approved by *Austin*. Brief for the Appellee at 15. Thus, the Government placed *Austin* at issue.

As demonstrated above, *Austin* is deeply flawed, irreconcilable with settled precedent, and deprives the public of core speech by a wide range of corporations. Rather than building a Rube Goldberg edifice based on special (and disputed) characteristics of Citizens United – defeating the "imperative for clarity," *WRTL II*, 127 S. Ct. at 2669 n.7 – the Court should rule that *Austin*

erred and that the fact that a speaker is a corporation is not a constitutional basis for suppressing its independent political speech. Such a holding will provide full relief to Appellant and correct the ongoing First Amendment injury *Austin* is inflicting on the public, which is being deprived of the views of the Chamber, its corporate members, and corporations generally.

Overruling any holding of this Court is a serious step. At the same time, the Court recognizes its special obligation to assure that its constitutional holdings, which are not subject to correction by anyone else, are faithful to the Constitution the Court is sworn to uphold. *See Smith v. Allwright*, 321 U.S. 649, 665 (1944); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-07, 410 (1932) (Brandeis, J., dissenting). Where a constitutional ruling is "badly reasoned" or rests on "a misreading of precedent," this Court "has never felt constrained" to perpetuate constitutional error. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (collecting authority); *Allwright*, 321 U.S. at 665 (overruling is particularly appropriate where the error lies in applying a constitutional principle, rather than in discerning it). Instead, the proper step is to overrule the erroneous decision and restore the constitutional rights of appellant and many others. *See Agostini v. Felton*, 521 U.S. 203, 239 (1997) (declining to wait for a "better vehicle").

CONCLUSION

For the foregoing reasons, *Austin* should be overruled and the Court should hold that the facts that Appellant Citizens United is incorporated and has received money from business corporations provide no basis for restricting its core First Amendment right to engage in independent electoral advocacy.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF THE COMMITTEE FOR ECONOMIC DEVELOPMENT AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Long-Standing Restrictions On Using Corporate Treasury Funds In Campaigns Should Not Be Disturbed, Particularly In This Case 3

A. Congress Has Prevented Significant Corporate Involvement in Federal Elections for More Than a Century 4

B. Reversing *Austin* or *McConnell* Would Disregard the Deference Traditionally Accorded to Congressional Regulation of Corporate Electoral Expenditures 7

C. This Case Is a Particularly Poor Vehicle for Reversing *Austin* or *McConnell* 9

II. Overruling *Austin* Or *McConnell* Would Harm, Not Help, Corporate Interests 10

A. Corporations Would Spend on Electioneering to Secure Preferred Access to and Avert Retribution from Elected Officials, Not to Advance Ideas 11

B. Because Corporate Spending on Behalf of Candidates Often Lacks an Ideological Purpose, It Erodes Public Confidence in Business 15

III. Existing Rules Enable Corporations To Engage In Genuine Expression Without Exposing Them To Coercive Pressure To Advocate On Behalf Of Candidates 16

A. Issue Advocacy Provides a Healthy Outlet for Genuine Corporate Expression 17

B. Political Action Committees Are Robust Outlets for Corporate Views in Candidate Elections 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Federal Election Commission v. Beaumont, 539 U.S. 146 (2003) 8, 17, 19

Federal Election Commission v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 8, 20

Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 19

Federal Election Commission v. National Right To Work Committee, 459 U.S. 197 (1982) 7, 8, 17, 19

Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449 (2007) 17, 18

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McConnell v. Federal Election Commission, 540 U.S. 93 (2003) ..... *passim*

United States v. International Union United Automobile Workers of America, 352 U.S. 567 (1957) 4, 7

STATUTES

2 U.S.C. § 434(f)(3) 6

2 U.S.C. § 441b 5

2 U.S.C. § 441b(b)(2) 3

2 U.S.C. § 441i 6

Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1080 5

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Taft-Hartley Act of 1947, Pub. L. No. 80-101, 61 Stat. 159 5

Tillman Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) 4

LEGISLATIVE MATERIAL

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Declaration of Gerald Greenwald, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) (No. 02-1674) 12

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INTEREST OF *AMICUS CURIAE*[1]

The Committee for Economic Development ("CED") is a nonprofit, nonpartisan, and nonpolitical public policy organization directed by approximately 200 senior corporate executives and university leaders. Since its founding in 1942, its mission has been to use the leadership of the corporate community to support policies that promote economic growth. CED is a leading advocate for business interests on issues ranging from health care to corporate governance.

Businesses are the perceived beneficiaries of a rule allowing unfettered independent spending from corporate treasury funds to advocate the election or defeat of candidates for office. It is their First Amendment rights this Court supposedly would vindicate by reversing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the relevant portions of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). In this *amicus curiae* brief, CED seeks to counteract the assumption that corporations want more leeway to spend money on political campaigns. To the contrary, the business leaders who serve as CED's trustees believe that a decision striking down the ban on corporate electioneering expenditures would severely harm corporate interests.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Because this issue is critically important to this nation's businesses, CED respectfully urges this Court not to disturb the well-established regulatory regime built around *Austin* and *McConnell*.

SUMMARY OF ARGUMENT

The question posed in this Court's order regarding supplemental briefing is whether corporations have a First Amendment right to make independent expenditures from their treasury funds to support or oppose a candidate for public office. The recognition of such a right would have a profound and unwelcome impact on corporations and elections. This Court should leave in place its decisions in *Austin* and *McConnell* upholding restrictions on corporate electioneering.

The impact of striking down the electioneering restrictions would be profound because it would allow sustained, substantial corporate involvement in elections for federal office for the first time in this nation's history. When candidates devised new avenues to access corporate resources, Congress invariably closed those avenues quickly. Reversing *Austin* and *McConnell* would create the first major avenue for spending from corporate treasury funds that Congress could not close.

Businesses would not welcome such a regime because it would expose corporations to corrupt shakedowns for political money. Corporations would face intense pressure to provide indirect financial support for candidates to attract the attention of, and avoid retribution from, elected officials. Corporate electioneering would harm public confidence in

business, fueling the perception that large corporations secure unfair advantages by purchasing political influence. Yet each corporation would be helpless to get out of the political game, fearful of losing out in the economic marketplace to competitors that were willing to play ball.

Existing rules already give corporations the ability to speak on the issues that matter to them. Thus, the primary effect of overruling *Austin* or *McConnell* would be to promote political rent-seeking, not genuine expression of ideas. Such a decision would hurt rather than help business interests.

ARGUMENT

I. Long-Standing Restrictions On Using Corporate Treasury Funds In Campaigns Should Not Be Disturbed, Particularly In This Case.

This country's political tradition features a firmly established separation between corporate funds and candidate elections. The provision restricting electioneering communications—§ 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), 2 U.S.C. § 441b(b)(2)—is the latest in a long, unbroken line of statutes preserving that separation. This Court should not intervene to disturb the considered legislative judgment underlying § 203. That is especially true here because interested parties—litigants, Congress, and the business interests on whose behalf CED advocates—had no opportunity to assemble a factual record of the likely impact of striking down the electioneering ban.

A. Congress Has Prevented Significant Corporate Involvement in Federal Elections for More Than a Century.

From 1907 to the present, Congress has never allowed corporations to use their resources freely to influence federal elections. In fact, every time that existing laws have seemed inadequate to restrict such a use of corporate funds, Congress has acted promptly to address the inadequacy. For more than a century, federal elections have taken place under a consistent policy of highly restricted corporate involvement.

Businesses first began making significant campaign contributions in the late nineteenth century. *See* Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contributions Cases*, 5 Elec L. J. 293, 295 & n.5 (2006). As popular unease grew over corporations' electoral sway, Congress passed the Tillman Act in 1907. Pub. L. No. 59-36, 34 Stat. 864. Aimed at "purg[ing] national politics of . . . the pernicious influence of 'big money' campaign contributions," this Act banned corporations from contributing money from corporate treasury funds in connection with federal elections. *United States v. Int'l Union United Auto. Workers of Am.*, 352 U.S. 567, 572 (1957) ("*Automobile Workers*").

In the 1920s, politicians took advantage of the Tillman Act's use of the term "money contribution," which left a loophole allowing corporations to make unrestricted nonmonetary contributions (*e.g.*, loans, in-kind assistance, or use of corporate facilities).

Congress hastily closed this loophole through the Federal Corrupt Practices Act of 1925, replacing "money contribution" with "anything of value." Ch. 368, 43 Stat. 1070. Likewise, when the political influence of labor unions grew in the 1940s, Congress passed the Taft-Hartley Act, which applied the corporate contribution ban to unions. Pub. L. No. 80-101, 61 Stat. 159 (1947). Congress also prohibited both corporate and union independent expenditures for or against candidates. *Id.*

This regime held for almost half a century, though it was revised somewhat by the Federal Election Campaign Act of 1971 ("FECA"). Pub L. No. 92-255, 86 Stat. 3 (1972). FECA clarified that corporations could use treasury funds to pay for internal communications, registration and get-out-the-vote drives aimed at stockholders, and the establishment and operation of political action committees. 2 U.S.C. § 441b. FECA did not alter the existing contribution and expenditure bans.

More recently, in the 1990s, the explosive rise of issue advocacy and soft money challenged the tradition of separating corporate treasury funds from elections. "Issue advocacy" refers to advertisements that do not expressly call for the election or defeat of a specific candidate. "Soft money" refers to funds given to political parties for purposes such as registering voters, getting out the vote, and certain kinds of advertising. By the 2000 election cycle, corporate soft money contributions totaled 48% of all soft money receipts and often were given in sums of $100,000 or more by large companies. *See* Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, *in The Election After*

Reform: Money, Politics, and The Bipartisan Campaign Reform Act 112-18 (Michael J. Malbin ed., 2006).

Again, Congress acted quickly, passing the Bipartisan Campaign Reform Act of 2002. BCRA banned parties and candidates from receiving or spending soft money. 2 U.S.C. § 441i. It also extended the prohibition on corporate contributions and expenditures supporting "electioneering communication[s]"—advertisements that refer to a candidate and that are broadcast within sixty days of a general election or thirty days of a primary. 2 U.S.C. § 434(f)(3).

BCRA succeeded not only in eliminating corporate soft money but also in minimizing corporate electoral involvement overall. In 2004, corporate donations to so-called "527 committees," the main mechanism for circumventing the soft-money ban, totaled less than 13% of what corporations had given in soft money in 2000. Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups, in The Election After Reform, supra*, at 90. Corporate-funded advertising campaigns within the BCRA-designated time periods essentially vanished. *See id.* at 90.

Congress thus has consistently attempted to keep corporate money out of federal elections for more than a century. Its efforts generally have worked. For decades at a time, most notably from 1947 until the 1980s, the dam against large-scale corporate funding of elections held, and elections were conducted with minimal financial influence from corporate treasury funds. While candidates occasionally have identified new loopholes to access

unregulated corporate resources, Congress has moved with impressive speed to close each spigot soon after it opened. Periods of unfettered corporate activity are clearly the historical exception, not the rule.

B. Reversing *Austin* or *McConnell* Would Disregard the Deference Traditionally Accorded to Congressional Regulation of Corporate Electoral Expenditures.

This Court has repeatedly recognized that regulating corporate funds in elections is a delicate and difficult task better suited to legislative than judicial management. In *Automobile Workers*, for instance, the Court declined an opportunity to overturn the Taft-Hartley Act's prohibition on corporate and union expenditures. The Court acknowledged "the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *Automobile Workers*, 352 U.S. at 585. Because of Congress's expertise and the sensitivity of the subject, "[r]efusal to anticipate constitutional questions [was] peculiarly appropriate." *Id.* at 591.

Similarly, in *Federal Election Commission v. National Right To Work Committee* ("*NRWC*"), 459 U.S. 197 (1982), the Court held that the "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations[,] warrants considerable deference." *Id.* at 209 (quotation marks

omitted); *see also id.* at 210 (refusing to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Austin*, 494 U.S. at 661 (same); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258 n.11 (1986) (same). More recently, the Court stated that "our cases on campaign finance regulation represent respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146, 155 (2003) (internal quotation marks omitted). This judicial respect for Congress's special role should "discourage any broadside attack on corporate campaign finance regulation." *Id.* at 156.

"Second guess[ing]" legislative judgment here is particularly unwise because reversing *Austin* and *McConnell* would leave Congress with few if any options to deal with the problem of corporate electioneering expenditures. The immediate result of such a decision would be predictable: just as candidates financed their campaigns almost entirely through contributions from corporate treasury funds before the Tillman Act, pursued vast nonmonetary contributions from corporations before the Federal Corrupt Practices Act, and relied on corporate soft money contributions to their parties before BCRA, candidates would depend on and encourage substantial independent expenditures made on their behalf and financed by corporate treasury funds. When this avalanche of new spending takes place, Congress would be powerless to stop it. Efforts to restrict the objects of this spending, to limit the time periods during which the funds can be deployed, or

perhaps even to require information about the funds' sources and magnitude, could be held to violate the First Amendment. In this way, a subject particularly suited to legislative supervision would be removed from Congress's effective control.

C. This Case Is a Particularly Poor Vehicle for Reversing *Austin* or *McConnell*.

This case is a particularly unsuitable vehicle for considering the question presented because the relevant record is poorly developed. The only evidence before this Court goes to the validity of § 203 as applied. To decide whether to overrule *Austin* or *McConnell*, the Court would need to evaluate § 203's facial validity without the benefit of the data, reports, affidavits, and testimony that the business community for which CED advocates (as well as the parties and Congress) would have compiled had they known that the statute was in constitutional jeopardy.

In *McConnell*, the only previous decision involving a facial challenge to § 203, the Court often referenced the "ample" and "voluminous" record, which spanned 100,000 pages. 540 U.S. at 132, 145. The enormous record in *McConnell* "carried and framed the case," providing a basis for the reasoning of both the majority and the dissent. David B. Magleby, *The Importance of the Record in* McConnell v. FEC, 3 Election L.J. 285, 285 (2004) (quotation marks omitted).

Here, in contrast, the Court would appraise § 203's facial constitutionality without information about the burden it imposes, corporations' other

options for electoral involvement, corporations' own views on § 203, the likely effects of striking the provision, and countless other matters. That is because, as the Federal Election Commission notes in its supplemental brief, *see* Supp. Br. of Appellee 3-4, Citizens United did not pursue a facial challenge to § 203 before the district court. None of the interested parties had any reason to assemble a factual record relevant to such a challenge, and none did so: the record assembled before the district court is replete with information about *Hillary: The Movie* but bereft of information about the range of applications of § 203.

The Court would thus be well-advised to defer the question until it is squarely presented in a case with a fully developed factual record.

II. Overruling *Austin* Or *McConnell* Would Harm, Not Help, Corporate Interests.

As past and present executives of some of the nation's largest companies, CED's trustees have direct experience with solicitations for financial support from party leaders, elected officials, and the officials' influential backers. Their experiences teach a simple lesson: corporate participation in elections is more transactional than ideological. It is forced by the competitive need to maintain access to and avoid retribution from elected officials of both parties. Thus, as *McConnell* recognized, prior to BCRA's soft money ban, individual corporations commonly gave money to both parties, a pattern of giving explicable only as cynically pragmatic. *See McConnell*, 540 U.S. at 124-25.

Overruling *Austin* or *McConnell* would put corporations in the same prisoner's dilemma that existed when soft-money contributions were permitted. While corporations generally would prefer not to divert their resources from running profitable businesses to funding politics, they would fear the consequences of remaining on the sidelines. The race to the bottom that occurred with direct contributions at the end of the nineteenth century and with soft money in the early 1990s would begin anew. And in addition to forcing corporations to waste overwhelming sums of shareholder wealth on independent electioneering, the new regime would undermine public trust in business by furthering the already extant belief that corporations are in bed with government officials.

A. Corporations Would Spend on Electioneering to Secure Preferred Access to and Avert Retribution from Elected Officials, Not to Advance Ideas.

Corporate support for political candidates is a fundamentally commercial process in which businesses feel compelled to participate. "Sophisticated political donors . . . are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to maximize political return." Declaration of Wright H. Andrews, attorney and lobbyist, ¶ 8, *McConnell*, 540 U.S. 93 (No. 02-1674)

("Andrews Decl.").[2] As this Court recognized in *McConnell*, "many corporate contributions [are] motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties." 540 U.S. at 124-25.

Politicians openly acknowledge the connection between money and access. Senator Carl Levin (D-Mich.) stated: "The parties advertise access. It's blatant. Both parties do it." 147 Cong. Rec. 53,248 (Apr. 2, 2001). To insure access regardless of the political climate, corporations must contribute to both parties. In the 2000 election cycle, 35 of the 50 largest soft-money donors gave to both parties, and 28 of the 50 gave more than $100,000 to both parties. *See McConnell*, 540 U.S. at 124 n.12. As the *McConnell* Court recognized, this pattern is inconsistent with genuine expression of ideas.

The record in *McConnell* was replete with examples of cash for access. *See, e.g., McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 555-60 (D.D.C. 2003), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003); Declaration of Gerald Greenwald, Chairman Emeritus of United Airlines and CED trustee, ¶ 12, *McConnell*, 540 U.S. 93 (No. 02-1674) ("Greenwald Decl.") ("[B]usiness leaders believe—based on

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[2] As noted above, *see* Part I.C, *supra*, the record in this case does not include evidence about the impact that striking down the electioneering restrictions would have on corporations and the political process. Nevertheless, the experiences of CED's trustees, publicly available research, and the record assembled in *McConnell* provide ample reason to believe that this impact would be negative and substantial.

experience and with good reason—that . . . access [to politicians] gives them an opportunity to shape and affect governmental decisions."); Press Release, CED, *Senior Business Executives Back Campaign Finance Reform* (Oct. 18, 2000) (showing that 75% of business leaders believe political contributions give them an advantage in shaping legislation).

The *McConnell* record also showed the danger of retribution for corporations that do not participate. One Fortune 500 lobbyist described corporate spending on political campaigns in one simple word: "protection." Burt Solomon, *Forever Unclean*, Nat'l J., Mar. 18, 2000, at 858 ("If you decline to give, you're taking a risk of legislative retribution. . . . Companies are scared that on some critical issue, they'll get hosed."). This Court also approvingly quoted Mr. Greenwald's statement that "[b]usiness and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed." *McConnell*, 540 U.S. at 125 n.13 (quoting Greenwald Decl.).

"Independent" corporate expenditures would pose precisely the same risks posed by direct and soft money contributions. As Justice Scalia stated in a prior oral argument:

> I can understand why there's . . . corruption if the donor gives the candidate money . . . . But you allow individuals to spend $100,000 in their own advertising for this candidate, and it says at the bottom of the ad, . . . paid for by Schwartz, and the candidate knows

> Schwartz has bought hundreds of thousands of dollars of television advertising, that is perfectly okay, right? . . . I can't understand that. That seems to me so fanciful to think that the one situation presents . . . an opportunity for corruption and the other doesn't. You're much better off if you want to corrupt Schwartz, spending the money on an advertisement that says . . . presented by XYZ Corporation.

Tr. of Oral Argument at 5-6, *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (No. 00-191). It is naïve to think that candidates and elected officials would be unaware of which corporations spend on their or their parties' behalf.

If *Austin* were overruled, corporations would use electioneering expenditures, made directly or through bundling organizations, to the same massive extent they would make direct contributions absent regulation. For example, after California limited the amount of direct contributions in 2000, independent expenditures increased by 6144% in legislative elections. *See* California Fair Political Practices Commission, *Independent Expenditures* 4 (June 2008), *available at* http://www.fppc.ca.gov/ie/IEReport2.pdf. Seventy-two percent of the independent expenditures were made by a mere 25 independent expenditure groups, largely representing the interests of corporations, labor unions, and tribal casinos. *Id.* In many state races,

these expenditures "accounted for more than 50% of the total spent in the campaign." *Id.* Given the fungibility of electioneering expenditures and direct contributions, this Court should not disturb Congress's effort to shield corporations from compelled political participation.

B. Because Corporate Spending on Behalf of Candidates Often Lacks an Ideological Purpose, It Erodes Public Confidence in Business.

When corporations spend money to elect or defeat specific candidates, the public loses confidence in the integrity of business, and of government. "[M]illions of Americans are convinced that lobbyists and the interests we represent are unprincipled 'sleaze balls' who, in effect, use great sums of money to bribe a corrupt Congress." Andrews Decl., ¶ 20.

The polls and Members of Congress recognize Americans' belief that corporate interests control Congress. *See, e.g.*, Mark Mellman & Richard Wirthlin, *Research of Findings of a Telephone Study Among 1300 Adult Americans* (Sept. 23, 2002). Former Senator Alan Simpson (R-Wyo.) observed that, "[b]oth during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations." Declaration of Alan K. Simpson, ¶ 14, *McConnell*, 540 U.S. 93 (No. 02-1674).

There is a widespread perception that corporate coziness with government officials "contributed to the current crisis in the financial system." John Rauh &

Dan Weeks, *Take Wall Street out of Congress*, Concord Monitor, Feb. 7, 2009; *see also* Jim McElhatton & Jennifer Haberkorn, *Failed firms' leaders gave big to politicians*, Wash. Times, Sept. 19, 2008, at A1 ("[S]uch donations were made by company executives eager to keep government regulation out of their business and . . . Americans must now be left wondering whether the largesse influenced the decision to rescue the companies when they failed."). This perception is harmful to the business community. As leaders in that community, CED's trustees are particularly concerned about the potential for unlimited corporate expenditures to elect or defeat a candidate to further undermine the public's trust in corporations.

As CED has said before, businesses "wish to compete in the marketplace, not in the political arena." *See* CED, *Investing in the People's Business: A Business Proposal for Campaign Finance Reform* 1 (1999). Overruling *Austin* or *McConnell* would impair the ability of corporate leaders to stick to their core economic mission by dragging them into politics.

III. Existing Rules Enable Corporations To Engage In Genuine Expression Without Exposing Them To Coercive Pressure To Advocate On Behalf Of Candidates.

All of this is not to say that companies do not value their right to speak on issues important to their economic activities. The current statutory regime, however, does not meaningfully impinge on corporate political speech or even on corporate

involvement in elections. It restricts (1) only electioneering communications, not issue advocacy and (2) only the use of corporate treasury funds, not the organization of segregated funds structured to facilitate political participation. Consequently, the current regime strikes an appropriate balance between protecting corporations from coerced support for candidates and permitting corporations to engage in genuine expression.

This Court consistently has affirmed the importance of maintaining that balance. *See NRWC*, 459 U.S. at 209 (recognizing that "particular legal and economic attributes of corporations" might require "careful legislative adjustment of the federal electoral laws"); *Beaumont*, 539 U.S. at 153 ("Today, as in 1907, the law focuses on the special characteristics of the corporate structure that threaten the integrity of the political process.") (internal quotation marks and citations omitted). It should do so again here.

A. Issue Advocacy Provides a Healthy Outlet for Genuine Corporate Expression.

The first way in which § 203 balances corporate expression against compelled candidate support is by distinguishing electioneering communications from genuine issue advocacy.

In *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007), this Court limited BCRA's ban on the use of treasury funds to pay for electioneering communications to ads that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific

candidate." *Id.* at 470. Corporations thus are free to advocate regarding issues that they view as important without the pressure of a system where access and preferred legislative outcomes hinge on that spending. Independent expenditures on issue advertising also are difficult for candidates to track: generally, they are not directed to particular districts and do not advocate the election or defeat of a specific candidate (or even a party).

The First Amendment understandably protects issue advocacy, because corporations can make truly voluntary choices about whether to participate and also can advocate positions based on actual beliefs and interests, not fear of retribution. But the First Amendment should not protect a system that forces corporations to choose whether to pay to play or be shunned by Congress. *Cf. Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

B. Political Action Committees Are Robust Outlets for Corporate Views in Candidate Elections.

Section 203 also balances these competing interests by allowing corporations to use segregated funds known as political action committees, or PACs, to contribute to candidates or parties and pay for electioneering communications. By requiring that corporate political expenditures come from individual donations, not corporate treasury funds, PAC requirements drastically limit corporations' exposure to compelled expenditures.

This Court has, in a variety of contexts, upheld requirements that corporations use PACs rather

than treasury funds to participate in politics. *See, e.g.*, *McConnell*, 540 U.S. 93; *Beaumont*, 539 U.S. 146; *NRWC*, 459 U.S. 197. In doing so, it has recognized that such requirements provide corporations with ample opportunity to engage in genuine political expression. *See Beaumont*, 539 U.S. at 162. Crucially, PACs are "wholly controlled" by their parent corporation, which also may fund a PAC's administrative expenses. *Id.* at 149, 162-63. PACs enjoy robust First Amendment protections and are free to engage in express advocacy, electioneering communications, and political contributions. *See Fed. Elec. Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480 (1985).

As of 2006, over 1,800 corporate PACs were registered with the FEC. *See* Edward Zuckerman, *The Almanac of Federal PACs: 2008-2009* (2008). Moreover, experience has demonstrated that PACs are versatile vehicles of political expression, having accounted for about $135 million in independent expenditures in the 2007-08 election cycle alone. *See* Press Release, Federal Election Commission, *Growth in PAC Financial Activity Slows* (Apr. 24, 2009), *available at* http://www.fec.gov/press/press2009/20090415PAC/20090424PAC.shtml. This Court was thus correct to conclude in *McConnell* that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view [§ 203] as a 'complete ban' on expression rather than a regulation." 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162).[3]

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[3] This Court has recognized that the "practical effect" of certain segregated fund requirements "may be . . . to make engaging in

CONCLUSION

On behalf of its trustees, including CEOs of major corporations, *amicus* respectfully suggests that this Court think twice before embarking on an uncharted and dangerous course that will harm organizations whose rights the Court would purport to vindicate. This Court should not disturb *Austin* or *McConnell*.

Respectfully submitted,

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protected speech a severely demanding task" for nonprofit, nonstock ideological corporations. *See Mass. Citizens for Life*, 479 U.S. at 256. However, this concern applies with far less force to sophisticated for-profit corporations and thus does not compel reconsideration of *Austin* or *McConnell*. At most, such a concern counsels toward applying *Austin*'s exception for corporations with "features more akin to voluntary political associations than business firms" to § 203. *See Austin*, 494 U.S. at 661.

AMICUS CURIAE BRIEF

No. 08-205

In the

Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Striking Down the Long-Standing Corporate Spending Restrictions Would Undermine the Very Architecture of Campaign Finance Law and Is Not Necessary to Protect Corporate Political Expression 5

A. The Federal Campaign Finance Laws Have Developed Through a History of Close Attention to the Differences Among Types of Spenders 6

B. Corporations Have Ample and Effective Means of Political Participation, and Abrupt Revisiting of Established Restrictions on Their Spending Is Not Warranted 9

II. The Moment Is Wrong for the Court to Radically Reverse Established Law 12

A. The Moment Is Wrong for the Court to Open the Channels for Unlimited Corporate Spending 12

TABLE OF CONTENTS
(continued)

Page

B. The Moment Is Wrong for the Court to Upset a Regulatory and Constitutional Balance Now Featuring Unprecedented Participation by Small Donors 14

III. The Court Lacks Any Record to Support the Sudden Review of Core Precedent on Corporate Spending, Nor Does It Have the Time on This Schedule to Address Complex Doctrinal Issues 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Austin v. *Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) ..... passim

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5, 7, 10

FEC v. *Beaumont*, 539 U.S. 146 (2003) 17, 18

FEC v. *Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) 5, 8, 17, 18

FEC v. *Nat'l Right to Work Comm.*, 459 U.S. 197 (1982) 6, 17

FEC v. *Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007) 17, 19

First Nat'l Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 7, 11

McConnell v. *FEC*, 540 U.S. 93 (2003) 4, 10

Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) 16

Nw. Austin Mun. Util. Dist. No. One v. *Holder*, No. 08–322 (June 22, 2009) 4

Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833 (1992) 5

Shays v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008) 18

United States v. *Int'l Union United Auto*

TABLE OF AUTHORITIES
(continued)

Page

Workers, 352 U.S. 567 (1957) 11

Statutes

2 U.S.C. § 431(14) 1

2 U.S.C. § 4411e(a)(1)(A) 18

2 U.S.C. § 4411e(a)(1)(C) 18

2 U.S.C. § 441a 7, 10, 18

2 U.S.C. § 441b(b)(2)(A) 10

2 U.S.C. § 441b(b)(2)(C) 10

2 U.S.C. § 441b(b)(4)(D) 10

2 U.S.C. § 441i(a) 7

2 U.S.C. § 441i(b) 7

18 U.S.C. § 610 6

Taft-Hartley Act, 61 Stat. 136 (1947) 6

War Labor Disputes Act of 1943, 57 Stat. 167 6

Regulations and Rules

11 C.F.R. § 113.4(c) 11

11 C.F.R. § 114.2(f)(2) 11

11 C.F.R. § 114.3(a)(1) 10

11 C.F.R. § 114.3(c)(4) 11

TABLE OF AUTHORITIES
(continued)

Page

11 C.F.R. § 114.4(c)(2) 11

11 C.F.R. § 114.4(c)(4)-(5) 10

11 C.F.R. § 114.4(c)(6) 11

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11 C.F.R. § 114.8 10

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Simon Johnson, *The Quiet Coup*, The Atlantic, May 2009 13

Matthew Josephson, *The Politicos, 1865-1896* (1938) 12

TABLE OF AUTHORITIES
(continued)

Page

Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (2009) 13

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STATEMENT OF INTEREST

The Democratic National Committee (DNC)[1] is the organization which, by virtue of the bylaws of the Democratic Party of the United States, is responsible for the day-to-day operation of that party at the national level, within the meaning of § 301(14) of the Federal Election Campaign Act. 2 U.S.C. § 431(14). The DNC plans the Party's quadrennial presidential nominating convention; promotes the election of Party candidates with both technical and financial support; and works with national, state, and local party organizations, elected officials, candidates, and constituencies to respond to the needs and views of the Democratic electorate and the nation.

The DNC, the candidates that it supports, and its contributors must all comply with campaign finance laws. The DNC's pursuit of its mission is heavily influenced, if not decisively shaped, by the long- and short-term structure and implementation of those laws. Accordingly, the DNC is, by necessity, deeply conversant with the laws and constitutional principles that the Court has requested parties and amici to address.

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[1] The DNC submits this brief pursuant to the written consent of the parties. No party or counsel for a party has authored this brief in whole or in part, and no person or entity other than the DNC has made a financial contribution to its preparation or submission.

The Court has asked whether it need revisit a cornerstone of campaign finance regulation—the prohibition on corporate spending for express advocacy in federal elections. From its perspective as a major party organization, and drawing on decades of experience with an evolving regulatory scheme, the DNC will offer the Court its views on the consequences of sudden upheaval in the constitutional foundation of regulation.

SUMMARY OF ARGUMENT

This case is far from the right occasion for a convulsive change in campaign finance doctrine affecting corporations. The question posed by the Court—the scope of the corporate right to intervene directly in the political process—is one laden with consequence, particularly at this time. The relationship of corporation to government, and of profit motive to public responsibility, is an all-consuming topic in American politics and government, more so than at any time since the Great Depression. A decision now to sweep away long-standing corporate spending limitations would alter, much to the favor of one class of participants, the very terms on which this great national debate is being conducted.

As the Court has observed, the campaign finance laws have developed over time, by a process of incremental adjustment and with careful attention to differences among types of organizations and political actors. A decision to abruptly recast the foundation of the laws, by

reversing the corporate spending restrictions, would reverberate throughout the campaign finance system, materially and profoundly affecting the position of other speakers, including political parties such as the DNC and individual donors. In considering so momentous a step, the Court does not have at its disposal anything approaching the necessary extensive evidentiary inquiry—for which an expedited briefing schedule is no substitute. The parties and *amici* cannot manufacture this record now, and two months' time is not enough. Also lacking on this schedule is the opportunity for the Court to fully consider complex doctrinal issues it has never before addressed.

Any such radical adjustment to the intricate structure of the law also threatens to arrest a trend in progress toward the empowerment of the individual "small donor" who contributes to candidates and to parties such as the DNC. The campaign laws protect the political participation of individuals, as volunteers and otherwise, in the political process. They also provide numerous outlets for corporate, including for-profit, political expression. But only now, through the interaction of the law and new technologies, have small individual givers grown in importance, closer than ever before to matching the aggregate, but modestly constrained, giving power and associated influence of corporations and other institutional actors.

A rough balance in the operation of the law, just recently established, would not survive the sudden revision of the rules to the great and instant advantage of the for-profit corporate community. The predictable outcome would be a heightened risk of corruption—both corruption in fact and corruption in appearance.

ARGUMENT

Reconsidering *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell* v. *FEC*, 540 U.S. 93 (2003), is unnecessary in this case. The issues presented by the type of nonprofits and activity before the Court are quite separate from the large questions posed for reargument. Not even the Appellant, in the first round of briefing before the Court, suggested that the relief it seeks turns on confronting those questions.

Just last Term the Court held: "[T]he importance of the question does not justify our rushing to decide it. Quite the contrary: Our usual practice is to avoid the unnecessary resolution of constitutional questions." *Nw. Austin Mun. Util. Dist. No. One* v. *Holder*, No. 08–322, at 2 (June 22, 2009).

That is the rule followed in the case of open constitutional issues. It applies even more compellingly to settled ones, where the established law has been applied to a number of different statutory iterations over many years, and where the federal and state legislatures have been part of,

and have relied on, a larger dialogue with the Court that has influenced the course of constitutional interpretation. *Cf. Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 854-56 (1992).

Campaign finance regulation, as this Court has noted, has proceeded incrementally, and the Court has reviewed the constitutional issues as necessarily—and only as necessarily—presented. *See FEC* v. *Mass. Citizens for Life, Inc.*, 479 U.S. 238, 258, n.11 (1986). As evident from *Buckley* v. *Valeo*, 424 U.S. 1, 25 (1976) (per curiam), to the present day, the Court has been mindful of the pressures on the Congress to fashion regulation sensitive to the complexity of the political process and to constitutional constraints. The law as it stands today, and in its fundamental parts, represents a laboriously wrought balance, a historic component of which is control on corporate political spending.

I. Striking Down the Long-Standing Corporate Spending Restrictions Would Undermine the Very Architecture of Campaign Finance Law and Is Not Necessary to Protect Corporate Political Expression

Especially where the law has evolved in this way, institutional modesty, as well as fairness to the other branches, counsels great hesitation when considering an abrupt reversal in the law's

direction without thorough consideration of the consequences.

A. The Federal Campaign Finance Laws Have Developed Through a History of Close Attention to the Differences Among Types of Spenders

As Justice Rehnquist wrote for a unanimous Court, "the differing structures and purposes of different entities may require different forms of regulation in order to protect the integrity of the electoral process." *FEC* v. *Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (internal quotation marks and citation omitted). In regulating campaign finance within the limits established by the Court, Congress has paid proper heed to the differences among spenders and the interrelationship of rules established for each. Regulation in this field is not a "one size fits all" proposition, nor is the rule established for one type of organization, in conducting any particular activity, without consequences for the rules established for other types of organizations and their operations.

The statutory prohibition implicated in this case is a fitting example, for Congress, having imposed source restrictions on corporations, concluded that it should extend them to labor organizations as well. *See* Hatch Act, 18 U.S.C. § 610; War Labor Disputes Act of 1943, ch. 144, § 9, 57 Stat. 167; Taft-Hartley Act, 61 Stat. 136 (1947). In the Bipartisan Campaign Reform Act of 2002

(BCRA), Pub. L. No. 107-155, 116 Stat. 81, §§ 202, 214 (codified at 2 U.S.C. § 441a), Congress distinguished even among types of political party committees, setting out different financing rules for national parties, on the one hand, and state parties, on the other. *Compare* 2 U.S.C. § 441i(a) *with id.* § 441i(b).

These and other distinctions are grounded in the concern to prevent corruption or its appearance. *See First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 787 n.26 (1978) (opinion of Powell, J.) ("The importance of the governmental interest in preventing [the problem of corruption of elected representatives through the creation of political debts] has never been doubted."). But such distinctions also serve the requirement that restrictions must be closely tailored to the constitutional source of government authority. *Buckley*, 424 U.S. at 25. The result is a scheme of varied limits, built around different organizational characteristics and sources of funding.

Spenders adjust to and function under rules that, if radically altered, have immediate and far-reaching effects on political competition. The full impact over time of a tectonic shift in the constitutional balance is unknowable. That there will be an impact is certain, and the consequences—for the rights and relative influence of spenders within the political system—are sure to be profound. There can be no question that revisiting the core constitutional law governing

corporate spending, and particularly *Austin*, would be just such a radical step of vast consequence.

A major political party such as the DNC, closely regulated in its activities, does not function in isolation from the spending of other political actors. Whether as allies or adversaries, other organizations raise and spend money within the same political process to influence the same elections. Should the corporate sector as a whole be freed to make use of its large aggregations of wealth to influence voter choice, the very terms on which political parties compete to be heard will undergo dramatic, wholesale revision.

Some aspects of what this would mean are foreseeable. For-profit, statutorily-created corporations could devote unlimited sums, generated through business activity, to express advocacy. Parties could respond, where response is required, only with funds raised contributor by contributor, within meaningful limits, including restrictions on the universe of lawful contributors. Parties are indeed limited in their fundraising reach by the power of their political appeal. Unlike corporations, their donors must choose to give, as contributors; parties are not free to set up ancillary lines of business and generate funds by establishing a "customer" base from which funds, gathered in commercial exchange, may be tapped for political purposes.

Of course, not all corporations are alike, as the Court has affirmed. *See Mass. Citizens for Life*,

479 U.S. at 259. Since 1907, the corporate sector has become more differentiated, and nonprofit corporations have proliferated. The Court has distinguished for-profit corporations, with wealth accrued without regard to levels of political support, from nonprofit corporations established for ideological purposes and independent of commercial firms. The case before the Court falls into this latter category. Resolution of this case does not compel the Court to revisit, much less overturn, its decisions validating Congressional controls on for-profit corporate spending on elections.

Distinctions of this kind have supplied the analytic tools for the Court's (and the Congress's) labors in this field. Disposing of the Appellant's claim does not require disregarding such distinctions. And to disregard them would lead the Court to demolish virtually overnight one of the foundations of federal and many state campaign finance laws.

B. Corporations Have Ample and Effective Means of Political Participation, and Abrupt Revisiting of Established Restrictions on Their Spending Is Not Warranted

In no event need the Court be concerned that, absent radical surgery on the campaign finance laws, corporations will be shut out of the political process by a misguided application of notions of "equality." The statute analyzed in

Austin and BCRA § 203 as analyzed in *McConnell* represent "marginal restriction[s]." *Buckley*, 424 U.S. at 20. Indeed, one can hardly say that the development of the campaign finance laws since *Austin* has rendered corporations voiceless or without the means of participating in the federal elections process. Nothing before the Court—either argued directly or intimated—would suggest that for-profit corporations, though restricted by law, have been silenced by it, suffering injury disproportionate to the rationale for regulation.

Corporations may finance political action committees (PACs) and may devote considerable resources to these vehicles for expressing their preferences among electoral choices. 2 U.S.C. § 441b(b)(2)(C); 11 C.F.R. § 114.5. PAC funds are supplied by executives and shareholders, yet they are a corporate enterprise through which the monies on hand are controlled by corporate managers, in the corporate interest. 11 C.F.R. § 114.5(d).

Corporations are similarly able to fund unlimited communications on political topics with their executives and shareholders. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.3(a)(1). They may fund additional PAC activity through trade associations of which they are members, 2 U.S.C. § 441b(b)(4)(D); 11 C.F.R. § 114.8; they may distribute voting guides and voting records, 11 C.F.R. § 114.4(c)(4)-(5); and they may underwrite both partisan and nonpartisan voter registration

and turn-out activity, *id.* §§ 114.3(c)(4), 114.4(c)(2). They may host fundraising events for candidates, fully associating themselves with specific partisan causes. *Id.* §§ 113.4(c), 114.2(f)(2). They may even publicly endorse candidates. *Id.* § 114.4(c)(6).

No one has suggested to the Court that for the last 102 years, following passage of the Tillman Act, American corporations have been absent from the political process, somehow rendered mute. However, as state-created mechanisms for artificially large aggregations of wealth, they have been subject to limits on the use of that wealth to prevent them from dominating and corrupting the political process. *Austin*, 494 U.S. at 658.

The Court poses its question directly about *Austin*, but the law constraining corporate general treasury express advocacy was settled well before *Austin*. The Court has long defended Congress's efforts to protect the electoral process "from what it deemed to be the corroding effect of money employed in elections by aggregated power." *United States* v. *Int'l Union United Auto Workers*, 352 U.S. 567, 582 (1957). For decades, "the [i]mportance of the governmental interest in preventing this occurrence has never been doubted." *Bellotti*, 435 U.S. at 787 n.26.

II. The Moment Is Wrong for the Court to Radically Reverse Established Law

A. The Moment Is Wrong for the Court to Open the Channels for Unlimited Corporate Spending

The Court's decisions are not rendered in a vacuum. It would be strange indeed if historic limits on the political use of artificially aggregated wealth were summarily swept away at a time of heightened national concern about corporate social and political accountability.

In this regard, the current environment is much like that of a century ago, when the same concerns first resulted in limitations on the use of corporate wealth in campaigns. As trusts and corporate wealth grew, so did corporate contributions, beginning in earnest in the 1896 presidential election. *See* Matthew Josephson, *The Politicos, 1865-1896* at 699 (1938). Responding to public outrage, President Theodore Roosevelt repeatedly urged Congress to forbid all corporate campaign contributions. In his 1905 State of the Union address, he stated,

> The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign—that is, to the Government, which represents the people as a

> whole—some effective power of supervision over their corporate use.

Theodore Roosevelt, State of the Union Message, December 5, 1905, *available at* http://www.theodore-roosevelt.com/sotu5.html. Two years later, Congress passed the first statute of the type at issue here.

These issues are just as salient, under changed conditions, in this era. Huge aggregations of wealth, facilitated by state-created mechanisms and other forms of public support, are front and center in the national policy dialogue of the day. The notion of "firms too big to fail" figures prominently in this debate. So, too, does a range of other statutory enactments, regulatory initiatives and new proposals that underscore the complex, politically sensitive relationship of the private and public sectors, of public interest and private profit. *See* Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* 208-09, 242-43 (2009).[2]

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[2] In his analysis of contemporary policy challenges, Judge Posner urges close attention to corporate interaction with the political process. Judge Posner considers how "a profound failure of the market was abetted by government inaction. That inaction was the result in part of political pressures (to keep interest rates down . . . and to conciliate powerful political interests that are—not incidentally—large contributors to political campaigns)." Posner, *supra*, at 242-43; *see also* Simon Johnson, *The Quiet Coup*, The Atlantic, May 2009 (alleging the connection of campaign finance,

These circumstances, echoing as they do the nation's experience at the outset of the last century, do not favor a sudden and major shift in political spending power to the benefit of the for-profit corporate sector. A public already troubled by the great pending questions of corporate influence and responsibility would be still more troubled. The balance holding under the current regulatory scheme would, if so violently disturbed, give way to deep anxieties about potential, perceived, and actual corruption.

B. The Moment Is Wrong for the Court to Upset a Regulatory and Constitutional Balance Now Featuring Unprecedented Participation by Small Donors

Also at risk in any radical revision of the campaign finance laws is the nascent—and so, still tenuous—power of small individual donors. Parties, political committees, and candidates, working within the structure of the campaign finance laws and with the aid of new technologies,

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among other factors, to failed government policy and oversight). The feared or actual deployment in the political process of massive corporate resources, calculated to induce government inaction or thwart regulatory controls, is what defines the corruption addressed by long-standing campaign finance limits. Reconsideration of these limits, in this case and its non-record, would be—to understate the point—poorly timed.

have mobilized small individual donors in unprecedented numbers.[3]

Those same donors are now enlisting to volunteer in their political causes, forming a new online corps of freshly empowered average citizens of varying party affiliations and political commitments. This is a new development, the further maturation of which is being awaited with keen anticipation. Quite apart from this new development's established success in bolstering public participation, it promises to increase long lagging public confidence in the political process.

The 2008 election in particular proved that the small donor increase was not an anomaly but rather was indicative of an emerging trend. Senator John McCain raised $35 million from about 827,000 small donors, while Senator Barack

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[3] The convergence of BCRA and the Internet in 2004 was a watershed moment for small donors. *See* Institute for Politics Democracy & the Internet & Campaign Finance Institute, *Small Donors and Online Giving: A Study of Donors to the 2004 Campaigns* (Mar. 2006), *available at* http://www.ipdi.org/UploadedFiles/Small%20Donors%20Report.pdf. Senator John Kerry raised 37 percent of his contributions from small donors—those contributing $200 or less—while President George W. Bush raised 31 percent from small donors. For perspective, during the 2000 election, Vice President Al Gore's small donor base was 20 percent of his total fundraising efforts, while then-Governor Bush's was 16 percent. *Id.* at 3-4. Overall, the total number of small donors tripled or quadrupled, from close to 625,000 in 2000 to perhaps 2.8 million in 2004. *Id.* at 5.

Obama raised $178 million from 3.7 million small donors. *See generally* Ctr. for the Study of Elections & Democracy, *The Change Election: Money, Mobilization, and Persuasion in the 2008 Federal Elections* 1-56 (David B. Magleby ed., 2009). The Presidential elections are leading indicators: the political parties and their candidates are building on this "small donor" participatory model throughout the country.

A sudden change in the law, to the advantage of corporate wealth amassed in commercial transactions, would cause a violent disruption in this process. An emerging balance, years in the making, would be undone. In the place of a sense of empowerment could be expected another spell of disillusionment. What will predictably follow is a widespread sense that the rules were changed, and corporate political power restored to commanding levels, just as the era of the small individual donor had begun.

III. The Court Lacks Any Record to Support the Sudden Review of Core Precedent on Corporate Spending, Nor Does It Have the Time on This Schedule to Address Complex Doctrinal Issues

If "[t]he quantum of empirical evidence needed . . . will vary up or down with the novelty and plausibility of the justification raised," *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000), then a very complete record should be demanded of any party asking to overturn established law built

on accepted public law facts. It is novel indeed for the Court to consider revisiting those factual understandings in a case in which there is no relevant record whatsoever. And the record suitable for a case involving nonprofit ideological corporations does not suffice to support the review of spending restrictions on for-profit corporations. Throughout the Court's jurisprudence, from *National Right to Work*, 459 U.S. 197, through *Massachusetts Citizens for Life*, 479 U.S. 238, and *Federal Election Commission* v. *Beaumont*, 539 U.S. 146 (2003), to *Federal Election Commission* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), the Court has expressly recognized the significance of the difference in type of corporation.

Compounding the problem of a missing record is the doctrinal challenge of adapting the contribution/expenditure distinction to the field of corporate political spending. *Buckley* laid down this distinction in cases where the spender was authorized to contribute directly, but was subject to contribution limits. This same corruption rationale was inadequate to sustain the same limits when the spending was truly "independent" of the candidate. In the case of corporations, barred from contributing directly, the question never before addressed is whether an entity prohibited from giving at all may claim the same right to escape all limits on a claim of "independence."

Is the right the same where the concern at the heart of the regulatory scheme is the source of

funds, not the amount that an otherwise lawful source may donate? The Court has never spoken to this issue;[4] it was not presented and briefed in this case to date; and reargument on this schedule affords minimal opportunity, without a record, to achieve the "comprehensive examination" that such an issue calls for. *Beaumont*, 539 U.S. at 164 (Kennedy, J., concurring).[5]

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[4] The Court has sanctioned express electoral advocacy by a special class of nonprofit corporations, *Mass. Citizens for Life*, 479 U.S. at 263-64, but only on the condition that these entities are not funded by prohibited sources, including business corporations. This unusual case does address the larger question of whether prohibited sources themselves, barred from direct giving, free themselves of all limits by asserting independence under the Buckley rationale. The significance of this question extends beyond this case. *See, e.g.*, 2 U.S.C. § 441le(a)(1)(A), (C) (statutory ban on foreign national contributions *and* independent expenditures).

[5] The issue of bona fide independence is not a simple one, as the history of regulation on this point amply demonstrates. In 2002, Congress enacted a revision of the "coordination rules" designed to more clearly distinguish truly independent from coordinated spending. BCRA, 2 U.S.C. § 441a. Litigation ensued and has yet to conclude. *Shays* v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008). Corporate "independent spending," if sanctioned by a reversal of *Austin*, raises a host of other questions unique to the corporate sector. For example, may a corporation running a full lobbying operation in regular contact with Members successfully establish independence from those same Members when proposing to spend without limit on their campaigns? How the contribution/expenditure distinction is maintained for for-profit corporations within the framework of congressional

A nation's political integrity is "a value second to none in a free society." *Wis. Right to Life*, 127 S. Ct. at 2689 (Souter, J., dissenting). The Court should not consider a radical reversal of its precedents without a high level of confidence that such action would not damage the nation's political integrity, real and perceived. Such a risk should certainly not be courted without the support of a full record and the opportunity for a complete engagement with the difficult constitutional questions presented.

CONCLUSION

What the Court does on the merits of this or any case is not going to be affected by public opinion. But it is surely appropriate for the Court, in applying the jurisprudential principles behind constitutional avoidance and stare decisis, to consider whether the time, case, and process are right.

The DNC fears that few things could be worse, for the country and for the Court, than to make a hurried decision on the merits of an issue that the Court need not decide, using an expedited reargument process unfamiliar to the public. The Court should take all action to avoid the impression or conclusion that it is in an unusual rush to reconsider, abruptly, principles that were

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authority to guard against corruption or its appearance presents a novel question, and a complex one.

developed during a long and careful process and were reaffirmed just years ago.

A hasty rush to decide these particular questions would represent a sharp break from the constitutional decision-making discipline that the Court has avowed. Moreover, for the reasons stated, the time and case chosen for abandoning that discipline would be deeply inopportune.

RESPECTFULLY SUBMITTED,

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v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF AMICUS CURIAE FIDELIS CENTER FOR LAW AND POLICY AND CATHOLICVOTE.COM IN SUPPORT OF THE APPELLANT ON SUPPLEMENTAL QUESTION

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QUESTION PRESENTED

As per the Court's order entered June 29, 2009, this amicus curiae addresses whether this Court should overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

Austin Should Be Overruled Because It Defies The Gravamen Of First Amendment Precedent 2

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

BE&K Construction Co. v. NLRB, 536 U.S. 516 (2002) 12

Bigelow v. Virginia, 421 U.S. 809 (1975) 3

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) 13

Board of County Commissioners, Wabaunsee County, Ka. v. Umbehr, 518 U.S. 668 (1996) 8, 10

Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) 4

Board of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000) 11

Bose Corp. v. Consumers Union, 466 U.S. 485 (1984) 5

Brentwood Academy v. Tenn. Secondary School Athletic Assoc., 531 U.S. 288 (2001) 9

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) 15

Citizens Publishing Co. v. United States, 394 U.S. 131 (1969) 5

Cohen v. Cal., 403 U.S. 15 (1971) 11

Davis v. Federal Election Commission, 128 S.Ct. 2759 (2008) 10

TABLE OF AUTHORITIES – Continued

Page

Eu v. San Francisco City, Democratic Central Comm., 489 U.S. 221 (1989) 7

FCC v. League of Women Voters of Cal., 468 U.S. 364 (1984) 8

First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978) 2, 4, 5, 7, 12

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995) 15

Follett v. Town of McCormick, 321 U.S. 573 (1944) 14

Friedman v. Rogers, 440 U.S. 1 (1979) 15

Garrison v. Louisiana, 379 U.S. 64 (1964) 7

Healy v. James, 408 U.S. 169 (1972) 8, 9

Hustler Magazine v. Falwell, 485 U.S. 46 (1988) 14

Illinois ex rel. Madigan v. Telemarketing Assocs., 538 U.S. 600 (2003) 14

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 12

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993) 8

Legal Service Corporation v. Velazquez, 531 U.S. 533 (2001) 4, 10

McDonald v. Smith, 472 U.S. 479 (1985) 13

Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241 (1974) 13

TABLE OF AUTHORITIES – Continued

Page

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 14

Mills v. Alabama, 384 U.S. 214 (1966) 7

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 13

New York Times, Inc. v. Sullivan, 376 U.S. 254 (1964) 15

O'Hare Truck Service v. City of Northlake, 518 U.S. 712 (1996) 8, 9

Pacific Gas & Electric Co. v. Public Utilities Com., 475 U.S. 1 (1988) 13

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 15

Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc., 508 U.S. 49 (1993) 13

Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) 11

Riley v. National Federation of Blind of N.C., Inc., 487 U.S. 781 (1988) 13

Rumsfeld v. Forum For Academic & Institutional Rights, Inc., 547 U.S. 47 (2006) 8, 11

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 8

Santa Clara County v. Southern P. R. Co., 118 U.S. 394 (1886) 2

TABLE OF AUTHORITIES – Continued

Page

Schaumburg v. Citizens for Better Env't, 444 U.S. 620 (1980) 14

Simon & Schuster, Inc. v. New York State Crime Victims Board, 502 U.S. 105 (1991) 2, 3, 4

Texas v. Johnson, 491 U.S. 397 (1989) 11

The Florida Star v. B.J.F., 491 U.S. 524 (1989) 14

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 4, 15

WatchTower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002) 14

West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 (1943) 14

Wooley v. Maynard, 430 U.S. 705 (1977) 14

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) 15

MISCELLANEOUS

U.S. Const. amend. I ..... *passim*

Susan W. Dana, "*Restrictions On Corporate Spending On State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce*," 27 Hastings Const. L.Q. 309, 354-59 (2000) 10

INTEREST OF THE AMICI[1]

Fidelis Center For Law And Policy ("Fidelis") is a not-for-profit public interest organization that is dedicated to the sanctity of life, religious liberty, marriage and family. In an effort to protect and promote these fundamental rights and institutions, Fidelis engages in public education and public interest litigation.

Fidelis submits this brief on behalf of itself and those who support CatholicVote.org, a nonpartisan voter education program devoted to building a culture that embodies in its law respect for the fundamental rights and institutions described above. Members of CatholicVote.org seek to serve their country by supporting educational activities designed to promote an authentic understanding of ordered liberty and the common good as seen in light of the Roman Catholic religious tradition. *See* www.youtube.com/catholicvote. Fidelis submits this brief in support of Citizens United because it believes that this Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) has a chilling effect upon speech and undercuts discussion about law and policy in a way that is fundamentally inconsistent with First Amendment jurisprudence.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Austin Should Be Overruled Because It Defies The Gravamen Of First Amendment Precedent.

Fidelis Center For Law And Policy respectfully submits that this Court's decision in *Austin v. Mich. State Chamber of Commerce,* 494 U.S. 652 (1990), represents a deeply flawed departure from well established principles of First Amendment jurisprudence. As long ago as *Santa Clara County v. Southern P. R. Co.,* 118 U.S. 394 (1886), this court recognized that corporations were entitled to constitutional protection. About one hundred years later, in *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978), this Court extended to corporations the protection provided by the First Amendment, reasoning that "the inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *Id.* at 777. *Austin* departed from this obvious truth by embracing the farfetched notion that speech from a particular source (corporate) about a particular subject (views on political candidates) has "corrosive and distorting effects" on public discourse. *Id.* at 660.

Austin contradicts the great weight of First Amendment precedent and should be overruled. First, *Austin* cannot be squared with precedent holding that the First Amendment prohibits laws that burden speech based on the identity of the speaker and content of speech. In *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991), this Court struck down a state law requiring

criminals who derived income from works about their crime to pay funds into an escrow account designed to compensate victims. This Court observed that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech," noting that "in the context of financial regulation . . . the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace." *Id.* at 115.

Austin should be overruled because it imposes a financial penalty on corporate speakers based on the content of their speech, contradicting a principle "so engrained in . . . First Amendment jurisprudence . . . [and] so 'obvious' as to not require explanation." *Simon & Schuster*, 502 U.S. at 115. In this regard, this Court must reject any claim that *Austin* falls outside the rule in *Simon & Schuster* because *Austin* targets speech deemed "corrupt." Although *Austin* purports to focus on "corruption", it looks to nothing more than the identity of the speaker and the content of the speech. Just as only criminals were subject to the regulation at issue in *Simon & Schuster*, only corporations are subject to the regulation here. It is fundamental that government "cannot foreclose the exercise of constitutional rights by mere labels," *see, Bigelow v. Virginia*, 421 U.S. 809, 826 (1975), and government cannot satisfy its burden of justifying regulation on expressive activity by means of a circular argument which defines the state's interest

with reference to nothing more than the content of the speech that is regulated. *See Simon & Schuster*, 502 U.S. at 119-20; *see also, Legal Service Corporation v. Velazquez*, 531 U.S. 533, 547 (2001) (reasoning that "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").

Austin cannot be squared with another axiom of First Amendment jurisprudence, i.e., the First Amendment protects speech (regardless of its source) in order to protect the rights of the willing listener. This Court has long recognized that the protection provided to speech by the First Amendment includes the right to listen for "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *See, e.g., Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67 (1982). In *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), this Court relied upon a wide array of prior decisions protecting speech with reference to the interests of the willing listener to protect speech about matters of public interest. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 756-57.

Austin defies this axiomatic First Amendment principle. Whereas *Bellotti* refused to ban speech based on the identity of the speaker, because "the inherent worth of . . . speech in terms of its capacity for informing the [listening] public does not depend upon the identity of its source, whether corporation,

association, union, or individual," *Bellotti*, 435 U.S. at 777, *Austin* failed to give this vital interest (or the voters) any credit, approving a per se ban of speech deemed corrupting based on nothing more than its source (corporate) and its content (concerning political candidates). *Austin* should be overruled because it disregarded the willing listener's interest in hearing speech by corporations about political candidates, and more broadly, failed to acknowledge that the First Amendment places responsibility for discerning true from false in the people (not officeholders). *See, e.g.*, *Citizens Publishing Co. v. United States*, 394 U.S. 131, 139-40 (1969) (The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ."); *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503-04 ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty . . . but also is essential to . . . the vitality of society as a whole.").

Austin's stripping of First Amendment protection from corporate speech about political candidates is anomalous for another reason: it makes First Amendment protection turn on whether speech implicates economic interests. In *Austin* this Court accepted a claim that "the resources in the treasury of a business corporation . . . reflect . . . the economically motivated decisions of investors and customers," *See Austin*, 494 U.S. at 659, to find a new kind of corruption, "the corrosive and distortive effects of immense

aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660.

But the hostility to economic motivations that justifies the total ban on corporate speech authorized under *Austin* is at odds with the longstanding case law converging around that point that speech does *not* lose protection because it can be connected to economic considerations. *See Virginia State Board of Pharmacy*, 425 U.S. at 761-66 (citing a wide variety of cases extending First Amendment protection to speech without regard for pecuniary considerations involved). *Austin*'s definition of corruption is grounded in nothing more than the fact that corporate speech is linked to the economic interests of shareholders. *Austin*, 494 U.S. at 559-60. In this way, *Austin* makes First Amendment protection turn on the link between speech and profit-motive in a manner wholly inconsistent with the great weight of this Court's precedent on point, which has consistently held that speech does not lose First Amendment protection because it is linked to pecuniary considerations.

The per se ban on speech too closely wed to economic motivations blessed by *Austin* gives rise to an irony that provides yet another way *Austin* cuts against the grain of First Amendment jurisprudence. This Court has long recognized that "[w]hatever differences may exist about the interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment

was to protect free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. at 218. "For speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). For this reason, this Court has stated that "the First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco City, Democratic Central Comm.*, 489 U.S. 221, 23 (1989).

Bellotti observed this architectonic principle of First Amendment law by protecting corporate speech about political matters in the interest of informed public discourse, but *Austin* disregards the principle by categorically excluding views about candidates advanced by corporations on the grounds such views are driven by economic motivations. The odd result produced by *Austin*'s animosity toward economic interest is that the First Amendment provides no protection to core political speech by corporations, but it provides greater protection to corporate speech about matters further removed from free speech concerns at the core of the First Amendment – and more tightly wed to economic motivations. *Austin* should be overruled because it inverts the hierarchy of values that lies at the heart of current First Amendment jurisprudence.

Austin also legitimizes an unconstitutional condition that is inimical to First Amendment freedom. As this Supreme Court has long held, "[w]hat the First Amendment precludes the government from

commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 77-78 (1990). "[T]his principle, known as the unconstitutional conditions doctrine," *see Rumsfeld v. Forum For Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59 (2006), has a simple yet compelling rationale: "[i]f the government could deny benefits to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be in effect penalized and inhibited. . . . Such interference with constitutional rights is impermissible." *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712, 717 (1996). In keeping with this principle, this Court has repeatedly struck down efforts to burden activity protected by the First Amendment, justified by claims that the restriction is simply a condition of eligibility for government benefits. *See, e.g., Board of County Commissioners, Wabaunsee County, Ka. v. Umbehr*, 518 U.S. 668, 675, 680 (1996) (noting that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech," listing cases dealing with "users of public facilities and recipients of small government subsidies . . . " and *citing Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Healy v. James*, 408 U.S. 169 (1972) (access to campus facilities for student meetings and activities); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (government subsidy for private speech).

Austin should be overruled because it amounts to an unconstitutional condition. In *Austin* this Court allowed a total ban on corporate speech about political candidates justified with reference to benefits conferred on corporations by state law. *Austin*, 494 U.S. at 658-59. In so doing, *Austin* endorsed what must be seen as an unconstitutional condition because the benefits of incorporating now come at a price, i.e., shareholders are not free to use their corporate treasury to fund political speech about candidates. Such a result epitomizes the concern that "[i]f the government could deny benefits to a person because of . . . constitutionally protected speech or associations . . . exercise of those freedoms would be in effect penalized and inhibited," *see*, *O'Hare Truck Service*, 518 U.S. 712, 717 (1996), but defies the principle that "[s]uch interference with constitutional rights is impermissible." *Id.* In this regard, it makes no difference that state law gives and federal law takes away because when dealing with constitutional rights of the first order this Court is "not free to discard practical realities." *See Healy*, 408 U.S. at 183; *see also*, *Brentwood Academy v. Tenn. Secondary School Athletic Assoc.*, 531 U.S. 288 (2001) (noting that "if . . . formalism were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling."). *Austin* unconstitutionally justifies forfeiture of fundamental First Amendment rights with reference to benefits extended by law.

In this regard, *Austin* has pernicious and far reaching implications for free speech that will yield a bitter harvest if the decision is left standing. If the conception of corruption legitimated by *Austin* is sound, then government may restrict the First Amendment activity of a vast range of business entities and individuals which receive similar benefits under state law, as so many do. *See* Susan W. Dana, "*Restrictions On Corporate Spending On State Ballot Measure Campaigns: A Re-Evaluation of Austin v. Michigan Chamber of Commerce*," 27 Hastings Const. L.Q. 309, 354-59 (2000) (noting that a variety of business entities receive benefits the same or similar to those extended to corporations). This fear would be a reality for wealthy individuals if it had not been foreclosed by *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008) (striking down the "millionaires amendment"). But the decision in *Davis* simply shows that *Austin* is flawed. For it is painfully clear that *Austin* can only be squared with *Davis* by elevating (corporate) form above substance contrary to this Court's longstanding admonition that when dealing with fundamental rights it must avoid "[d]etermining constitutional claims on the basis of . . . formal distinctions, which can be manipulated largely at the will of the government agencies concerned. . . ." *Board of County Commissioners, Wabaunsee County, Kansas, v. Umbehr*, 518 U.S. 668, 679-80 (1996) (holding that eligibility for government contracts cannot be conditioned on political fealty and citing cases for the proposition that the law must focus on substance not form); *see also Legal Service*

Corporation, 531 U.S. 533, 547 (2001) (holding that Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise). *Austin* should be overruled because it endorses a pernicious principle that can be used to eviscerate the First Amendment rights of all speakers.

More broadly, *Austin*'s effort to justify a gag on corporate speech out of solicitude for dissenting shareholders contradicts the approach this Court takes in other areas of First Amendment law implicating like concerns. In a long line of cases this Court has consistently refused to restrict the expression of some based on the objections of others. In the context of government speech, this Court has recognized that government must be permitted to speak despite the objection of dissenting citizens, *see, e.g.*, *Rumsfeld*, 547 U.S. at 64, because "[w]hen the government speaks . . . it is, in the end, accountable to the electorate and the political process for its advocacy. . . ." *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000). Behind this principle is the more general one: government must not empower a heckler's veto. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989) (striking down a law that prohibited flag burning); *Cohen v. Cal.*, 403 U.S. 15, 22 (1971); *e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 880 (1997) (striking down restriction on transmission of indecent material to persons under 18 on grounds it effectively gave opponents of indecent speech a

heckler's veto); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (striking down regulation empowering board to restrict display of movies deemed sacrilegious).

Austin should be overruled because it defies the principle that government should not use its power to distort private decisions about whether to speak and what to say. Whereas *Bellotti* respects the principle based on a realistic appreciation for shareholder democracy, *see Bellotti*, 435 U.S. at 795, *Austin* gags corporate speech by effectively giving supposedly dissenting members a heckler's veto. *See Austin*, 494 U.S. at 661-63 (justifying gag rule based on reluctance of dissenting members to withdraw from corporation). *Austin* should be overruled because it allows supposedly dissenting members to exercise a heckler's veto – and the result is a total gag of corporate speech about political candidates that is anathema to the First Amendment.

More generally, *Austin*'s singling-out of corporations for disfavored treatment under the First Amendment presents a radical departure from many other strains of First Amendment jurisprudence which treat corporations like other speakers.

- This Court has treated corporations and other speaks alike when evaluating burdens on petitioning protected by the First Amendment. *See BE&K Construction Co. v. NLRB*, 536 U.S. 516, 537 (2002) (employer's unsuccessful retaliatory lawsuit against unions could not serve as a basis for imposition of liability for unfair labor

practices absent a showing that the lawsuit was objectively baseless); *see also*, *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus. Inc.*, 508 U.S. 49 (1993) (barring antitrust liability for litigation because suit was both objectively and subjectively baseless); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (lawsuit brought for improper motive cannot be enjoined provided it is not a sham) (1983); *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (no personal liability for torts committed by fellow protestors absent specific intent via authorization, direction, ratification of specific tortious activity, incitement of imminent lawless action, or specific instructions to carry out violent acts or threats); *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985) (no tort liability for petition to President absent reckless disregard for the truth).

- This court has extended the same First Amendment protection from coerced speech to corporations and other speakers alike. *Pacific Gas & Electric Co. v. Public Utilities Com.*, 475 U.S. 1, 21 (1988) (holding it was a violation of the corporation's First Amendment rights and that the freedom from compelled speech extended equally from individuals to corporations); *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 797-98 (1988) (compelled disclosure of fee arrangement violated First Amendment); *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that a statute forcing a newspaper corporation to publish editorial replies was a violation of the corporation's First Amendment

rights); *cf. Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (compelled display of "Live Free or Die" violated First Amendment); *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943) (state law compelling recitation of Pledge of Allegiance violated First Amendment).

- This Court has treated corporations like other speakers with respect to charitable solicitations. *See, Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 611 (2003) (noting that "[t]he First Amendment protects the right to engage in charitable solicitation," and extending First Amendment protection to corporations engaged in charitable solicitation); *Schaumburg v. Citizens for Better Env't*, 444 U.S. 620, 622 (1980) (ordinance that required a permit for charitable solicitations by a non-profit corporation was constitutional); *cf. WatchTower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (citing numerous cases); *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

- This Court has applied the same First Amendment standards for defamatory speech to corporations and others. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14-17 (1990) (same applied to defamation claims involving corporations and other speakers); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (no liability for emotional distress based on protected speech absent heightened showing); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (invalidating statute that allowed punishment for publication of lawfully obtained truthful information where

state law imposed a negligence *per se* standard for liability); *New York Times, Inc. v. Sullivan*, 376 U.S. 254, 256, 283 (1964) (this court determined that a newspaper corporation must act with actual malice to be liable in a defamation suit).

- This Court has treated corporations and individuals alike with respect to commercial speech. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 753 (1976) (focusing on content of the speech and not the identity of the speaker); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 571 (1980) (endorsing a system of prior restraints as an acceptable method of regulating commercial speech to ensure it is truthful, accurate, not misleading); *cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995) ("commercial speech . . . may freely be regulated if it is misleading"); *Friedman v. Rogers*, 440 U.S. 1, 9, (1979) (citations omitted) ("The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely."); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (rule requiring disclosure to ensure information is not misleading is consistent with First Amendment); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992) (informed consent disclosure requirements are constitutional).

These varied lines of precedent illustrate some of the countless ways that *Austin*'s treatment of corporate speech about political candidates defies

long-standing strains of First Amendment jurisprudence that are well rooted in fundamental principles and mutually reinforcing. And what justifies this aberration? Nothing. Rather, *Austin*'s per se ban on certain speech by certain speakers represents a deeply flawed departure from this Court's vigilant service to the First Amendment.

CONCLUSION

As demonstrated above, *Austin* cannot be incorporated (dare we say) into that great body of First Amendment precedent that protects our freedom of speech about issues of public importance. Quite the contrary, *Austin* represents an outlying precedent inimical to the fundamental First Amendment values that have served the common good so well. This Court should use this case to overrule *Austin*.

Respectfully submitted,

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July 2009

AMICUS CURIAE BRIEF

134

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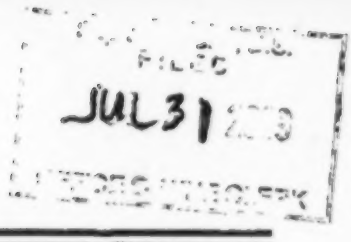

No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF FORMER OFFICIALS OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* ON BEHALF OF NEITHER PARTY

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12

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 4

ARGUMENT 4

I. *HILLARY: THE MOVIE* DOES NOT FALL WITHIN THE COVERAGE OF BCRA 4

A. The Communication Was Not "Targeted to the Relevant Electorate" 4

B. The Statute Contains an Implicit *De Minimis* Exception 8

C. The Court Should Follow the Statutory Construction Principles Set Forth in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, ___U.S.___, 129 S.Ct. 2504 (2009) 10

II. CITIZENS UNITED IS ENTITLED TO "AS APPLIED" FIRST AMENDMENT PROTECTION UNDER A PROPER READING OF *AUSTIN* 12

III. NO REASON EXISTS TO RECONSIDER THE FACIAL CONSTITUTIONALITY OF BCRA . 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Abuelhawa v. United States,
___U.S.___, 129 S.Ct. 2102 (2009) 11

Ashwander v. TVA,
297 U.S. 288 (1936) 16

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 3, 12, 13

Board of Trs., State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989) 15

Brockett v. Spokane Arcades, Inc.,
472 U.S. 491 (1985) 15

Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87 (1982) 15

Buckley v. Valeo,
424 U.S. 1 (1976) 15

Burlington Northern & Santa Fe Ry. v. United States,
___U.S.___, 129 S. Ct. 1870 (2009) 11

Coates v. City of Cincinnati,
402 U.S. 611 (1971) 14

Colorado Right to Life Comm., Inc. v. Coffman,
498 F.3d 1137 (10th Cir. 2007) 9

Daughterty County Bd. of Educ. v. White,
439 U.S. 32 (1978) 11

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council,
485 U.S. 568 (1988) 7

FEC v. Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986) 2, 8, 13, 15

FEC v. Wisconsin Right to Life, Inc.,
551 U.S. 449, 127 S. Ct. 2652 (2007) 4, 15

Georgia v. Evans,
316 U.S. 159 (1942) 6

Gooding v. Wilson,
405 U.S. 518 (1972) 14

Marbury v. Madison,
5 U.S. (1 Cranch) 137, (1803) 13

McConnell v. FEC,
251 F. Supp. 2d 176 (D.D.C. 2003) 6

McConnell v. FEC,
540 U.S. 93 (2003) 1, 4

NLRB v. Catholic Bishops of Chicago,
440 U.S. 490 (1979) 11

Northwest Austin Mun. Util. Dist. No. One v. Mukasey,
573 F. Supp. 2d 221 (D.D.C. 2008) 10

Northwest Austin Mun. Util. Dist. No. One v. Holder,
___U.S.___, 129 S.Ct. 2504 (2009) 3, 10, 11

Renne v. Geary,
501 U.S. 312 (1991) 15

Rowland v. California Men's Colony,
506 U.S. 194 (1993) 6

United States v. Board of Cmm'rs of Sheffield, Ala.,
435 U.S. 110 (1978) 11

United States v. Cooper Corp.,
312 U.S. 600 (1941) 6

United States v. Hayes,
555 U.S. __, 129 S.Ct. 1079 (2009) 11

United States v. Jin Foey Moy,
241 U.S. 394 (1916) 7

United States v. Raines,
362 U.S. 17 (1960) 14

Virginia v. Hicks,
539 U.S. 113 (2003) 15

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 6

Yazoo & Mississippi Valley R.R. v. Jackson Vinegar,
226 U.S. 217 (1912) 14

STATUTES

2 U.S.C. § 434(f)(3)(A)(i) 2, 5, 6
2 U.S.C. § 434(f)(3)(C) 2, 6
2 U.S.C. § 441b(a)-(b) 5
42 U.S.C. § 1973c(a) 10
Tillman Act, ch. 420, 34 Stat. 864-865. 12

REGULATIONS

11 C.F.R. § 100.29(b)(3)(ii)(A) 2, 5

OTHER AUTHORITIES

John Noonan, *"Persons" and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of Masks* (1976) 6

Richard Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853 (1991) 14

S. Rep. No. 105-167, vol. 3 (1998) 6

Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 Tul. L. Rev. 563 (1987). 7

INTEREST OF AMICI[1]

Amici, Norman Dorsen, Aryeh Neier, John Shattuck, Morton Halperin, and Burt Neuborne, are former officials of the American Civil Liberties Union (ACLU) who have sought to achieve both a robust First Amendment jurisprudence and effective reform of campaign financing.[2] *Amici* appeared before this Court in *McConnell v. FEC*, 540 U.S. 93 (2003), in defense of the facial constitutionality of the Bipartisan Campaign Reform Act of 2002 (BCRA), urging that the unavoidable tension between certain applications of BCRA and the First Amendment should be resolved by narrowly construing provisions of the Act and recognizing "as applied" First Amendment exemptions from its operation.

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[1] This brief is filed with the consent of the parties. Appellant's letter of consent has been lodged with the clerk of the court. Appellee has granted blanket consent. No counsel for a party authored this brief in whole or in part; nor did any person other than *amici* or their counsel make a monetary contribution to the preparation or submission of this brief.

[2] Norman Dorsen, Frederick I. and Grace Stokes Professor of Law at NYU School of Law, served as ACLU General Counsel from 1969-1976, and as President of the ACLU from 1976-1991; Aryeh Neier, President of the Open Society Institute, served as Executive Director of the ACLU from 1970-1978; John Shattuck, newly-appointed President of Central European University in Budapest and former Assistant Secretary of State for Democracy, Human Rights and Labor, served as ACLU National Legislative Director from 1976-1984; Morton Halperin, Senior Advisor, Open Society Institute, served as ACLU National Legal Director from 1984-1992; Burt Neuborne, Inez Milholland Professor of Civil Liberties at NYU School of Law, served as NYCLU staff counsel from 1967-1972, Assistant National Legal Director from 1972-1974, and National Legal Director from 1982-1986.

This brief, filed in response to the Court's order dated June 29, 2009, reiterates *amici*'s belief that the significant First Amendment issues raised by the application of BCRA to the material before the Court can – and should – be resolved by statutory construction informed by respect for congressional purpose and the canon of constitutional avoidance. If constitutional adjudication is deemed necessary, appellant's First Amendment interests may be protected by an "as applied" First Amendment ruling, rendering it unnecessary to reconsider existing precedent.

SUMMARY OF ARGUMENT

1. *Hillary: The Movie* (hereafter "*Hillary*") does not fall within BCRA's statutory ambit. It was not "targeted to the relevant electorate" within the meaning of 2 U.S.C. §§ 434(f)(3)(A)(i)(III), (C); 11 C.F.R. § 100.29(b)(3)(ii)(A). Nor, under the facts of this case, does the presence of a *de minimis* trace of for-profit corporate funding cause *Hillary* to fall within the definition of an electioneering communication paid for in whole or part from for-profit corporate treasury funds.

Six powerful impediments to statutory coverage exist. First, *Hillary* was produced and distributed by Citizens United, a non-profit corporation analogous to the exempt non-profit corporation in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986) ("*MCFL*"). Second, while Citizens United reports receiving trace amounts of financial support from for-profit corporations, over 99% of the funding for *Hillary* is said to be derived from private individuals. (Appellant's Br. 32.) Third, no evidence

exists in the record that for-profit corporate donors played any role in producing or editing the material. Fourth, no evidence exists in the record concerning whether Citizens United solicits funds from for-profit corporations. Fifth, the video-on-demand distribution mechanism contemplated by Citizens United required potential hearers to request access to the material affirmatively. Sixth, given such a volitional distribution system, the material was not reasonably likely to be viewed by more than 50,000 persons eligible to vote in the relevant state Democratic presidential primary.

Given the six factors, and guided by Congress's purpose in enacting BCRA and by the well-established canon of constitutional avoidance, the Court should find that *Hillary* does not fall within the statutory coverage of BCRA. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, ___U.S.___, 129 S.Ct. 2504 (2009).

2. Assuming that statutory coverage exists, it is not necessary to revisit settled Supreme Court doctrine in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), to resolve the First Amendment issues raised by this case. Given the indirect, *de minimis* nature of the for-profit corporate funding, and the voluntary nature of the contemplated distribution mechanism, the First Amendment precludes the FEC from prohibiting the material's dissemination.

3. Given the ample statutory and "as applied" avenues open to the Court to protect the First Amendment interests of Citizens United, there is no reason to revisit the Court's refusal in *McConnell v.*

FEC, 540 U.S. 93 (2003) to invalidate an important congressional regulatory scheme on its face.

STATEMENT OF THE CASE

The narrative facts of the case are well stated in the briefs of the parties. It is worth noting, however, that neither party appears interested in seriously considering whether *Hillary* actually falls within the ambit of BCRA. Citizens United appears bent on undermining the constitutional underpinning of campaign finance regulation. The FEC appears bent on stretching its regulatory authority to the breaking point. The result is a case posing unnecessary tension between BCRA and the First Amendment.

ARGUMENT

I. *HILLARY: THE MOVIE* DOES NOT FALL WITHIN THE COVERAGE OF BCRA

A. The Communication Was Not "Targeted to the Relevant Electorate"

BCRA prohibits the dissemination of an "electioneering communication" within thirty days of a contested presidential primary if the communication: (1) refers to a clearly identified presidential candidate;[3] (2) is underwritten in whole or part by for-profit corporate treasury funds; and (3) is "targeted to the

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[3] A First Amendment gloss requires the reference to the presidential candidate to be the unquestioned functional equivalent of a request to vote for or against the candidate. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"). *Hillary* appears to satisfy this criterion.

relevant electorate." 2 U.S.C. §§ 434(f)(3)(A)(i)(I)-(III), 441b(a)-(b)[4] In the context of a presidential primary election, a communication is deemed "targeted to the relevant electorate" if it "[c]an be received by 50,000 or more persons in the State where a primary election...is being held within 30 days." 11 C.F.R. § 100.29(b)(3)(ii)(A).[5] A similar 50,000 person targeting requirement exists for House and Senate races, with elaborate statutory rules governing whether a given radio or television communication satisfies the 50,000 person threshold. 2 U.S.C. § 434(f)(3)(A)(i)(II)(aa)-(bb).

The parties appear to assume that *Hillary* was "targeted to the relevant electorate" because the communication was technologically capable of being downloaded on cable television by 50,000 or more viewers in at least one of the states holding Democratic presidential primaries in January, 2008. In fact, the phrase "can be received by 50,000 or more persons" imposes a more demanding jurisdictional threshold. In order for *Hillary* to fall within BCRA's reach, the FEC must demonstrate a plausible likelihood that the communication will be viewed by 50,000 or more potential voters in one of the relevant state Democratic presidential primary elections.

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[4] The relevant statutory definition of an "electioneering communication" falling within the FEC's regulatory authority is set forth in the Statutory Appendix to Appellant's Brief on the Merits at 16a-17a.

[5] This regulation merely represents an application of the 50,000 person threshold statutory provision in BCRA to the presidential context.

The clear purpose of the 50,000 "person" threshold is to assure that a communication will reach a critical mass of voters before subjecting it to federal regulation. Print and Internet communications were exempted from BCRA's coverage because Congress deemed communications on those two exempted media less likely to reach a mass audience capable of affecting the outcome of an election. *Id.* at 2 U.S.C. § 434(f)(3)(A)(i).[6] Similarly, Congress has provided a safe harbor for radio and television communications transmitted on media that cannot reach at least 50,000 persons in the relevant electoral area. *Id.* at 2 U.S.C. § 434(f)(3)(C).

Given such clear statutory structure and purpose, the term "person" must mean a viewer who is eligible to vote in the relevant election. An alleged "electioneering communication" viewed principally by infants, pre-teens, or otherwise electorally ineligible recipients can hardly be described as "targeted to the relevant electorate." Construing the inherently ambiguous term "person" in a congressional statute is a judicial cottage industry.[7] In this case, a combination

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[6] Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial legislation was needed to stanch that flow of money. *McConnell v. FEC*, 251 F. Supp. 2d 176, 569-573 (D.D.C. 2003) (Kollar-Kotelly, J.); *id.*, at 799 (Leon, J.); S. Rep. No. 105-167, vol. 3, at 4465, 4474-4481 (1998); 5 *id.* at 7521-7525.

[7] *Rowland v. California Men's Colony*, 506 U.S. 194, 198-211 (1993); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989); *Georgia v. Evans*, 316 U.S. 159, 162-63 (1942); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). See John Noonan, *"Persons" and Masks of the Law: Cardozo, Holmes,*

of the well-established canon of constitutional avoidance[8] and respect for BCRA's structure and purpose should lead this Court to construe the term "person" to mean a viewer who is eligible to vote in the relevant election.

Similarly, the phrase "can be received" must be read as connoting more than a mere technological capacity to reach the target audience. Given Congress's purpose, the phrase requires a reasonable prospect that the communication will, in fact, reach the target audience. In the context of the standard thirty- or sixty- second political communication on the television and radio, it makes good sense for BCRA to ask whether the radio or television signal is technologically capable of reaching 50,000 or more persons, since that is a valid predictive measure of the likely viewing audience. The theoretical reach of a cable television signal is not, however, a reliable predictor of the likely viewing audience of a ninety-minute video-on-demand requiring affirmative action by a prospective viewer. Under such a volitional distribution mechanism, a more searching inquiry is required into the number of "persons" in the relevant electorate who would be plausibly likely to download the communication. Given the content and tenor of *Hillary*, it is doubtful that 50,000 or more voters in a state Democratic presidential primary would

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Jefferson and Wythe as Makers of Masks (1976); Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 Tul. L. Rev. 563 (1987).

[8] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988); *United States v. Jin Foey Moy*, 241 U.S. 394, 401 (1916).

affirmatively elect to download a ninety-minute political attack on one of the Democratic Party's most popular figures.

Thus, although *Hillary* was targeted to an "electorate," it was not "targeted to the relevant electorate" – voters in an upcoming state Democratic presidential primary.

B. The Statute Contains an Implicit *De Minimis* Exception

Although the factual record is sparse,[9] *Hillary* does not appear to fall within the category of corporate-funded electioneering communications that Congress intended to regulate. First, the movie appears to have been produced and distributed by a non-profit advocacy corporation analogous to the exempt non-profit corporation in *MCFL*, 479 U.S. 238, 263-64 (1986). Second, Citizens United reports that it receives only a *de minimis* amount of financial support from for-profit corporations, asserting that over 99% of the funding for *Hillary* came from private individuals who share its political beliefs. (Appellant's Br. 32.) Third, no evidence exists in the record that for-profit corporate donors played a role in conceiving, producing or editing the material. Finally, no evidence exists in

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[9] To the extent it is necessary to make factual findings needed to determine whether the targeting threshold was met in this case, or whether a *de minimis* exception is warranted, a remand to the District Court appears appropriate.

the record concerning whether Citizens United solicits funds from for-profit corporations.[10]

When the four factors are combined with the volitional distribution mechanism contemplated by Citizens United, the communication falls within an implicit *de minimis* exception to statutory coverage. One of the basic purposes of BCRA was to prevent for-profit corporations from deploying the massive economic power of their corporate treasuries, which derive from economic transactions unrelated to politics, to influence electoral outcomes unfairly. However, where, as here, an electoral communication appears to be disseminated by a non-profit advocacy group that is allegedly funded overwhelmingly by personal donations, the accidental presence of a trace, unsolicited corporate contribution to the advocacy group should not trigger BCRA's ban on for-profit corporate electioneering communications. Under the apparent facts of this case, the canon of constitutional avoidance coupled with the Court's duty to respect BCRA's context, structure and purpose should lead to the recognition of an implicit *de minimis* exception to statutory coverage. *See Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1148-1151 (10th Cir. 2007) (recognizing *de minimis* exception).

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[10] Appellee's Supplemental Brief concedes the applicability of an *MCLF de minimis* exception if an organization's overall for-profit funding sources are tiny: "If appellant's overall operations are financed 'overwhelmingly' by individual donations, as it asserts is true of the financing of *Hillary*, appellant would appear to be covered by these decisions." (Appellee's Supplemental Br. 3, n.1.)

C. The Court Should Follow the Statutory Construction Principles Set Forth in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, ___U.S.___, 129 S.Ct. 2504 (2009)

Each of the exceptions to coverage urged by *amici* requires construction of the statutory text. Recognizing the "targeting" threshold advanced by *amici* requires the Court to construe the statutory terms "person" and "can be received" narrowly to exempt communications that are not likely to reach the requisite number of persons eligible to vote in the relevant election.

Recognizing the *de minimis* exception to statutory coverage urged by *amici* requires the Court to look to the structure and purpose of BCRA, rather than apply the text mechanically.

In approaching both questions of statutory interpretation, the Court should follow the approach of the Court in *Northwest Austin Mun. Util. Dist. No. One v. Holder*, ___U.S.___, 129 S.Ct. 2504 (2009). In *Northwest Austin*, the Court was confronted with a provision in the Voting Rights Act that appeared to confine the ability to seek a judicial bailout from Section 5 pre-clearance obligations to political subdivisions that carry out voter registration. 42 U.S.C. § 1973c(a). Applying the literal text, the lower court declined to consider the Utility District's bailout application. *Northwest Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 232 (D.D.C. 2008). This Court reversed.

The Chief Justice, writing for eight Justices, noted that the Supreme Court, in deference to Congress's purpose in enacting the Voting Rights Act, had

departed from the provision's literal text on two occasions to expand the scope of Section 5 coverage. *United States v. Board of Cmm'rs of Sheffield, Ala.*, 435 U.S. 110 (1978); *Daughterty County Bd. of Educ. v. White*, 439 U.S. 32 (1978). Given the serious constitutional issues posed in *Northwest Austin*, the Chief Justice invoked the canon of constitutional avoidance to depart from the literal text yet a third time in order to advance Congress's overarching purpose, this time enabling political subdivisions to seek statutory bailout even though they do not conduct voter registration. Similar respect for congressional purpose and the canon of constitutional avoidance should result, in this case, in the recognition of both statutory exceptions to BCRA coverage discussed *supra*.[11]

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[11] A similar approach to statutory interpretation was applied this Term in *United States v. Hayes*, 555 U.S. __, 129 S.Ct. 1079 (2009), when Justice Ginsburg, writing for seven Justices, declined to read the statutory term "misdemeanor crime of domestic violence" to require that domestic violence have been an element of the predicate offense. Faced with punctuation and grammar pointing in the other direction, Justice Ginsburg reasoned that such a reading would "frustrate Congress's manifest purpose" in enacting the statute. 555 U.S. __, 129 S.Ct. 1079, 1081 (2009). *Hayes* was a more difficult statutory construction case because the canon of constitutional avoidance was not available to guide the Court's deliberations. *See also Abuelhawa v. United States*, __U.S.__, 129 S.Ct. 2102 (2009) (construing "facilitate"); and *Burlington Northern & Santa Fe Ry. v. United States*, __U.S.__, 129 S. Ct. 1870 (2009) (construing "arrange"). There is, of course, no argument for deference to the FEC's reading in a case involving the agency's statutory jurisdiction, especially in a First Amendment setting. *See NLRB v. Catholic Bishops of Chicago*, 440 U.S. 490, 507 (1979).

II. CITIZENS UNITED IS ENTITLED TO "AS APPLIED" FIRST AMENDMENT PROTECTION UNDER PROPER READING OF *AUSTIN*

If BCRA is construed to ban the dissemination of *Hillary* within thirty days of a presidential primary election solely because the film's funding included trace amounts of unsolicited corporate contributions to Citizens United, a proper reading of *Austin* renders the statute's application unconstitutional "as applied."

In *Austin*, an organization more than three-quarters of whose members were for-profit business corporations, produced a classic electioneering communication expressly urging the election of a named candidate in a local election. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 664 (1990). Fearing that such direct for-profit corporate participation in electoral debate risked destabilizing the democratic process by permitting for-profit corporations to deploy massive economic power assembled through non-political economic transactions, the *Austin*-Court upheld a state statute that followed the settled national policy of limiting the direct participation of for-profit corporations in the electoral process, whether that participation takes the form of corporate campaign contributions, banned since 1907, or targeted "express advocacy" of the election or defeat of a named candidate. Tillman Act, ch. 420, 34 Stat. 864-865.

The speech at issue in this case carries none of the dangers perceived in *Austin*. Unlike the communication in *Austin*, the speech in this case appears to have been paid for and disseminated by a

non-profit advocacy organization funded overwhelmingly by like-minded individual donors. See *MCFL* 479 U.S. 238, 263-64 (1986). In *Austin*, the communication was funded by an organization 75% of whose members were for-profit corporations. In this case, more than 99% of the funding for *Hillary* appears to have come from individual sources, and no for-profit corporation appears to have played a role in determining the substantive content of the material. (Appellant's Br. 32.) In *Austin*, the communication was intended to be released on the eve of the election in a form directed to all prospective voters. *Austin*, 494 U.S. at 656. In this case, the communication was made available solely to those wishing to view it.

It is not necessary to determine at what point such differences render *Austin* inapplicable as precedent for the FEC's actions in this case. It is enough to note that since none of the dangers that drove the *Austin* decision are present in this case, the First Amendment protects the speech in question.

Given the ease with which this case can be disposed of on "as applied" First Amendment grounds that are fully consistent with *Austin*, it would be particularly inappropriate to reconsider *Austin* in a case that bears almost no resemblance to it.

III. NO REASON EXISTS TO RECONSIDER THE FACIAL CONSTITUTIONALITY OF BCRA

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, (1803), Chief Justice Marshall stressed that the power of this Court to review the constitutionality of congressional legislation is rooted in the Court's duty

to resolve the "case or controversy" before it. Accordingly, in the vast bulk of cases, the Court applies the Constitution to the facts before it, but declines to decide whether the statute could be constitutionally applied in other settings. *Yazoo & Mississippi Valley R.R. v. Jackson Vinegar*, 226 U.S. 217 (1912); *United States v. Raines*, 362 U.S. 17 (1960).

A major exception to the Court's "as applied" approach grew out of a concern that the mere existence of certain statutes, especially state statutes not subject to a narrowing construction by the Court, might operate to limit the free speech rights of non-parties who lacked the resources or sophistication to secure their own "as applied" protection. Accordingly, the Court developed a practice in the First Amendment area of invalidating statutes on their face in settings where: (1) a substantial number of applications would be unconstitutional; and (2) targets of the statutes were unlikely to be able to protect their own First Amendment rights. *See* Richard Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853 (1991). Not surprisingly, the Court often opted for facial review in settings involving state statutes where it lacked power to construe the statute narrowly to avoid collision with the First Amendment. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972).

In *McConnell*, this Court upheld BCRA against a facial challenge, while allowing for future "as applied" review. The Court rejected the facial challenge for three reasons. First, whatever BCRA's difficulties at the margins, the statute's core applications are clearly constitutional. For every *Citizens United* testing the outer margins of the statute and its relationship to the

First Amendment, there are innumerable garden variety applications that prevent massive inflows of corporate and private wealth with the capacity to corrupt the electoral process. *Virginia v. Hicks*, 539 U.S. 113, 119-20 (2003).

Second, the targets of FEC enforcement under BCRA's regulations governing for-profit corporate speech are generally well-funded and sophisticated speakers fully competent to protect their First Amendment rights through an "as applied" challenge to FEC regulation. *See Renne v. Geary*, 501 U.S. 312, 323-24 (1991); *Board of Trs., State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504-505 (1985).

In fact, the "as applied" review process has worked well in the context of campaign finance regulation to permit both effective regulation and robust First Amendment protection. This Court began the "as applied" process in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), continued it in *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982) and in *MCFL*, 479 U.S. 238, 264 (1986), expanded it in *WRTL II*, 551 U.S. 449, ___, 127 S. Ct. 2652, 2659 (2007) and has the ability in this case to further refine the constitutionally permissible scope of the statute. Accordingly, there is no need to depart from classic principles of "as applied" review in this case, especially when such a departure would require overruling settled Supreme Court precedent, and risk a general destabilization of the law in many areas.

Finally, as *amici* have demonstrated, BCRA is subject to at least two narrowing constructions capable of advancing Congress's purpose, while protecting the

free speech interests of Citizens United. Under *Ashwander v. TVA*, 297 U.S. 288, 345-49 (1936), it is clearly preferable to explore such a non-constitutional approach before considering overturning settled constitutional precedent, and departing from the Court's long-standing commitment to "as applied" constitutional review.

CONCLUSION

For the above-stated reasons, *amici* urge that the decision below be vacated, and the case be remanded to consider whether BCRA applies to this case. In the alternative, *amici* urge the Court to recognize that the First Amendment, as applied, prevents the FEC from prohibiting the dissemination of *Hillary: The Movie* in the context of a presidential primary election.

Dated: July 31, 2009
New York, New York

Respectfully submitted,

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AMICUS CURIAE BRIEF

134

64

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IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal
from the United States District Court
for the District of Columbia

BRIEF AMICUS CURIAE OF THE FREE SPEECH DEFENSE AND EDUCATION FUND, INC., FREE SPEECH COALITION, INC., *ET AL.* IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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The Richard Norman Company,
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U.S. Border Control Foundation, and
The United States Constitutional Rights Legal Defense Fund, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT

I. CITIZENS UNITED'S FIRST AMENDMENT CHALLENGE SHOULD BE SUSTAINED, AND AUSTIN AND MCCONNELL, AS APPLIED TO BCRA SECTION 203, SHOULD BE OVERRULED

A. Austin and McConnell Denigrate the Freedom of the Press 4

B. BCRA Section 203 Implicates the Freedom of the Press 6

II. THE FREEDOM OF THE PRESS IS NOT A SPECIAL PRIVILEGE OF THE INSTITUTIONAL PRESS 8

III. BCRA Section 203 Violates Citizens United's Freedom of the Press

A. BCRA Section 203 Establishes an Unconstitutional Licensing System 13

B. BCRA Section 203 Operates as an Unconstitutional "Previous Restraint" ... 14

C. BCRA Section 203 Unconstitutionally Intrudes into the Function of Editors 15

D. BCRA Section 203 Unconstitutionally Imposes Economic Penalties and Burdens on Issue Advertising 17

E. BCRA Section 203 Violates the Press Principle of Anonymity 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

U.S. Constitution
Amendment I . . . . . 4, *passim*

STATUTES
2 U.S.C. § 431(9)(B)(i) 8
2 U.S.C. § 434(f)(1) 13
2 U.S.C. § 434(f)(3)(A)(i) 5
2 U.S.C. § 434(f)(3)(B)(i) 8, 9
2 U.S.C. § 437g 14, 15
Bipartisan Campaign Reform Act,
section 203 . . . . . 4, *passim*

REGULATIONS
11 C.F.R. § 104.20 . . . . . 13, 14
11 C.F.R. §§ 111.4-111.17 15
11 C.F.R. § 114.15 . . . . . 5, *passim*

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Arkansas Writers' Project, Inc. v. Ragland,
481 U.S. 221 (1987) 18
Austin v. Michigan State Chamber of
Commerce, 494 U.S. 652 (1990) . . . . . 6, *passim*
Branzburg v. Hayes, 408 U.S. 665 (1972) 11
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INTEREST OF AMICI CURIAE[1]

These *amici curiae* form a coalition of interested nonprofit, tax-exempt, and political organizations, individuals, and for-profit corporations, committed to the proper construction of the Constitution and laws of the United States. Most of these *amici* have filed *amicus curiae* and/or party litigant briefs in the past in cases before federal courts, including this Court. Certain of these *amici* were among the appellants in McConnell v. FEC, 540 U.S. 93 (2003).

Twelve of these *amici* are tax-exempt under section 501(c)(3) of the Internal Revenue Code ("IRC"):
The Free Speech Defense and Education Fund, Inc.,
American Values,
Concerned Women for America,
Conservative Legal Defense and Education Fund,
Downsize DC Foundation,
English First Foundation,
Gun Owners Foundation,
Institute on the Constitution,
The Lincoln Institute for Research and Education,
The National Center for Public Policy Research,
U.S. Border Control Foundation, and
The United States Constitutional Rights Legal Defense Fund, Inc.

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[1] It is hereby certified that the parties have consented to the filing of this brief; that counsel of record for all parties received notice at least 10 days prior to the filing date of the intention to file this brief; and that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Ten are tax-exempt under IRC section 501(c)(4):
Free Speech Coalition, Inc.,
The Abraham Lincoln Foundation for Public Policy Research, Inc.,
Americans for the Preservation of Liberty,
DownsizeDC.org, Inc.,
English First,
Gun Owners of America, Inc.,
The National Right to Work Committee,
National Taxpayers Union,
The Senior Citizens League, and
U.S. Border Control.

Two are former Libertarian Party candidates for federal office:
Michael Cloud, and
Carla Howell.

One is a national political party organization:
Constitution Party.

Three are for-profit companies which assist nonprofit organizations in developing and implementing outreach programs for the public:
Base Connect, Inc.,
Eberle Communications Group, Inc., and
The Richard Norman Company.

The *amici* believe that their brief will be of assistance to the Court, bringing to its attention relevant matter on freedom of the press, not fully addressed by the parties.

SUMMARY OF ARGUMENT

Citizens United's challenge to federal regulation of electioneering communications should be sustained, and this Court's decisions in Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), and in McConnell v. FEC, 540 U.S. 93 (2003), as applied to BCRA section 203, should be overruled. Both decisions endorse an erroneous view of the freedom of speech that conflicts with Citizens United's freedom of the press.

Contrary to the assumptions in Austin and McConnell, the freedom of the press does not confer a special privilege upon the institutional press, but is enjoyed by all the people. Austin's and McConnell's narrow reading of the press freedom is not only contrary to history, but at odds with new realities of journalism.

BCRA section 203 violates Citizens United's freedom of press by: (1) establishing a licensing system; (2) operating as an unconstitutional previous restraint; (3) intruding into the editorial function; (4) imposing discriminatory economic penalties and burdens; and (5) forcing the public disclosure of the names and addresses of authors and publishers.

Because Austin and those portions of McConnell upholding BCRA section 203 violate these free press principles, they should be overturned.

ARGUMENT

I. CITIZENS UNITED'S FIRST AMENDMENT CHALLENGE SHOULD BE SUSTAINED, AND AUSTIN AND MCCONNELL, AS APPLIED TO BCRA SECTION 203, SHOULD BE OVERRULED.

A. Austin and McConnell Denigrate the Freedom of the Press.

With the enactment of the Federal Election Campaign Act of 1971, and its subsequent amendment in 1974 ("FECA"), Congress installed the Federal Election Commission ("FEC") as its gatekeeper to the marketplace of ideas concerning political campaigns for federal elective office. Under the constraints imposed by Buckley v. Valeo, 424 U.S. 1 (1976), the FEC's licensing power initially applied only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.*, at 44.

Dissatisfied with this "express advocacy" rule, and in an effort to extend the FEC's market entry control,[2] Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA"), expanding FEC's reach to "electioneering communication[s]" — broadcasts "targeted to the relevant electorate" that "refer[red] to a clearly identified candidate for Federal office" during

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[2] *See* McConnell v. FEC, 540 U.S. 93, 126-129, 189-90 (2003).

a statutorily-specified time proximate to an election. *See* 2 U.S.C. § 434(f)(3)(A)(i).

Initially, it appeared to this Court that such enlargement of FEC market control was sufficiently constrained by the literal language of the statute to meet First Amendment standards. *See* McConnell v. FEC, 540 U.S. 93, 194 (2003). However, in 2006, by unanimous vote, this Court ruled that a broadcast communication that met the statute's specified criteria could be constitutionally protected. *See* Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410, 411-12 (2006). In an ensuing "as applied" challenge, the Court ruled that the First Amendment constricted the FEC's power to regulate a communication that referred to a candidate only if the broadcast language was "the **functional equivalent of express advocacy**." FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, ___, 168 L.Ed.2d 329, 346 (2007) (emphasis added) (hereinafter "WRTL II").

Following WRTL II, the FEC adopted new regulations permitting corporations and labor unions to draw on their general treasuries "to make an electioneering communication ... unless the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." *See* 11 C.F.R. § 114.15(a). As the FEC acknowledged, the new rules empowered the FEC to **scrutinize the content** of any "issue ad" to ascertain whether it qualified for an exemption under either (i) its three-pronged "safe harbor" provision (11 C.F.R. § 114.15(b)) or (ii) its multi-factor interpretative provision (11 C.F.R.

§ 114.15(c)). *See* FEC Notice 2007-26, 72 *Fed. Reg.* 72,899-913 (Dec. 26, 2007). Thus, the FEC has assumed wide discretionary power controlling the terms under which a corporation or labor union would be permitted access to the marketplace of ideas during a federal election season.

According to both McConnell and Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990), the lodging of such discretionary **censorship powers** in the executive branch accords with the **freedom of speech**, because of the "'the **corrosive and distorting effects of immense aggregation of wealth** ... that have little or no correlation to the public's support for the corporation's [or union's] political ideas.'" *See* McConnell, 540 U.S. at 206 (emphasis added). For the reasons set out below, McConnell and Austin should be overturned because they rest upon an erroneous view of **freedom of speech** that conflicts with Citizens United's **freedom of the press**.

B. BCRA Section 203 Implicates the Freedom of the Press.

BCRA section 203 appears to apply equally to all candidates for election to federal office. In reality, it was deliberately crafted to vest incumbent members of Congress with a kind of super-trademark over their names — to be enforced by the FEC against independent entities, including incorporated nonprofit groups known to engage in the pesky activity of educating the public about the legislative actions of

those incumbents.[3] In the past, this Court has not hesitated to look behind high-sounding legislative pronouncements to uncover ulterior goals. For example, in Grosjean v. American Press Co., 297 U.S. 233 (1936), the Court, alerted by such censorious antecedents in English history (297 U.S. at 245-247), saw through a Louisiana statute — disguised by the Huey Long political machine as a revenue-raising "tax" measure[4] — when, in fact, its "plain purpose [was to] penaliz[e] the publishers and curtail[] the circulation of a selected group of newspapers" in violation of the freedom of the press (*id.*, at 250-51). Likewise, BCRA section 203, while "wrapped ... in the verbal cellophane of a [campaign finance reform] measure,"[5] is designed to penalize and curtail corporate and union communications in violation of the press guarantee.

Although this case appears to have been litigated as a generic First Amendment challenge with primary emphasis on freedom of speech (*see, e.g.*, Brief for Appellant, pp. 10-12), free press issues bubbled to the surface during oral argument following the government's disturbing responses to Justice Alito's probing questions as to whether a book could be banned as an "electioneering communication." (Oral Argument Transcript, p. 27, l. 16 – p. 31, l. 1 (Mar. 24,

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[3] *See* McConnell, 540 U.S. at 260 (Scalia, J., dissenting).

[4] *See generally* Richard Cortner, The Kingfish and the Constitution: Huey Long, the First Amendment, and the Emergence of Modern Press Freedom in America (1996).

[5] The phraseology is that of Justice Frankfurter from his dissent in United States v. Kahriger, 345 U.S. 22, 38 (1953).

2009)). At one point, the government even argued that "media corporations, the institutional press, would have a greater First Amendment right" than non-media entities such as Citizens United.[6] Tr. 28, ll. 7-11, p. 34, ll. 1-25. Such a dangerous assertion cannot go unchallenged. Nor can this appeal be resolved properly unless the Court grapples with what has now been revealed to be the central issue — the applicability and scope of the freedom of the press.

II. THE FREEDOM OF THE PRESS IS NOT A SPECIAL PRIVILEGE OF THE INSTITUTIONAL PRESS.

In Austin, the Michigan State Chamber of Commerce never raised the First Amendment free press issue. In McConnell, however, one group of litigants (Congressman Ron Paul, Gun Owners of America, Inc., Gun Owners of America Political Victory Fund, RealCampaignReform.org[7], Citizens United, Citizens United Political Victory Fund, Michael Cloud, and Carla Howell) did, assailing BCRA section 203 "as violative of Freedom of the Press" (*see, e.g.*, Brief for Appellants Congressman Ron Paul, *et al.*, pp. 16-50). This argument was summarily dismissed (*see* 540 U.S.

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[6] The Deputy Solicitor General was reflecting not only his own flawed view of press freedom, but that of Congress. Apparently believing the institutional press to have greater rights than other Americans, Congress largely exempted the institutional press from its ban on electioneering communications. 2 U.S.C. § 434(f)(3)(B)(i). This exemption parallels the press exemption applicable to campaign expenditures. 2 U.S.C. § 431(9)(B)(i).

[7] Now DownsizeDC.org, Inc.

at 209 n.89), apparently on the ground that BCRA's media exemption preserved whatever press rights might be at stake. *See* 540 U.S. at 208-09. Both Austin and McConnell having failed to address the press issue, the two were wrongly decided.

McConnell found BCRA's "narrow exception [2 U.S.C. section 434(f)(3)(B)(i)] [to be] wholly consistent with First Amendment principles," because of Austin. *Id.*, 540 U.S. at 208. Quoting from Mills v. Alabama, 384 U.S. 214, 219 (1966), Austin adopted the view that: "'[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and **as a constitutionally chosen means** for keeping officials elected by the people responsible to all the people whom they were selected to serve.'" Austin, 494 U.S. at 667-68 (emphasis added).

But Mills did not elevate the institutional press to such a preferred position. To the contrary, Mills stated that "[t]he Constitution specifically selected the press, which includes not only newspapers, books and magazines, but **humble leaflets and circulars** ... to play an important role in the discussion of public affairs." Mills, 384 U.S. at 219 (emphasis added). Furthermore, Mills emphasized that the people's press freedom plays a key role in the electoral process. *Id.*, 384 U.S. at 218-19. Thus, Mills ruled unconstitutional a statute that forbade "'any electioneering ... for or against the election or nomination of any candidate ... that is being voted on **on the day on which the election** affecting such candidates ... **is being held.**'"

Id., at 216 n.2, 220 (emphasis added). And it so ruled on the grounds of the freedom of the press:

> The Alabama Corrupt Practices Act ... silences the press **at a time when it can be most effective.** It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed **freedom of the press.** [*Id.*, 384 U.S. at 219 (emphasis added).]

While Mills concerned a newspaper editorial, it was most certainly not based on Austin's and McConnell's "narrow reading of the Press Clause," which would cause "fundamental difficulties" of interpretation and application. *See* First National Bank of Boston v. Bellotti, 435 U.S. 765, 798-801 (1978) (Burger, C.J., concurring). As Justice Scalia pointedly asked at oral argument: "But does 'the press' mean the media in that constitutional provision? You think in 1791 there were ... people running around with fedoras that had ... little press tickets in it.... Doesn't it cover ... the right of any individual to ... write, to publish?" Tr. 34, ll. 5-13.

Although "indispensable to the political ... life of their communities," colonial printers were not a dominant institution. Jeffrey L. Pasley, The Tyranny of Printers: Newspaper Politics in the Early American Republic, p. 24 (U. of Va. Press 2001). Indeed, newspapers were transient concerns, as "more than two-thirds of the American newspapers established before 1821 published for three years or less." *Id.*, at 52.

Prior to the recognition of the freedom of the press in England, it was assumed "the press should be regulated so as to ensure the success of the royal policies." Fredrick Siebert, Freedom of the Press in England, 1476-1776, U. of Ill. Press, p. 6 (1965). By "the end of the eighteenth century," however, the "freedom of the press became one of the natural rights of man as derived from the law of God and incapable of infringement by any man-made power." *Id.*, at 7.

As James Madison put it, in the United States:

> **[t]he people**, not the government possess the absolute sovereignty. The legislature, no less than the executive is under limitations of power.... This security of the **freedom of the press** requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also. [James Madison, "The Virginia Report of 1799," reprinted in Garrett Epps, ed., The First Amendment: Freedom of the Press, p. 78 (2008) (emphasis added).]

Thus, the American experience validated Blackstone's description that the "liberty of the press is indeed essential to the nature of a free state." IV William Blackstone, Commentaries on the Laws of England, p. 151 (U. of Chicago, facsimile ed. 1769). In his concurring opinion in Bellotti, Chief Justice Burger rejected the notion that the freedom of the press bestows First Amendment monopoly rights upon the institutional press. *Id.*, 435 U.S. at 802. *See also* Lovell v. Griffin, 303 U.S. 444, 452 (1938); Branzburg v. Hayes, 408 U.S. 665, 704 (1972) ("the traditional

doctrine [of the] liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher....").

The government's narrow reading of the press freedom is not only contrary to history, but is at odds with the realities of the twenty-first century. To believe that the institutional press was granted special constitutional privileges would be to grant special rights largely to "[f]ive global-dimension firms [which] own most of the newspapers, magazines, book publishers, motion picture studios, and radio and television stations in the United States" — *i.e.*, Time Warner, The Walt Disney Company, News Corporation, Viacom, and Bertelsmann. Ben H. Bagdikian, The New Media Monopoly, Beacon Press, p. 3 (2004). And the government's view would deny the reality of the Internet:

> It was not long ago that the boundaries between journalists and the rest of us seemed relatively clear.... Those days are gone. The lines distinguishing professional journalists from other people who disseminate information, ideas and opinions to a wide audience have been blurred, perhaps beyond recognition.... [Scott Gant, We're All Journalists Now, Free Press, p. 3 (2007).]

Contrary to Austin and McConnell, freedom of the press belongs not just to corporations like General Electric, but rather to "the people."

III. BCRA SECTION 203 VIOLATES CITIZENS UNITED'S FREEDOM OF THE PRESS.

A. BCRA Section 203 Establishes an Unconstitutional Licensing System.

Empowered by BCRA section 203's grant of editorial discretion, and subject to no objective standard, the FEC decides which issue ads may be broadcast without compliance with all of the rules imposed on political committees (*e.g.*, financial stricture, reporting, and public disclosure). Notwithstanding WRTL II, the FEC commissioners also assert jurisdiction over issue ads that are not the functional equivalent of express advocacy, requiring the sponsors of constitutionally-protected ads to comply with BCRA section 203's reporting and disclosure requirements. *See* 11 C.F.R. § 114.15(f).[8]

For over 70 years, it has been well-established that any effort by the government to require a permit before dissemination of ideas "strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *See* Lovell v. Griffin, 303 U.S. 444, 451 (1938). Yet, 2 U.S.C. section 434(f)(1) and its implementing regulation (11 C.F.R. § 104.20(a) and (b)) require that Citizens United "file a statement" with the FEC within 24 hours after disbursement of an initial $10,000 of direct costs for airing any communication referring to a candidate for federal office — whether or not it is the functional equivalent of express advocacy

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[8] *See also* FEC Notice 2007-26, 72 *Fed. Reg.* 72,899-901 (Dec. 26, 2007).

— during the specified statutory periods. Such statement must include the name and addresses of all persons directly involved in the communication. 11 C.F.R. § 104.20(c). Such forced disclosure is tantamount to "'censorship through license'" which, contrary to "'the doctrine of the freedom of the press ... makes impossible the free and unhampered distribution'" of ideas. *See* Watchtower Bible and Tract Society v. Village of Stratton, 536 U.S. 150, 162 (2002), quoting from Schneider v. State, 308 U.S. 147, 164 (1939).

B. BCRA Section 203 Operates as an Unconstitutional "Previous Restraint."

BCRA section 203 also violates the press principle against "previous restraint[s]." *See* Lovell, 303 U.S. at 451-52. In Near v. Minnesota, 283 U.S. 697 (1931), this Court ruled that a statute authorizing **injunctive relief** against an allegedly libelous publication constituted "an unconstitutional restraint upon publication." *Id.*, 283 U.S. at 723. Since Near, this Court has found governmental efforts to enjoin the publication of protected speech to be presumptively unconstitutional, a presumption that can be overcome only by an "overwhelming national interest." *See* New York Times Co. v. United States, 403 U.S. 713, 726 n.*, 726-27 (1971) (Brennan, J., concurring).

Yet, Congress has equipped the FEC with the power to seek **injunctive relief** in a federal district court without having to meet this extraordinarily high burden. *See* 2 U.S.C. § 437g(a)(6). Additionally, Congress has established an enforcement process that

can be triggered by a complaint filed with the FEC, signed by a person who only believes that a violation of the FECA laws "**is about to occur**." *See* 2 U.S.C. § 437g and 11 C.F.R. §§ 111.4-111.17 (emphasis added). Further, under 2 U.S.C. section 437g(a)(2), the FEC may initiate its own investigation and enforcement processes to determine if there is probable cause that a violation is about to occur. *See* 11 C.F.R. §§ 111.9-111.17. Such intrusive administrative powers do nothing to alleviate the "previous restraint." Rather, they exacerbate it.

By these administrative means, the FEC would "substitute[] [its] judgment ... for the judgment of ... individual householder[s],"[9] at times most critical to them — just before a federal election. As the Court observed in Watchtower, "'the evils to be prevented [by the Free Press Clause] were not the censorship of the press merely, but **any action** of the government by means of which it might prevent such **free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.**'" *Id.*, 536 U.S. at 168 (emphasis added).

C. BCRA Section 203 Unconstitutionally Intrudes into the Function of Editors.

Purportedly, BCRA section 203 is warranted by a Congressional policy designed to protect the federal electoral process from "'the corrosive and distorting

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[9] Martin v. Struthers, 319 U.S. 141, 144 (1943).

effects of immense aggregations of wealth.'" *Id.*, 540 U.S. at 205. In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), this Court rejected an almost identical justification for a 1913 Florida statute requiring a newspaper to print a state office candidate's reply "to criticism and attacks on his record by a newspaper." *Id.* at 243. Although the statute was defended as necessary to counter the "noncompetitive and enormously powerful" established press (*id.*, at 249), the Court ruled that it "fail[ed] to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.*, at 258.

According to Blackstone's pristine statement of the liberty of the press, "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press...." IV Blackstone's Commentaries 151-52. Thus, the Court in Miami Herald ruled that "the choice of material to go into a newspaper ... and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment" outside of "governmental regulation." *Id.*, 418 U.S. at 258.

In an effort to implement WRTL II, the FEC has embarked on an editorial quest to sort out those issue ads that "function" as express advocacy from those that do not. *See* FEC Notice 2007-26, 72 *Fed. Reg.* 72,899-915. To that end, FEC has promulgated regulations to guide its "content" and "interpretive" judgments. *See, e.g.*, 11 C.F.R. § 114.15(c)(2). Indeed, as evidenced by FEC Advisory Opinion 2008-15, the FEC commissioners may have no better reason for ruling

that a proposed issue ad may be an electioneering communication than that it did not receive a majority Commission vote to authorize it. In such case, the rejected ad did not fall to the "newsroom floor" because of the editorial judgment of its author; rather, it fell to the "FEC floor," because BCRA section 203 "allow[s] government to insinuate itself into the editorial rooms of this Nation's press." *See* Miami Herald, 418 U.S. at 259 (White, J., concurring).

D. BCRA Section 203 Unconstitutionally Imposes Economic Penalties and Burdens on Issue Advertising.

As McConnell pointed out, BCRA section 203 does not ban corporate- or union-sponsored issue ads referring to a candidate for federal office broadcast during the covered periods before election. Rather, "under BCRA, corporations and unions may not use their general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *Id.*, 540 U.S. at 204. A similar argument was made in Miami Herald — that the right-to-reply statute "does not amount to a restriction of [the newspaper's] right to speak because 'the statute in question here has not prevented the Miami Herald from saying anything it wished.'" *Id.*, 418 U.S. at 256. But, as the Miami Herald Court pointed out, "Government restraint on publishing need not fall into familiar and traditional patterns to be subject to constitutional limitations on government powers." *Id.* Rather, the question is whether BCRA section 203 "exacts a penalty on the basis of the content" of the

communication (*id.*), and therefore, "under the operation of the statute, political and electoral coverage would be blunted or reduced" (*id.*, at 257). If so, it would be a violation of the freedom of the press. *See* Grosjean, 297 U.S. at 250.

The very purpose of BCRA section 203 is to "blunt or reduce" corporate and labor union influence in the electoral marketplace, by forcing corporations and labor unions to form a PAC and conform to the strict rules by which money is to be raised. By increasing the costs of corporate and labor union participation in the public debate swirling about in the electoral politics marketplace, BCRA section 203 plays the same role as the infamous English "taxes on knowledge," the "main purpose of [which] was to suppress the publications of comments and criticisms objectionable to the Crown." *See* Grosjean, 297 U.S. at 246.

Moreover, the financial burden imposed by BCRA section 203 is discriminatory in that a like burden is not placed upon a news story or commentary or editorial by a "broadcast facility." *See* 2 U.S.C. § 434(f)(3)(B)(i). As this Court observed in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), "a discriminatory tax on the press burdens rights protected by the First Amendment ... because selective taxation of the press ... poses a particular danger of abuse by the State." *Id.*, 481 U.S. at 227-28.

E. BCRA Section 203 Violates the Press Principle of Anonymity.

Even if an issue ad is found not to be the functional equivalent of "express advocacy," the FEC requires corporations and labor unions to comply with BCRA section 203's disclaimer and disclosure provisions, including identification of the person(s) responsible for the issue ad and the person(s) whose finances made the ad possible. *See* FEC Notice 2007-26, 72 *Fed. Reg.* 72,900. In short, the FEC requires that the author and publisher of the ad be disclosed to the public.

As Justice Black observed in Talley v. California, 362 U.S. 60 (1960):

> The obnoxious press licensing law of England, which also was enforced on the Colonies was due in part to the knowledge that **exposure of the names of printers, writers and distributors** would lessen the circulation of literature critical of the government. [*Id.*, 362 U.S. at 64 (emphasis added).]

In his concurring opinion in McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995), Justice Thomas documented "the extent to which anonymity and the freedom of the press were intertwined in the early American mind." *Id.*, at 361. And rightfully so. The principle of anonymity is akin to the principle of editorial control. As the McIntyre majority acknowledged, "the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude."

Id., 514 U.S. at 348. And as McIntyre pointed out, the people need no help from the government to sort out the true from the false:

> "Don't underestimate the common man. People ... can evaluate [the] anonymity along with [the] message as long as they are permitted ... to read that message. [O]nce they have done so, it is for them to decide what is 'responsible,' what is valuable, and what is truth." [*Id.*, 514 U.S. at 348 n.11.]

The FEC rules requiring disclosure bespeak the opposite view, that people are not capable of ferreting out the truth without the government's paternalistic oversight. Such a policy is anathema to the freedom of the press. *See* Miami Herald, 418 U.S. at 259 (White, J., concurring).

CONCLUSION

Austin, and those portions of McConnell which relate to BCRA section 203, should be overturned, and BCRA section 203 should be declared unconstitutional as violative of the freedom of the press.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CITIZENS UNITED,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICI CURIAE* HACHETTE BOOK GROUP, INC. AND HARPERCOLLINS PUBLISHERS L.L.C. IN SUPPORT OF NEITHER PARTY ON SUPPLEMENTAL QUESTIONS

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. BCRA SECTION 203 DOES NOT APPLY TO BOOKS EVEN IF DISTRIBUTED VIA ELECTRONIC READER DEVICES SUCH AS AN AMAZON KINDLE 5

A. BCRA Section 203 Does Not Apply to Books 5

B. A Book Distributed to an Electronic Book Reader Device such as an Amazon Kindle Is Not a "Broadcast, Cable, or Satellite Communication" Subject to BCRA Section 203 8

II. NEITHER *AUSTIN* NOR *MCCONNELL* SUPPORTS THE AUTHORITY OF THE GOVERNMENT UNDER THE CONSTITUTION TO REGULATE BOOKS CONTAINING ELECTORAL ADVOCACY 10

A. The Only Compelling Interest that May Justify Restricting Electoral Advocacy Is Preventing Corruption or the Appearance of Corruption in the Electoral Process 10

B. The Holding in *McConnell* Is Predicated on the Finding that a Certain Form of Communication—Broadcast Advertisements—Poses a Real Risk of Corruption 13

C. Because Books Do Not Have a Distorting Effect on the Electoral Process, Neither *Austin* nor *McConnell* Permits Imposing Restrictions on Books Containing Electoral Advocacy 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. Mich. Chamber of Commerce, 494 U.S. 653 (1990) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) 10

Carcieri v. Salazar, 129 S.Ct. 1058 (2009) 5

FCC v. Pacifica Found., 438 U.S. 726 (1978) 17

FEC v. Mass. Citizens for Life, Inc. 479 U.S. 238 (1986) 11, 16

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 10, 11, 12

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McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C. 2003) 14, 15

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Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 16

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2 U.S.C. § 431 2

2 U.S.C. § 434(f)(3)(A)(i) 4, 5, 8

2 U.S.C. § 441b 2

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Alaska Stat. § 15.13.400 6

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Idaho Code Ann. § 67-6602(f) 6

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REGULATIONS

11 C.F.R. § 100.29(a) 8

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Priya Ganapati, *E-Book Reader Roundup: Samsung's Papyrus Joins the Crowd*, *Wired*, Mar. 25, 2009 9

Priya Ganapati, *Plastic Logic E-Book Reader to Use AT&T Wireless*, *Wired*, Jul. 22, 2009 9

Page(s)

Product Description – Introducing Kindle™, http://www.amazon.com/Kindle-Amazons-Original-Wireless-generation/dp/B000FI73MA..... 8

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Hachette Book Group, Inc. (Hachette Book Group) and HarperCollins Publishers L.L.C. (HarperCollins), are publishing companies that publish books on a wide range of subjects, including books about electoral campaigns and candidates for elected office, and books written by political figures. Hachette Book Group is a leading trade publisher based in New York and a division of Hachette Livre, the second largest book publisher in the world. Hachette Book Group publishes about 600 books per year. HarperCollins Publishers L.L.C. (HarperCollins) is one of the world's leading publishers. HarperCollins is based in New York and is a subsidiary of News Corporation. The company publishes under the divisions of HarperCollins General Books Group–U.S., HarperCollins Children's Books Group–U.S., HarperCollins U.K., HarperCollins Canada, HarperCollins Australia, HarperCollins India, HarperCollins New Zealand, and Zondervan.

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[1] The parties have consented to the filing of this brief. No counsel for a party prepared this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

HarperCollins' revenues exceed $1 billion each year.

This case is about a film, not a book. However, the issue of the government's power to regulate the publication of books referring to candidates for federal office, or containing "express advocacy" or the "functional equivalent of express advocacy," was raised at Oral Argument before the Court. Specifically, the Deputy Solicitor General responded to hypothetical inquiries from the Court by contending that: (1) books downloaded for reading onto an Amazon Kindle electronic reader device are subject to Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b (2005), Tr. 28:21-29:18; (2) books that include express advocacy or its functional equivalent could be subject to pre-existing provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 *et seq.* (2005), such that "a corporation could be barred from using its general treasury funds to publish the book," Tr. 29:10-14; *see also* Tr. 31:14-32:7; and (3) more generally, that the interest in preventing corruption of the electoral process permits Congress to require corporations, which publish books that include either express advocacy or its functional equivalent, to fund those books through segregated funds or a political action committee (PAC). Tr. 27:15-31:1.

Any regulation of books directly implicates and affects *amici*'s rights and interests. *Amici* are

key players in the marketplace of ideas who publish books about electoral campaigns and candidates in the ordinary course of their business, in which they do not serve as conduits for the type of campaign-related spending that may create a threat to the political marketplace. If the Deputy Solicitor General's responses to the Court's hypothetical questions were correct, book publishers would need to make significant changes to their business models and practices, for example, to establish special segregated funds for the writing, advertisement, publication and distribution of any book that included electoral speech. They are not correct. The Deputy Solicitor General's responses depart from statutory and constitutional law, as well as regulatory practice to date.

In its supplemental briefing, the government appears to soften its positions. *Amici* note, however, that the government's supplemental briefing does not explicitly revise the statements made during Oral Argument in connection with books. Consequently, *amici* consider it important to articulate for the Court why those statements are inconsistent with the relevant statutory language and implementing regulations, and are not supported by *Austin v. Michigan Chamber of Commerce*, 494 U.S. 653 (1990), or *McConnell v. FEC*, 540 U.S. 93 (2003).

SUMMARY OF THE ARGUMENT

The question now before the Court is whether the Court should overrule either *Austin* or the part of *McConnell* that addresses the facial validity of BCRA Section 203. *Amici* respectfully submit that it is not necessary for the Court to overrule either *Austin* or the relevant part of *McConnell* in order to guarantee the constitutional protection of electoral speech in books, whether in printed form or downloaded onto an Amazon Kindle or similar device. Specifically, *amici* submit that: (1) books are plainly exempted from BCRA Section 203, such that there is no reason for the Court to consider *Austin* or *McConnell* in connection with this issue; and (2) even if the Court were to visit the broader constitutional inquiry about the government's authority to regulate books containing electoral speech, neither *Austin* nor *McConnell* entails or permits the potential imposition of restrictions on books.

As an initial matter, as the Deputy Solicitor General conceded, Section 203 of BCRA on its face does not apply to paper-printed books. Tr. 35:24-36:5. Section 203 is also inapplicable to books distributed via an electronic reader device, such as an Amazon Kindle, because such books are not "broadcast, cable, or satellite communication[s]." 2 U.S.C. § 434(f)(3)(A)(i) (2005).

Further, nothing in either *Austin* or *McConnell* supports the extension to books of the government's authority to regulate electioneering communications. Books present none of the features associated with the media that *McConnell* addresses. Unlike other forms of media deemed to present the greatest risk of corruption, books require a willing reader who "opts in" to seeking, acquiring and reading the book. Accordingly, neither *Austin* nor *McConnell* supports the claim that Congress may constitutionally regulate books.

ARGUMENT

I. BCRA SECTION 203 DOES NOT APPLY TO BOOKS EVEN IF DISTRIBUTED VIA ELECTRONIC READER DEVICES SUCH AS AN AMAZON KINDLE

A. BCRA Section 203 Does Not Apply to Books

Section 203 of BCRA prohibits corporations from using their general corporate treasury funds to finance "electioneering communications," 2 U.S.C. § 441b(b)(2), which are defined as "any broadcast, cable, or satellite communication" that meets certain criteria. *Id.* § 434(f)(3)(A)(i). Where "the statutory text is plain and unambiguous," the statute must be applied "according to its terms." *Carcieri v. Salazar*, 129 S.Ct. 1058, 1063-64 (2009). By its plain, unambiguous language, BCRA Section 203 does not apply to paper-printed books. The

BCRA's implementing regulations further confirm that BCRA Section 203 does not apply to paper-printed books. *See* 11 C.F.R. § 100.29(c)(1) (2009) ("[E]lectioneering communication does not include communications appearing in print media . . . .").[2]

A book distributed to an electronic reader device, such as an Amazon Kindle, is equally excluded from the scope of BCRA Section 203. Such a book is, quite simply put, a book; it consists of a large number of successive words rendered on a flat surface. Books downloaded onto electronic reader devices are not fundamentally different from paper-printed books; indeed, many such devices

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2 "Electioneering communications" has also been defined by at least 13 states to include some forms of non-broadcast communications, including billboards, pamphlets, paid print advertising, where such communications are targeted at an election, appear close in time to that election, clearly identify a candidate, and incur cost over a specified threshold. None of these expanded state definitions includes books. Alaska Stat. § 15.13.400 (2009); Cal. Elec. Code § 304 (West 2009); Conn. Gen. Stat. Ann. § 9-601b (West 2009); Fla. Stat. Ann. § 106.011(13) (West 2009); Haw. Rev. Stat. § 11-207.6(c) (2009); Idaho Code Ann. § 67-6602(f) (2009); 10 Ill. Comp. Stat. Ann. 5/9-1.14 (West 2009); Me. Rev. Stat. Ann. tit. 21-A, § 1014(2-A) (2009); Okla. Stat. tit. 74, § 257:1-1-2 (2009); S.C. Code Ann. § 8-13-1300(31) (2008); Vt. Stat. Ann. tit. 17, § 2891 (2008); Wash. Rev. Code Ann. § 42.17.020 (West 2009); W. Va. Code Ann. § 3-8-1a(12)(A) (West 2009).

have been designed to look and feel as much like paper-printed books as possible. *See, e.g.*, Kindle – Features – Enhanced Reading™, http://www.amazon.com/Kindle-Amazons-Wireless-Reading-Generation/dp/B00154JDAI (last visited July 30, 2009) ("Utilizing the latest in *electronic-ink* display technology, Kindle provides a crisp black-and-white 6" screen with the same appearance and readability of printed paper."). Much like a paper-printed book, the reader must flip each page of the book on an Amazon Kindle, in this case by punching an electronic button. Most importantly, the reader must choose to read the book in question and take an affirmative action—purchasing and downloading the book—in order to read it. The content of a book cannot be pushed onto an unwilling reader in the manner in which, for example, a television or radio advertisement might. The process of acquiring a book on an Amazon Kindle is similar to acquiring a physical book; the consumer—much like going to a bookstore or visiting Amazon.com on the Internet– must go to the "store" on the wireless reader device and decide which book to buy and read.

B. A Book Distributed to an Electronic Book Reader Device such as an Amazon Kindle Is Not a "Broadcast, Cable, or Satellite Communication" Subject to BCRA Section 203

In any event, a book distributed to an electronic reader device is not a "broadcast, cable, or satellite communication." 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(a), (b)(1). Books are not "publicly distributed by a television station, radio station, cable television system, or satellite system," 11 C.F.R. § 100.29(b)(1), to electronic book reader devices. Rather, a book is downloaded onto an electronic reader device, either wirelessly (through high-speed wireless data networks such as those provided by Sprint and AT&T) or through computers, via the Internet. *See* Product Description – Introducing Kindle™, http://www.amazon.com/Kindle-Amazons-Original-Wireless-generation/dp/B000FI73MA (last visited July 30, 2009) ("Using the same 3G network as advanced cell phones, [Amazon] deliver[s] your content using our own wireless delivery system . . . ."); Kindle Features – Wireless Access with Whispernet, http://www.amazon.com/Kindle-Amazons-Wireless-Reading-Generation/dp/B00154JDAI (last visited July 30, 2009) (explaining that "books . . . are delivered [to the Kindle] via Whispernet," which "utilizes Amazon's optimized technology plus Sprint's

national high-speed (3G) data network to enable you to wirelessly . . . download content"); Priya Ganapati, *Plastic Logic E-Book Reader to Use AT&T Wireless*, *Wired*, Jul. 22, 2009, http://www.wired.com/gadgetlab/2009/07/plasticlogic-att/ ("Electronic books reader manufacturer Plastic Logic announced . . . that it will offer wireless access in its upcoming devices through AT&T's 3G network . . . ."); Priya Ganapati, *E-Book Reader Roundup: Samsung's Papyrus Joins the Crowd*, *Wired*, Mar. 25, 2009, http://wired.com/gadgetlab/2009/03/samsungs-new-e (noting which electronic book reader devices allow for wireless downloads of books, and which such devices must be connected to Internet-enabled computers to allow such downloads).

Pursuant to the express terms of the BCRA implementing regulations, Section 203 does not cover communications that are "publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station." 11 C.F.R. § 100.29(c)(1). Thus, books downloaded onto an electronic reader device are exempt from Section 203. The implementing regulations exempt, even more explicitly, "communications over the Internet . . . or telephone communications," 11 C.F.R. § 100.29(c)(1)[3]—

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[3] The government recognizes, as it must, that "the restrictions imposed by BCRA Section 203 . . . are limited to broadcast media and do not apply to . . . the Internet." (Appellee Br. at 25-26.)

categories that broadly include the transmission of books to electronic reader devices (via wireless networks or computers connected to the Internet), described above. In short, under the plain language of the statute and its implementing regulations, books—whether in paper or electronic form—are not subject to BCRA Section 203.

II. NEITHER *AUSTIN* NOR *MCCONNELL* SUPPORTS THE AUTHORITY OF THE GOVERNMENT UNDER THE CONSTITUTION TO REGULATE BOOKS CONTAINING ELECTORAL ADVOCACY

A. The Only Compelling Interest that May Justify Restricting Electoral Advocacy Is Preventing Corruption or the Appearance of Corruption in the Electoral Process

The Court has long recognized that political speech, including independent expenditures in connection with elections, is "at the core of our electoral process and of the First Amendment freedoms." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (independent expenditures "produce speech at the core of the First Amendment"). Any restriction on political speech, including electoral advocacy, is therefore

subject to strict scrutiny; such speech may be burdened only if the government proves that the burden is justified by a compelling interest and is narrowly tailored to achieve that interest. *See, e.g.*, *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986) ("We must therefore determine whether the prohibition of § 441b burdens political speech, and, if so, whether such a burden is justified by a compelling state interest."); *id.* at 256 ("When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest.").

The Court has found only one compelling government interest capable of justifying a restriction on campaign-related speech, namely, the interest in combating corruption or the appearance of corruption. *See Nat'l Conservative Political Action Comm.*, 470 U.S. at 496-97 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."); *accord Austin*, 494 U.S. at 658. The Court has noted that "[c]orruption is a subversion of the political process." *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497.

In one formulation, the Court articulated the anti-corruption interest as preventing the "danger of 'financial quid pro quo' corruption." *Austin*, 494 U.S. at 659 (quoting *Nat'l Conservative Political*

Action Comm., 470 U.S. at 497); *see also Nat'l Conservative Political Action Comm.*, 470 U.S. at 497 ("The hallmark of corruption is the financial *quid pro quo*: dollars for political favors."). In *Austin*, the Court found that the anti-corruption interest also includes curbing the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. In formulating this type of "corruption in the political arena," *id.*, the Court made clear that its concern was that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* Thus, in *Austin*, the Court's recognition of a compelling government interest, which validates restrictions on corporations' speech in connection with elections, continued to focus on the danger that such speech might unduly affect the electoral process.

Although the Court in *Austin* identified the single interest deemed to be sufficiently compelling to justify restrictions on express advocacy, as the government implicitly recognizes here, the Court did not identify which forms and media of electoral advocacy invoke that interest. (*See* Appellee Suppl. Br. at 18 (noting that "the Court did not delineate precisely which corporate-funded communications

can properly be treated as electioneering").) As discussed below, at no time has a link between books and corruption of the electoral process been asserted, much less established.

B. The Holding in *McConnell* Is Predicated on the Finding that a Certain Form of Communication—Broadcast Advertisements—Poses a Real Risk of Corruption

McConnell's holding—that certain forms of corporate communications constituting the functional equivalent of express advocacy cannot be financed via general treasury funds—rests entirely on the corrosive effect of the specific forms of communications at issue in that case. In upholding BCRA Section 203 against a facial challenge in *McConnell*, the Court held that a compelling anti-corruption interest justified the regulation of certain broadcast, cable and satellite communications that constitute express advocacy or its functional equivalent. *McConnell*, 540 U.S. at 205-07. The Court found that "[t]he records developed in this litigation and by the Senate Committee adequately explain the reasons for th[e] legislative choice" of regulating these forms of communication and not others, insofar as "Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections, and that remedial

legislation was needed to stanch that flow of money." *Id.* at 207.[4]

Indeed, the district court, having examined the "elephantine" record, *McConnell v. FEC*, 251 F. Supp. 2d 176, 209 n. 40 (D.D.C. 2003), found that corporate-funded broadcast, cable and satellite communications are "the most potent form of advertising," *id.* at 645, in part because "advertisements on television and radio are aired throughout programming without any viewer choice," *id.* at 571. Contrasting broadcast advertising with other forms of media (including newspapers, the Internet, and direct mail), the district court concluded that those other media are not as effective as broadcast advertising in communicating an electioneering message to a mass audience, and, consequently, are not as problematic. *Id.* at 569-73.[5]

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[4] *Cf. McConnell*, 540 U.S., at 185 (in upholding another FECA provision, finding that "[t]he proliferation of sham issue ads has driven the soft-money explosion," and that "[t]he argument . . . that soft-money contributions to state and local candidates for 'public communications' do not corrupt or appear to corrupt federal candidates ignores . . . the record in this litigation").

[5] Specifically, the district court: (i) did "not find that the Internet is now, or was, a comparable medium to television and radio broadcast advertising." *McConnell*, 251 F. Supp. 2d at 572; (ii) found that "there is no evidence in the record that [direct mail] is

C. Because Books Do Not Have a Distorting Effect on the Electoral Process, Neither *Austin* nor *McConnell* Permits Imposing Restrictions on Books Containing Electoral Advocacy

The compelling interest in preventing the "virtual torrent of televised election-related ads during the periods immediately preceding federal elections," used to bombard unwilling recipients repeatedly with an electoral message, is simply not present with regard to books—no matter how they are purchased. A book requires its reader to "opt in" at two separate levels. First, the reader must affirmatively choose to acquire the book, whether through purchasing it in hard copy or as an electronic download to be read on a computer screen or an electronic reader device. Second, the reader must be motivated to read the book, and to absorb its message. Thus, a book is a form of communication that requires a significant element of "audience choice" in order for the message

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nearly as effective as broadcast advertising" and that, consequently, direct mail is not "as problematic as broadcast candidate-centered issue advertising," *id.* at 572; and (iii) did "not find newspaper advertising to be as effective as candidate-centered issue advertisements broadcast on radio and television," *id.* at 572, and accordingly did "not find that newspaper advertising poses a comparable problem to that of broadcast advertisements," *id.* at 573.

embedded in the communication to be transmitted. There are no unwilling recipients of a book's message; if a reader does not like it, she simply shuts the cover.[6] In addition, the significant investment of time required for the creation, production and distribution of books renders them an inherently less immediate and potent medium for the communication of electoral advocacy shortly before an election.[7]

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[6] Books typically are not distributed in free-of-charge mass-mailings sent to members of the public, by contrast with the newsletter at issue in *FEC v. Mass. Citizens for Life, Inc.* In that case, the Court held that a corporation's newsletter—which was "mailed free of charge and without request" to tens of thousands of individuals "regarded as sympathetic to the organization's purposes"—would be subject to 2 U.S.C. § 441b, but that Section 441b was unconstitutional as applied to appellee. 479 U.S. 238, 241, 244 (1986). That case does not stand for the broad proposition that Section 441b may constitutionally be applied to books published by publishers like *amici*.

[7] In considering whether certain governmental restrictions on speech (in contexts other than electoral advocacy) were constitutionally permissible, the Court has previously recognized that "'[e]ach medium of expression . . . may present its own problems.'" *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975)) (alterations in original). In particular, the Court has noted that "the broadcast media have established a uniquely pervasive presence in the lives of all

In short, the government has never demonstrated, or attempted to demonstrate, that books corrode or subvert the electoral process. Thus, neither *Austin* nor *McConnell* supports, or even suggests, that Congress may impose

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Americans," and that, "[b]ecause the broadcast audience is constantly tuning in and out," that audience may be subject to "unexpected program content." *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978). By contrast, a medium—such as a "dial-it" telephone message service allowing users to call in and listen to prerecorded messages—that "requires the listener to take affirmative steps to receive the communication" does not present this "'captive audience' problem." *Sable Comm'n of Cal., Inc. v. FCC*, 492 U.S. 115, 128 (1989) (distinguishing *Pacifica*—noting that it relied, in part, on "the 'unique' attributes of broadcasting"—and holding that a statute imposing a blanket ban on obscene and indecent interstate commercial telephone message was unconstitutional as applied to indecent messages); *see also Reno v. ACLU*, 521 U.S. at 869 (distinguishing *Pacifica*, in considering a restriction on Internet communications, because, in part, "the Internet is not as 'invasive' as radio or television"). Just as "callers [of dial-it services] will generally not be unwilling listeners," *Sable*, 492 U.S. at 128, individuals who choose to acquire and read a particular book will not be "unwilling" recipients of that book's message. Because the medium of books does not present a "captive audience" problem, it does not create the danger that the electoral process will be subverted by the torrential, repeated, unwelcome bombardment of readers with electoral advocacy messages.

prohibitions and regulations on books that include electoral advocacy. The government's statement, at Oral Argument, that Congress may constitutionally regulate all such books is unsupported, because such broad regulation would not be justified by a compelling government interest and nothing in *Austin* or *McConnell* requires that untoward result.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that BCRA Section 203 does not extend to books downloaded via an electronic reader device, and urge the Court to reject any interpretation of *Austin* that would permit the regulation of books. *Amici* further submit that it is not necessary for the Court to overrule either *Austin* or *McConnell* in order to guarantee the constitutional protection of electoral speech in books, because neither decision permits Congress to impose prohibitions and regulations on books that include electoral advocacy.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

CITIZENS UNITED,
Appellant

v.

FEDERAL ELECTION COMMISSION,
Appellee.

**On Appeal from the
the United States District Court
for the District of Columbia**

BRIEF OF *AMICUS CURIAE* INDEPENDENT SECTOR IN SUPPORT OF NEITHER PARTY

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25

TABLE OF CONTENTS

Page

Interest of *Amicus Curiae* 1

Summary of Argument 4

I. Citizens United's Communication Could Be Protected Under A Proper Understanding Of The *MCFL* Exemption 5

A. Background 5

B. Non-Profit Corporations That Accept *De Minimis* Corporate Contributions Do Not Present Any Threat Of Being A Conduit For Corporate Monies 8

1. The *MCFL* Exemption 8

2. All Circuit Courts Have Found A *De Minimis* Exception Within The *MCFL* Exemption 10

3. Citizens United Appears To Be Entitled To The *De Minimis* Exception To The *MCFL* Exemption 11

C. Citizens United's *De Minimis* Corporate Contributions Create A Unique Factual Scenario That Should Not Form A Basis To Overrule *Austin* And *McConnell* 13

II. Overruling *Austin* And *McConnell* Is Not Appropriate In This Appeal 16

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Beaumont v. FEC, 278 F.3d 261 (4th Cir. 2002) *rev'd on other grounds* 539 U.S. 146 (2003) 10

Buckley v. Valeo, 424 U.S. 1 (1976) 6

Colo. Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137 (10th Cir. 2007) 10, 11

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 10

FEC v. Beaumont, 539 U.S. 146 (2003) ..... *passim*

FEC v. Colo. Rep. Federal Campaign Comm., 533 U.S. 431 (2001) 13, 19

FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986) ..... *passim*

FEC v. Nat'l Conservative Political Action Committee, 470 U.S. 480 (1985) 13

FEC v. Nat'l Rifle Ass'n of Am., 254 F.3d 173 (D.C. Cir. 2001) 10, 11

FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982) 5, 18

FEC v. Survival Educ. Fund, Inc., 65 F.3d 285 (2d Cir. 1995) 10, 11

FEC v. Wis. Right to Life, 551 U.S. 449 (2007) ..... *passim*

McConnell v. FEC, 251 F. Supp. 2d 176 (D.D.C.), *modified by* 540 U.S. 93 (2003) ... 8, 16

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

Minn. Citizens Concerned for Life v. FEC, 113 F.3d 129 (8th Cir. 1997) 11

Montejo v. Louisiana,
129 S. Ct. 2079 (2009).....17
New York State Club Assn., Inc. v. City of New York, 487 U.S. 1 (1988)).....17
Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000).....18
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937)).....18
United States v. Auto. Workers, 352 U.S. 567, 570 (1957).....5, 18
United States v. Raines, 362 U.S. 17 (1960) 18
Virginia v. Hicks, 539 U.S. 113 (2003) 17
Wash. State Grange v. Wash. Republican Party, 128 S. Ct. 1184 (2008) 16, 17, 19

STATUTES

2 U.S.C. § 434..... 6
2 U.S.C. § 441b..... 4, 6
26 U.S.C. § 501(c)(3) 1, 2
26 U.S.C. § 501(c)(4).....2, 15, 16
26 U.S.C. § 501(c)(6).....15
Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81..... 6 ,7
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455)..... 6
Ariz. Rev. Stat. § 16-901.....17
Ariz. Rev. Stat. § 16-919.....17
Ariz. Rev. Stat. § 16-920.....17
Colo. Const. art. XXVIII, § 3(4) 17
Conn. Gen. Stat. § 9-613.....17
M.G.L. c. 55, § 8 17
Mich. Comp. Laws § 169.254 17
Minn. Stat. § 211B.15; 25 17

Pa. Stat. Ann. § 3253-3254 17
R.I. Gen. Laws § 17-25-10.....17
Tex. Elec. Code Ann. §§ 253.091-253.098.....17
Wis. Stat. § 11.38(1)(a)1 17
Wis. Stat. § 11.01(16)(a)1 17

In the
Supreme Court of the United States

No. 08-205

CITIZENS UNITED,
Appellant

v.

FEDERAL ELECTION COMMISSION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF *AMICUS CURIAE* INDEPENDENT SECTOR IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

Independent Sector, a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code, is the nation's foremost leadership forum for charities, foundations, and corporate giving programs committed to advancing the common good in America and around the world.[1]

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[1] This brief is filed with the consent of the parties. The Government has filed a blanket consent and a letter of consent from Citizens United has been filed with the Court.

Its nonpartisan coalition leads, strengthens, and mobilizes the charitable community to fulfill its vision of a just and inclusive society and a healthy democracy of active citizens, effective institutions, and vibrant communities. Independent Sector's membership of over 500 organizations collectively represents tens of thousands of charitable groups serving every cause in every region of the country, as well as millions of donors and volunteers.

The majority of Independent Sector's members are 501(c)(3) organizations that engage in advocacy efforts to inform public policy debates on issues that affect their constituents' and their ability to fulfill their charitable purposes. Such organizations are prohibited by law from participating in any political campaign on behalf of (or in opposition to) any candidate for public office. Some of Independent Sector's members have affiliated 501(c)(4) organizations that are subject to the existing federal campaign finance regulations in the same manner as the Appellant.

The advocacy efforts of Independent Sector's members include informing the public about pending public policy issues, as well as engaging in grassroots activities that discuss specific elected officials and their stated policy positions. Organizations such as Independent Sector's members cannot predict or control the timing of

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Pursuant to this Court's Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *Amicus* and its counsel made such a monetary contribution.

when an issue will be considered by public officials in relation to election dates. Independent Sector members have called on the public to contact their congressional representatives about pending votes that affect the funding and eligibility requirements for specific government programs related to charitable purposes ranging from human services to health to the arts. Some of Independent Sector's member organizations, for example, are concerned about the possibility of estate tax repeal because of the negative effect that would have on charitable giving. Their ability to encourage the public to contact their elected officials about a pending vote on the estate tax would be curtailed if the vote or hearings on the bill should be scheduled during an election period. Independent Sector members may find it necessary to run ads urging specific local actions, such as asking a local official to keep a particular shelter open, even though the official is also a candidate for federal office.

Independent Sector, and the charitable and philanthropic community as a whole, also have a fundamental interest in the integrity of our democratic system of government. The continuing influence of money in politics jeopardizes that integrity. Corruption and the appearance of corruption in the political process impairs the ability of citizens and charitable organizations to exercise their right to advocate for the causes they espouse and can discourage participation by individuals as well as charitable organizations.

Independent Sector supports the principles of campaign finance reform legislation that aim to bring greater integrity to the electoral and

democratic processes. Campaign finance reform should protect and strengthen the ability of citizens and the charitable non-profit organizations they form not only to advocate for their cause, but also to ensure that the voices and aspirations of citizens and the organizations that represent their views receive a fair hearing in the political process.

SUMMARY OF ARGUMENT

This Court directed the parties to submit supplemental briefing on the question of whether the Court should "overrule either or both *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and the part of *McConnell v. FEC*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. §441b?"

Amicus respectfully submits that the answer to that question is no. There are ample narrower grounds on which to resolve any constitutional tension present in this case between Citizens United's desire to distribute its film using general treasury funds through the medium of video on demand and the well-established compelling government interests in regulating corporate funding of elections.

ARGUMENT

I. CITIZENS UNITED'S COMMUNICATION COULD BE PROTECTED UNDER A PROPER APPLICATION OF THE *MCFL* EXEMPTION

A. Background

For over a century, Congress has regulated the use of corporate monies in federal elections. "The current law grew out of a 'popular feeling' in the late 19th century 'that aggregated capital unduly influenced politics, an influence not stopping short of corruption.'" *FEC v. Beaumont*, 539 U.S. 146, 187 (2003) (quoting *United States v. Auto. Workers*, 352 U.S. 567, 570 (1957)).

This Court has consistently recognized that the "'careful legislative adjustment of the federal election laws' . . . meant to strengthen the original, core prohibition on direct corporate contributions" was supported by the "public interest in 'restrict[ing] the influence of political war chests funneled through the corporate form.'" *Id.* at 153 (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982)). As this Court further stated, "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators." *Nat'l Right to Work Comm.*, 459 U.S. at 207 (quoting *Auto. Workers*, 352 U.S. at 59). Corruption, the appearance of corruption, and ensuring the integrity of the election process through narrowly tailored restrictions on both direct and indirect contributions is central to

these regulations. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld campaign contribution limits of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455) ("FECA") out of concern that when "large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined . . . ." *Id.* at 26-27.

Alongside Congress's "careful legislative adjustment" in the campaign finance area, this Court has conscientiously evaluated each successive legislative effort, repeatedly upholding regulations that furthered core government interests and modifying or striking down those aspects that did not sufficiently further those core interests. The holding in *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 256-65 (1986), demonstrates the incremental and deliberative approach that this Court consistently has used in reviewing challenges to the campaign finance laws. In *MCFL, supra,* this Court invalidated federal restrictions on campaign ads by non-profit political organizations funded primarily by individual contributions. The Court balanced the governmental interest in preventing the use of such organizations as "conduits" against the specific characteristics of the organization before it, finding that the governmental interest was not sufficiently strong to uphold the regulations. *Id.* at 262.

In 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA") in part to address the increasing problems created by soft money

and issue advertising. BCRA, Pub. L. No. 107-155, 116 Stat. 81. Section 203 of BCRA broadened, *inter alia*, the FECA provisions originally applicable only to express advocacy to prohibit all "electioneering communications." 2 U.S.C. § 441b(c). BCRA defines "electioneering communication" as any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 and 60 days of a primary and general election respectively (the "blackout period"). *Id.* at § 434(f)(3)(A)(i)(I)-(II)(bb). In *McConnell*, this Court upheld a broad facial challenge to BCRA, and reaffirmed the validity of the *MCFL* exemptions. 540 U.S. at 209-11. In *FEC v. Wisconsin Right to Life, Inc. ("WRTL II")*, 551 U.S. 449 (2007), Chief Justice Robert's controlling opinion held that the Constitution restricted Congress's ability to regulate electioneering communications to those that expressly advocate for or against a candidate for federal office, or their functional equivalent. *Id.* at 469-70.

The resulting campaign finance regulations have focused on four characteristics: 1) the speaker (including the speaker's corporate status and source and nature of funding); 2) the speech (whether it is express advocacy or its equivalent); 3) the timing of the speech (including proximity to an election); and 4) the medium of the speech. Applying these factors, the District Court below held that Appellant's documentary (the "Movie") could not be distributed via video on demand during the blackout period because the Movie: 1) fell within the media regulated under BCRA; 2)

amounted to express advocacy; and 3) was funded in part by corporate contributions. If any of these three findings were improper, then the Court need not reach the facial invalidity question.[2]

B. Non-Profit Corporations That Accept *De Minimis* Corporate Contributions Do Not Present The Threat Of Being A Conduit For Corporate Monies

1. *The* MCFL *Exemption*

While acknowledging the propriety of congressional concerns that "organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace," the *MCFL* Court also recognized that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear

---

[2] In BCRA, Congress singled out broadcast, cable and satellite transmissions of electioneering communications because of their wide appeal to the voting public and because of their pervasiveness. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 569-70 (D.D.C.) *modified by* 540 U.S. 93 (2003). If shown on video on demand, the Movie would be accessible only to cable subscribers who took affirmative steps to view the Movie, J.A. 256a, 258a, thus posing no risk that casual viewers would come across the Movie accidentally. Whether video on demand should fall within the media that BCRA was intended to regulate is questionable, and equally questionable whether the government's compelling interest in regulating express advocacy on broadcast, cable or satellite would necessarily extend to video on demand.

burdens on independent spending solely because of their incorporated status." *Id.* at 239, 263. Accordingly, the *MCFL* Court carved out an exemption from the FECA expenditure prohibitions for certain non-profit political corporations, and enumerated three factors ("the *MCFL* factors") that were "essential" to its holding: 1) the entity was formed for the purpose of promoting political ideas, and did not engage in business activities; 2) it had no shareholders; and 3) it was not formed by a corporation, and had a policy against accepting corporate contributions. *Id.* at 263-64.

The Court balanced the burden on First Amendment rights posed by requiring MCFL to engage in express advocacy only through a separate fund against the compelling government interest at issue:

> Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption. MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. . . . In short, MCFL is not the type of 'traditional [corporation] organized for economic gain,' *NCPAC*, *supra*, at 500, that has been the focus of regulation of corporate political activity.

Id. at 259. While the absence of corporate contributions was a factor in the Court's decision, the Court by no means based its holding on that factor alone. The rationale of *MCFL* certainly allows for a more nuanced analysis of the structure and purpose of a non-profit than counting only the sources of its support.

2. *All Circuit Courts Have Found A* De Minimis *Exception Within The* MCFL *Exemption*

Every Court of Appeals that has considered whether a 501(c)(4) non-profit corporation, such as Appellant, may accept any corporate contributions without violating BCRA has expressly found that a *de minimis* amount of corporate funding does not violate the *MCFL* exemption. *See Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1147-49, 1151 (10th Cir. 2007); *Beaumont v. FEC*, 278 F.3d 261, 273 (4th Cir. 2002), *rev'd on other grounds*, 539 U.S. 146 (2003); *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 192 (D.C. Cir. 2001); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130 (8th Cir. 1997); *Day v. Holahan*, 34 F.3d 1356, 1363-64 (8th Cir. 1994); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995).

For example, the Tenth Circuit held that a non-profit corporation that received less than one percent of its funding from corporations was entitled to an *MCFL* exemption because such a small amount of corporate funding "does not invite the creation of a political conduit for corporate funding of political activity." *Colo.*

Right to Life Comm., 498 F.3d at 1151. The D.C. Circuit held that the National Rifle Association's acceptance of $1000 in corporate contributions was *de minimis* and did not preclude the organization from receiving an *MCFL* exemption. *Nat'l Rifle Ass'n*, 254 F.3d at 192. Additionally, the Eighth Circuit twice held that a non-profit organization was entitled to an *MCFL* exemption when it had received "insignificant contributions from business corporations." *Minn. Citizens Concerned for Life*, 113 F.3d at 130; *see also Day*, 34 F.3d at 1364 ("The state goes too far in concluding that the factual findings of *MCFL* translate into absolutes in legal application."). The Second Circuit held that a non-profit corporation was entitled to an *MCFL* exemption when the minimal corporate funding it received was less than one percent of its overall revenue. *Survival Educ. Fund*, 65 F.3d at 292 ("[A] non-profit political advocacy corporation, which in fact receives no significant funding from unions or business corporations, does not surrender its First Amendment freedoms for the want of such a policy.") *Accord Beaumont*, 278 F.3d at 273 (stating that eight percent of overall revenue was a "modest percentage" that did not convert the non-profit into a conduit for corporate spending).

3. *Citizens United Appears To Be Entitled To The* De Minimis *Exception To The* MCFL *Exemption*

Here, both the record and the law suggest that Citizens United may be entitled to the *de minimis* exception recognized by the courts. The

Appellant's Brief represents that "[m]ore than ninety-nine percent of the funding for [the Movie] came from individuals" and its overall funding is "predominantly by donations from individuals who support Citizens United's ideological message" (Appellants Br. at 5, 32-33) (citing J.A. 244a, 251a-52a). This insignificant level of corporate support appears consistent with the *de minimis* standard applied by every Circuit Court that has addressed this issue. Like the non-profit in *MCFL*, Citizens United was formed for the express purpose of promoting certain political ideologies.[3] J.A. 11a. As such, Citizens United is unlikely to pose a threat of becoming a conduit for prohibited corporate contributions. Expressly adopting the *de minimis* exception here is entirely consistent with the Court's prior rulings and Congress's intent with respect to BCRA.

The Government has rightly suggested that "the evidentiary record is inadequate to determine whether [the Movie] was in fact financed 'overwhelmingly' by individual donations" since during discovery Citizens United "disclosed only those donations of $1000 or more that were made or pledged for the purpose of" producing the Movie. (Appellee Br. at 30) (citing J.A. 225a, 244a) The record is also silent on the important question of Citizens United's overall corporate funding as opposed to the funding for this particular film. In order to fully resolve this issue, remanding this case to the District Court

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[3] The record is devoid of any indication that Citizens United had any shareholders. Therefore, *MCFL's* concern over the interest of shareholders is inapplicable.

for a determination of the amount of corporate contributions and for an initial ruling on whether Citizens United has surpassed any *de minimis* exception would be appropriate.

C. Citizens United's *De Minimis* Corporate Contributions Create A Unique Factual Scenario That Should Not Form A Basis To Overrule *Austin* And *McConnell*.

This case does not present an appropriate vehicle to overrule *Austin* and *McConnell*. This is the first case before this Court in which a non-profit political advocacy group with apparently *de minimis* donations from corporations sought an exemption from the limits on advertising imposed by BCRA. Although this might appear to be an insignificant distinction, in fact it goes to the heart of the motivation of the federal regulation at issue: "to 'preven[t] corruption or the appearance of corruption[,]" *Beaumont*, 539 U.S. at 146 (quoting *FEC v. Nat'l Conservative Political Action Comm'n*, 470 U.S. 480, 496 (1985)), and to protect against the organization's "use as conduits for 'circumvention of [valid] contribution limits.'" *Id.* at 155 (quoting *FEC v. Colo. Republican Federal Campaign Comm.*, 533 U.S. 431, 456 (2001)).

The *McConnell* decision recognized the *MCFL* exemption, but the Court was not called upon to apply it. *McConnell*, 540 U.S. at 210-211. The Court's discussion of MCFL was limited to its recognition that the absence of an explicit carve-out for MCFL organizations from a specific section did not invalidate the entire section. *Id.* at 210-

11. Indeed, the Court reasoned that the existence of the *MCFL* test "for many years before BCRA was enacted," created the presumption that the legislators were aware that section 316(c)(6) could not have applied to *MCFL* organizations. *McConnell*, 540 U.S. at 211. Thus, *McConnell* need not be overruled for the proper disposition of the instant case.

Further, if the Court is inclined to exempt Citizens United from the advertising limits at issue here, it need not overrule *Austin* because it is not in conflict with this Court's existing precedent, given the specific circumstances of that case. The organization in *Austin*, the Michigan State Chamber of Commerce (the "Chamber"), unlike Citizens United, had largely corporate members, creating precisely the type of "conduit" for corporate money that Congress has sought to restrict, and that this Court has upheld through decades of its jurisprudence. *See MCFL*, 479 U.S. at 256-65; *Beaumont*, 539 U.S. at 155, *McConnell*, 540 U.S. at 211, *WRTL II*, 551 U.S. at 469-70.

Relying on the *MCFL* Factors, the *Austin* Court found that the Chamber was an organization composed primarily of corporate members, was financed primarily by corporate contributions, and was dedicated to promoting economic conditions favorable to private enterprise. These corporations would be reluctant to withdraw as members regardless of the Chamber's political expressions. *Austin*, 494 U.S. at 656. Citizens United, by contrast, is fairly characterized as having no purpose other than political advocacy, and its members have no economic incentive to remain a part of the

organization should they disagree with its political activities. J.A. 11a.

The fundamentally different tax status of the Chamber and Citizens United is also significant. The Chamber is a 501(c)(6) organization. In addition to chambers of commerce, section 501(c)(6) specifically encompasses business leagues, real estate boards, trade boards, and professional football leagues. Accordingly, these 501(c)(6) organizations will almost inevitably count corporations among its members and primary supporters. In contrast, Citizens United is a section 501(c)(4) organization that must be "operated *exclusively* for the promotion of social welfare," 26 U.S.C. 501(c)(4)(A) (emphasis added). Indeed, its express purpose is to "reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security." J.A. 11a.

These factual distinctions are sufficiently broad to distinguish the holding in *Austin* with respect to the first two *MCFL* factors. With respect to the third factor, clarifying that a *de minimis* exception to the *MCFL* exemption exists preserves the rationale behind *Austin* and *WRTL II*, while preventing the use of such organizations as conduits for circumvention of valid limits on political spending by corporations. This clarification offers ample support for the protection of atypical organizations like Citizens United, which do not expressly prohibit corporate donations, but are overwhelmingly supported by individuals.

II. OVERRULING *AUSTIN* AND *MCCONNELL* IS NOT APPROPRIATE IN THIS APPEAL

This litigation began as a challenge to the constitutionality of BCRA's regulation of electioneering communications as applied to a specific film produced by one 501(c)(4) entity to be distributed at a particular time by way of video on demand. J.A. 9a As noted above, to the extent that the Court is inclined to limit BCRA's regulation of electioneering communications in the specific context of this case, there are ample narrower constitutional grounds on which to reach this result. *Amicus* respectfully submits that this Court should apply its well-established prudential doctrines–especially in the campaign finance context–and decline to expand this specific challenge to every possible application of section 203 of BCRA. *See Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008) ("[F]acial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.").

Overruling recent precedent to sustain a facial challenge to complex legislation such as BCRA presents a number of practical and jurisprudential problems, especially where that precedent is in accord with decades of prior decisions. BCRA was the result of seven years of congressional hearings, fact-finding, consideration and careful drafting. *See McConnell*, 540 U.S. at 129-34. Just six years ago, this Court upheld the constitutionality of the basic structure of that

statute. *Id.* As a result of Congress's careful drafting and this Court's express approval, many states have modeled their own regulation of election-related financing by corporations on the federal statutes.[4] BCRA and *McConnell* have not proved "unworkable," as this Court's prior precedents require to overrule such a key and recent decision, *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009), nor has it been demonstrated on the record that the statute's overbreadth is substantial compared to its plainly legitimate sweep. *Wash. State Grange,* 128 S. Ct. at 1191, n.6.[5] Rather, in this particularly sensitive area of elections, core to the Nation's democracy and constitutional values, a step-by-step evaluation of

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[4] See e.g. Ariz. Rev. Stat. §§ 16-901, 16-919, & 16-920; Colo. Const. art. XXVIII, § 3(4); Conn. Gen. Stat. § 9-613; M.G.L. c. 55, § 8; Mich. Comp. Laws § 169.254; Minn. Stat. § 211B.15; 25 Pa. Stat. Ann. § 3253-3254; R.I. Gen. Laws § 17-25-10; Tex. Elec. Code Ann. §§ 253.091-253.098; Wis. Stat. § 11.38(1)(a)1 & Wis. Stat. 11.01(16)(a)1 (regulating corporate contributions).

[5] The absence of any factual record on the overbreadth issue is a sufficient ground in and of itself for the Court to pass on any such challenge. As this Court has repeatedly held, "[t]he overbreadth claimant bears the burden of demonstrating 'from the text of [the law] *and from actual fact*,' that substantial overbreadth exists." *Virginia v. Hicks,* 539 U.S. 113, 122 (2003) (quoting *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 14 (1988)) (emphasis added). In contrast, the factual record before the Court in support of the facial challenge to this statute in *McConnell* consumed 100,000 pages including testimony and declarations of over 200 fact and expert witnesses. *See McConnell,* 251 F.Supp.2d at 208-09.

the constitutional limits on financial restrictions in the context of elections with consequently narrow constitutional holdings is more than appropriate, it is imperative. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402-03 (2000) (Breyer, J., concurring); *Nat'l Right to Work Comm.*, 459 U.S. at 209 ("This careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' . . . to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference") (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46 (1937)).

In *WRTL II*, this Court engaged in just such an analysis, narrowing Section 203 of BCRA to regulate express advocacy or the functional equivalent of express advocacy by corporations or labor unions. 551 U.S. at 469-70 (Opinion of Roberts, J.). Since 1947, this Court has upheld congressional power to regulate such corporate campaign contributions, including express advocacy and its equivalent in federal elections. *Beaumont*, 539 U.S. at 152 ("[a]ny attack on the federal prohibition of direct corporate political contributions goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,' which we have canvassed a number of times before") (quoting *Auto. Workers*, 352 U.S. at 585); *accord, MCFL*, 479 U.S. at 246-49; *National Right to Work Comm.*, 459 U.S. at 209. Reversing *McConnell* would result in a reversal of federal and state regulation of such corporate contributions that began more than sixty years ago. (*See* Appellee Supp. Br. at 16-19)

Contrary to Citizens United's argument, (Appellant Supp. Br. at 3-6), the compelling government interests in these regulations repeatedly articulated by this Court remains "to prevent corruption or the appearance of corruption" and as a safeguard "against their use as conduits for 'circumvention of [valid] contribution limits.'" *Beaumont*, 539 U.S. at 154-55 (quoting *Colo. Rep. Fed. Campaign Comm.*, 533 U.S. at 456).

As this case, the statute at issue, and the most recent set of presidential elections all demonstrate, the means of communication of election messages and the possibilities that those means offer for increasing and decreasing the risk of corruption in the electoral processes are changing rapidly. What impact the Internet, for example, will have on campaign fund-raising, on political communications, on corporate participation in the electoral process is unclear and has changed dramatically with each election cycle. That is all the more reason to avoid rigid and broad constitutional restraints on the abilities of the various levels of government to reach accommodation between free and open dialogue about issues and candidates and reasonable regulation of corporate and labor union money in the context of elections. *See e.g., Wash. State Grange*, 128 S. Ct. at 1191 ("Exercising judicial restraint in a facial challenge 'frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy.'"

(quoting *United States v. Raines*, 362 U.S. 17, 22 (1960))).

CONCLUSION

Amicus Independent Sector has long been committed both to the integrity of the electoral process and the freedom of governmental officials from financial pressures and corruption necessitated by the inevitable fund raising that is part of the electoral process over the recent past. Independent Sector is also deeply conscious of the need for robust debate on the issues that affect the country, the people, non-profit and for profit corporate entities, and the tension between full realization of both goals. Accordingly, Independent Sector respectfully urges the Court not to overrule *Austin* or *McConnell*, but instead to rule narrowly to resolve the specific challenge before the Court.

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AMICUS CURIAE BRIEF

134

58

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Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF *AMICUS CURIAE* OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. This Court's Decisions Have Allowed Campaign-Finance Law to Circumvent the First Amendment's Protection of Political Speech	3
II. *Austin* Upheld the Direct Regulation of Core Political Speech	9
III. *Austin* and *McConnell* Allow the Suppression of the Most Effective Speech	13
IV. *Austin* and *McConnell* Allow Discrimination Against Speech Based on Its Content and the Identity of the Speaker	16
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Broward Coal. of Condos. v. Browning, No. 08-445, 2009 U.S. Dist. LEXIS 43925 (N.D.Fla. May 22, 2009) 10

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001) 6

FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) 1, 19

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McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

Meyer v. Grant, 486 U.S. 414 (1988) 15

Mills v. Alabama, 384 U.S. 214 (1966) 7

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 7

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Randall v. Sorrell, 548 U.S. 230 (2006) 1

Smith v. Ark. State Highway Employees, 441 U.S. 463 (1979) 17

TABLE OF AUTHORITIES – Continued

Page

SpeechNow.org v. FEC, No. 1:08-cv-00248 (D.D.C. filed Feb. 14, 2008) 11

CONSTITUTIONS

U.S. Const. amend. I ..... *passim*

Colo. Const. art. XXVIII, § 2(7)(a) 10

art. XXVIII, § 6(2) 11

STATUTES

Alaska Stat. § 15.13.067 11

§ 15.13.400(3) 10

§ 15.13.400(5) 10

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§ 106.011(18)(a) 10, 11

TABLE OF AUTHORITIES – Continued

Page

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Idaho Code § 67-6602(f) 10

10 Ill. Comp. Stat. 5/9-1.14 ..... 10, 11

La. Rev. Stat. § 18:1463(C)(5) 10

N.C. Gen. Stat. § 163.278.82(a) 11

Ohio Rev. Code Ann. § 3517.1011 11

§ 3517.1011(A)(7)(a) 10

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tit. 74, App., 257:10-1-2(d)(2) 11

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H.R. 158, 111th Cong. § 301 (2009) 6

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TABLE OF AUTHORITIES – Continued

Page

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Page

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit public-interest legal center dedicated to defending the essential foundations of a free society, including the right of all to speak out on elections and other matters of public import. Campaign-finance laws that burden speech threaten this right. For this reason, the Institute both litigates First Amendment cases that challenge campaign-finance regulations and files *amicus curiae* briefs in important cases, including *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006); and *McConnell v. FEC*, 540 U.S. 93 (2003). It is through these efforts that the Institute hopes to persuade this Court and others of the need to return to first principles in the realm of freedom of speech.

SUMMARY OF ARGUMENT

1. A mere three decades after this Court held in *Buckley v. Valeo* that political speech enjoys the fullest protections of the First Amendment, the Court is now addressing whether the government may ban films and even books that identify a candidate before

[1] No party counsel authored any of this brief, and no party, party counsel, or person other than *Amicus* or its counsel paid for brief preparation and submission. The parties consented to the filing of this brief.

an election. That this is an open question suggests something has gone terribly awry with this Court's First Amendment jurisprudence. The problem lies in allowing the logic of campaign-finance laws to trump the First Amendment. Each new campaign-finance restriction has increased the value of the available alternatives for speech and political participation, resulting in efforts to close down those alternatives with additional restrictions. In upholding many of these restrictions, this Court's jurisprudence has unfortunately exhibited far more concern for the circumvention of campaign-finance laws than for the circumvention of the First Amendment. The solution is to return to first principles. Overturning *Austin v. Michigan Chamber of Commerce* and the portion of *McConnell v. FEC* upholding BCRA Section 203 is a necessary first step.

2. *Austin* effectively overruled *Buckley* by obliterating the distinction between contributions and independent expenditures and by restoring the "fairness" rationale that *Buckley* had rejected. *McConnell* continued that radical expansion of the law, resulting in a rule that allows government to suppress the most effective political speech and to discriminate against speech based on its content and the identity of the speaker. Indeed, under *Austin* and *McConnell*, there is no principled bar to extending regulation to books, the Internet, other forms of communication, groups beyond corporations, or to ballot-issue elections.

3. It is time for the First Amendment to become more than an afterthought in this Court's "campaign-finance" jurisprudence; only then will Americans have true protection from politicians' endless quest to circumvent the right to free speech. *Austin* and *McConnell* have badly damaged the First Amendment, but this Court has the chance to repair that damage.

ARGUMENT

I. This Court's Decisions Have Allowed Campaign-Finance Law to Circumvent the First Amendment's Protection of Political Speech.

In *Buckley v. Valeo*, this Court stated that campaign speech enjoys the full protections of the First Amendment. "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." 424 U.S. 1, 48 (1976). Indeed, according to this Court, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 15. The Court has repeated this sentiment many times in the intervening years, but unfortunately its holdings have not always lived up to this ideal. The history of campaign-finance law marks the steady erosion of First Amendment rights.

This case presents the question of whether the government may prohibit a corporation from spending its own money to distribute a film that criticizes a candidate in the months preceding an election. At oral argument, the government frankly admitted that the same precedents that allow this restriction of corporate speech would also logically apply to the publication and distribution of books. In previous cases, members of this Court have pointed out that the freedom of the press is in peril as well. *See McConnell v. FEC*, 540 U.S. 93, 283-86 (2003) (Thomas, J., dissenting); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 690-92 (1990) (Scalia, J., dissenting). Although Congress has exempted certain media from the reach of the campaign-finance laws, this Court has never held that those exemptions are constitutionally required; indeed, it has implied repeatedly that they are not. *See McConnell*, 540 U.S. at 207-08 (referring to exemption for print and Internet communications as a "legislative choice"); *id.* at 208 (relying on *Austin* for distinction between media corporations and other corporations).

In sum, merely three decades after this Court assured us in *Buckley* that the First Amendment's protections could accommodate regulations designed to prevent the alleged evils associated with campaign financing, this Court is now addressing whether the government may ban films and books, with freedom of the press more a matter of legislative grace than of right. The rhetoric of *Buckley* has simply not kept pace with the reality of campaign-finance law.

The government and its supporting *amici* argue that BCRA Section 203 does not directly ban speech, and only requires corporations to finance that speech through separate segregated accounts. They will no doubt point out that individuals may still make unlimited independent expenditures, and that individuals can contribute to political committees and candidates. They will claim that concerns about book banning and media censorship are remote, that political debate remains robust, that free speech is safe. But these arguments should give no comfort to those concerned about the direction in which campaign-finance law is headed. Indeed, they represent the very mechanism by which the First Amendment has been eroded.

With every incremental advance in campaign-finance law, we have been assured that adequate alternative channels of communication and political participation remained. And yet, as the available alternatives were shut down one by one, and those who wished to speak and participate flocked to the remaining channels, the cries of campaign-finance "reformers" became louder and louder, and the list of alleged evils they sought to prevent became longer and longer.

Thus, *Buckley* upheld contribution limits because they allegedly helped eliminate *quid pro quo* corruption and its appearance. Before long, corruption became "improper influence" and the "distorting

effects" of large aggregations of wealth,[2] and still later any perceived "circumvention" of the regulatory scheme itself.[3] Protections for issue advocacy led to claims that it was a "sham" effort to influence elections, and the ban on corporate express advocacy was expanded to include merely identifying a candidate near an election.[4] Several states have extended the regulation of this speech to include print and Internet communications, to groups beyond corporations, and even to those who speak out in ballot-initiative elections. *See infra* pp. 10-11. The growth of individual independent expenditures has resulted in calls to regulate them as well,[5] to the extent that the FEC now takes the position that independent expenditures are "indirect contributions" to candidates that cause corruption. *See infra* pp. 11-12.

In short, every incremental advance in campaign-finance laws has laid the foundation for the next advance, with the result that today's "alternative

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[2] *See, e.g., Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000); *Austin*, 494 U.S. at 659-60.

[3] *See FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001).

[4] *See McConnell*, 540 U.S. at 185, 206.

[5] *See, e.g.*, H.R. 158, 111th Cong. § 301 (2009) (proposing ban on independent expenditures); FairElections Oregon, *Campaign Finance Reform: Why We Need It and How To Do It*, http://fairelections.net/fe5.htm (last visited July 27, 2009) (calling for enactment of a ballot measure to limit individual independent expenditures to $10,000).

avenue of communication" inevitably becomes tomorrow's loophole.

Indeed, virtually every principle that formed *Buckley*'s foundation now stands on shaky ground. *Buckley* relied on *Mills v. Alabama*, 384 U.S. 214 (1966), in which this Court struck down a law banning express advocacy on election day. *See Buckley*, 424 U.S. at 14. Yet, today, state and federal law prevents many groups from so much as identifying a candidate a month before the election. *Buckley* relied on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for the principle that the First Amendment ensures that public debates will remain "uninhibited, robust, and wide-open." *See Buckley*, 424 U.S. at 14. Yet, today, governments may bar corporations from urging citizens to vote for or against candidates out of concerns that corporate speech has a "corrosive and distorting effect" on the debate. *Austin*, 494 U.S. at 660. *Buckley* held that government may not limit speech in order to equalize the relative ability of speakers to influence elections. 424 U.S. at 48-49. Yet the restrictions on corporate speech today rest on the notion that corporations allegedly have an "unfair advantage in the political marketplace." *Austin*, 494 U.S. at 659. *Buckley* above all emphasized the importance of speech about candidates and campaigns. Yet political speech today is subjected to some of the most burdensome regulations imposed on any speech.

The notion that we have reached an end point—that, having banned corporate-funded advertisements

and now films that identify a candidate at the wrong time, the government will not turn next to books, websites, magazines, and newspapers that do the same thing or more—is not merely naïve: it flies in the face of the last three decades of campaign-finance law. Indeed, the supporters of BCRA referred to it as merely "a modest step" that "does not even begin to address . . . the fundamental problems that exist with the hard money aspect of the system." 148 Cong. Rec. S2101 (Mar. 20, 2002) (statement of Sen. Feingold). Consistent with this attitude, the majority of this Court in *McConnell* referred to the exemption for print and Internet communications from the electioneering-communications ban as a "legislative choice" and stated that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *McConnell*, 540 U.S. at 207-08.

This Court now asks whether it should overturn *Austin* and that portion of *McConnell* that upheld BCRA Section 203. In answering these questions, the Institute for Justice urges this Court to approach the First Amendment as the starting point of its analysis, not as an afterthought. The history of campaign-finance law shows that the words of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press"—have too often been ignored. The question this Court now faces is whether to continue the steady march toward more regulation and less speech or to reaffirm the First Amendment principles on which *Buckley*

relied. *Austin* and *McConnell* went far beyond those principles. Both cases should be overturned.

II. *Austin* Upheld the Direct Regulation of Core Political Speech.

Austin held that corporate independent expenditures may be restricted because corporations enjoy state-created "advantages" that allow them to accumulate large amounts of wealth. This wealth is allegedly not commensurate with popular support for a corporation's ideas, thus giving corporations an "unfair" advantage in political debates. 494 U.S. at 659-60. This holding effectively overruled *Buckley* on two key points. First, it obliterated the distinction between direct contributions to candidates and expenditures by candidates and others. Second, *Austin* reintroduced "fairness" as a rationale for limiting speech. *Id.* at 679 (Scalia, J., dissenting). *Austin*'s holding was ostensibly limited to the corporate context, but the overarching principle that emerged from the case is clear: Anyone who can be said to have an "unfair" advantage in affecting political outcomes may have all of their expenditures for political speech, and thus their speech itself, limited.

The most obvious example of this principle in action is BCRA's ban on electioneering communications, which this Court upheld in *McConnell*. After all, if Congress may ban corporate express advocacy because of corporations' "unfair advantage" in affecting election outcomes, there is no doctrinal

reason that Congress may not ban a portion of corporations' non-express advocacy as well. That is precisely what Section 203 does—it prevents corporations from merely mentioning a candidate in the weeks leading up to an election, whether they engage in express advocacy or not.

But the logical extension of *Austin*'s rationale has not been limited to federal restrictions on corporations' independent electoral advocacy. In the wake of *McConnell*, ten states passed restrictions on "electioneering communications"—bringing the total number of such state laws to fifteen. Michael C. Munger, *Locking Up Political Speech* 5-8 (2009), http://www.ij.org/locking_up_political_speech.pdf. These laws far surpass even BCRA's restrictions. The majority of state laws apply to a larger range of media, including print media or the Internet.[6] Several states regulate electioneering communications over a longer period of time before an election,[7] and some even regulate

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[6] Alaska Stat. § 15.13.400(3), (5); Cal. Gov't Code § 85310; Colo. Const. art. XXVIII, § 2(7)(a); Conn. Gen. Stat. § 9-601b(a)(2); Fla. Stat. § 106.011(13), (18)(a); Haw. Rev. Stat. § 11-207.6(c); Idaho Code § 67-6602(f); 10 Ill. Comp. Stat. 5/9-1.14; Okla. Stat. tit. 74, App., 257:1-1-2; Vt. Stat. Ann. tit. 17, § 2891; Wash. Rev. Code § 42.17.020(20); W. Va. Code § 3-8-1a(12)(A). Florida's law was recently struck down as unconstitutional. *Broward Coal. of Condos. v. Browning*, No. 08-445, 2009 U.S. Dist. LEXIS 43925 (N.D.Fla. May 22, 2009).

[7] Cal. Gov't Code § 85310; Conn. Gen. Stat. § 9-601b(a)(2); La. Rev. Stat. § 18:1463(C)(5); Ohio Rev. Code Ann. § 3517.1011(A)(7)(a); Wash. Rev. Code § 42.17.020(20).

speech about ballot issues.[8] Six states ban corporate electioneering communications entirely and, of these, two even ban speech by non-corporate groups like partnerships and trade associations.[9] When the fifteen states' laws do not ban electioneering communications outright, they indirectly ban many civic groups' speech by imposing on them onerous regulations with which they lack the resources to comply. *See* Munger, *supra*, at 2.

Austin's rationale has even been used to attack protections for independent expenditures as such. The FEC has taken the position in a case currently pending in the U.S. District Court for the District of Columbia that independent expenditures amount to "indirect contributions" to candidates and can cause corruption. The case, *SpeechNow.org v. FEC*, No. 1:08-cv-00248 (D.D.C. filed Feb. 14, 2008), involves a challenge to contribution limits that apply to a group of individuals that wish to pool their money and purchase advertisements that call for the election or

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[8] Florida's, Illinois's, and Oklahoma's electioneering-communications regulations extend to speech about ballot issues. *See* Fla. Stat. § 106.011(18)(a); 10 Ill. Comp. Stat 5/9-1.14; Okla. Stat. tit. 74, App. 257:1-1-2.

[9] Corporate electioneering communications are banned in Alaska (Alaska Stat. 15.13.067; 15.13.400(6), (13)-(14)); Colorado (Colo. Const. art. XXVIII, § 6(2)); Connecticut (Conn. Gen. Stat. 9-613, -614); North Carolina (N.C. Gen. Stat § 163.278.82(a)); Ohio (Ohio Rev. Code Ann. § 3517.1011); and Oklahoma (Okla. Stat. tit. 74, App., 257:10-1-2(d)(2)). Connecticut's and North Carolina's bans extend to non-corporate groups.

defeat of candidates. The group is an unincorporated association that will make only independent expenditures. It will be financed only by individual contributions—meaning that it will accept no corporate or union funds—and it will not make contributions to candidates nor will it coordinate its communications with them. Plaintiffs' Proposed Findings of Fact for Certification under 2 U.S.C. § 437h at 3-4, *SpeechNow.org v. FEC*, No. 1:08-cv-00248 (D.D.C. Oct. 28, 2008).

The FEC has taken the position that independent expenditures made even by *non-corporate* groups amount to "indirect contributions" to candidates that cause corruption. FEC's Proposed Findings of Fact at 39-47, *SpeechNow.org v. FEC*, No. 1:08-cv-00248 (D.D.C. Oct. 28, 2008). Although the FEC has used this argument to justify limits on contributions to the group, the implication is that all independent expenditures, by every kind of speaker, may be limited. Indeed, the FEC argues in this case that corporate independent expenditures are corrupting, and therefore may be limited, because candidates may feel gratitude towards the speaker. *See* Supplemental Brief for the Appellee at 8-9. But that same rationale can be extended to any expenditure or action that can be said to result in a candidate's gratitude.

These developments should not be surprising. The states and the FEC have applied not only the rationale of *Austin* and *McConnell*, but this Court's express statement in *McConnell* that the particular restrictions at issue in that case were mere

"legislative choice[s]" and that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." 540 U.S. at 207-08. Indeed, as Justice Scalia noted in his dissent in *Austin*, the majority's rationale logically extends to everyone who receives special advantages under federal or state tax laws, including individuals and non-corporate groups, such as LLCs. *See* 494 U.S. at 679.

The notion that everyone's political speech about elections can be regulated is a radical one, but as radical as it is, it follows logically from *Austin* and *McConnell*. So long as they remain the law of the land, there is no principled basis for this Court to turn back political censorship, including banning books.

III. *Austin* and *McConnell* Allow the Suppression of the Most Effective Speech.

This Court has made clear that the purpose of electoral advocacy is to affect the outcome of elections. "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it. . . ." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). Yet, under *Austin* and *McConnell*, some of the most effective speakers and the most effective speech are limited or barred from the debate entirely.

This Court has repeatedly stated that, in today's world, it takes money to speak effectively. *See, e.g.*, *Buckley*, 424 U.S. at 19 ("[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money."). Corporations generally have more money than individuals, so they can reach a larger audience. For Tax Year 2006, more than 5.8 million for-profit corporations filed tax returns with the IRS. Internal Revenue Service, *Statistics of Income: 2006, Corporation Income Tax Returns* 2 (2009). Also, incorporation is the most common organizational method for the 1.4 million nonprofit groups in America. Amy Blackwood et al., Urban Institute, *The Nonprofit Sector in Brief—Facts and Figures from the Nonprofit Almanac 2008: Public Charities, Giving, and Volunteering* 1 (2008), *available at* http://nccsdataweb.urban.org/kbfiles/797/Almanac2008publicCharities.pdf (last visited July 27, 2009); *see also* Mark Warda, *How To Form A Non-profit Corporation* 14 (3d ed. 2004). These numbers illustrate both the ease with which corporations are formed and that corporations provide numerous opportunities for Americans to associate with others who share common goals, views, or interests. Moreover, they illustrate the wide variety of voices Congress and state legislatures have been allowed to silence during election season. Indeed, for many Americans, the only way their voices will be heard is if they can speak through corporations of which they are either members, supporters, shareholders, or customers. Thus, the ironic result of *Austin*'s fairness rationale is that it ultimately shuts thousands of

Americans out of meaningful participation in the political process.

It is no answer to say that people can speak through means other than corporations that may be less effective. "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Nor does it matter that corporations are free to speak about candidates during other times of the year. Obviously, the ability to speak effectively about an election includes being able to speak when people are paying the most attention. In its zeal to strip this ability from corporations, Congress mutes their speech for long periods of time. For example, during a presidential-election race, Section 203 bans at least 120 days of speech about the candidates in every jurisdiction. Bradley A. Smith & Jason Robert Owen, *Boundary Based Media Restrictions in Boundless Broadcast Media Markets:* McConnell v. FEC*'s Underinclusive Overbreadth Analysis*, 18 Stan. L. & Pol'y Rev. 240, 261 (2007). In multi-state media markets, the ban can cover as many as 217 days. *Id.* at 257, 261.

By allowing the government to censor speech because of its effectiveness, *Austin* and *McConnell* assume that Americans need to be protected from it. Before *Austin*, this patronizing assumption was regularly rejected by this Court. *See, e.g.*, *Bellotti*, 435 U.S. at 791 ("[T]he people in our democracy are

entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments."). It is time to reject it again, once and for all.

IV. *Austin* and *McConnell* Allow Discrimination Against Speech Based on Its Content and the Identity of the Speaker.

It is fundamental that the government cannot regulate speech based on either its content or the identity of the speaker. *See Bellotti*, 435 U.S. at 777. But *Austin* and *McConnell* allow regulation of corporate speech on both grounds. A corporate speaker can use its treasury funds to communicate about everything except candidates for office, their positions on the issues, and whether or not they deserve election or defeat. And discrimination against corporations is allowed by virtue of the fact they are corporations.

The government and self-styled "reformers" warn that ending discrimination against corporate speech will result in a "flood" of money into political campaigns. This argument, like *Austin* itself, wrongly conflates contributions with independent expenditures. And it is based on the notion that there is a monolithic corporate viewpoint that, left unchecked, will promote policy outcomes many will find disagreeable. Of course, even if all corporations spoke with one voice, and those who disagreed with their ideas could never succeed in accomplishing their policy goals, that would be no reason to censor

corporate speech. "The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. State Highway Employees*, 441 U.S. 463, 464-65 (1979) (internal citations omitted).

But there obviously is no such thing as a monolithic corporate viewpoint. True, if *Austin* and the portion of *McConnell* upholding BCRA Section 203 are overturned, corporations such as AIG, GM, and Chrysler may spend large sums of money to elect candidates who have benefitted them. But other voices, both corporate and non-corporate, will almost certainly spend money for the opposite purpose. Thus, for example, while AIG may run advertisements supporting candidates who opposed attempts to regulate it, other financial-services corporations that did not receive favorable treatment and nonprofit watchdog groups will be able to run ads opposing those candidates. Likewise, while Chrysler will be able to spend freely on ads supporting candidates who worked to give it favorable treatment in bankruptcy court, the institutional investors who owned Chrysler bonds will be able run ads opposing those candidates. And if Chrysler and GM run ads supporting candidates who helped bail them out, then other corporations, such as Ford, or advocacy groups that promote fiscal conservatism can run ads opposing those candidates. And, lest it be forgotten, unions, to whom Section 203 also applies, will also be able to speak out on these issues and others.

With the demise of *Austin* and *McConnell*'s upholding of Section 203, all corporations will have the same opportunity that media corporations now enjoy to endorse and talk about candidates during election season. But if those precedents remain in place, then censorship of even media corporations—which "flood" the public arena with money in the form of endorsements and coverage of candidates—will inevitably occur in the name of preventing circumvention of Section 203. As this Court noted in *Austin*, the media's exemption from restrictions on corporate speech is discretionary, not mandatory. 494 U.S. at 668. *McConnell* noted the same in regard to Section 203 and even hinted that Congress could, in the future, legitimately curb media companies' speech as part of the next "phase" of "stanch[ing] [the] flow" of corporate speech. 540 U.S. at 207-08.

This future could be sooner than we think. At least one corporation, the NRA, has established a media company to avoid Section 203's ban. John Eggerton, *Kerry Takes Aim at 'NRA-TV'*, Broadcasting & Cable, Dec. 15, 2003. Nothing prevents Congress from responding to similar efforts by narrowing the media exemption to include only "mainstream" or "established" companies.

But even these are shifting categories that provide little protection for the media. Recently, D.C. was abuzz over the Washington Post's now-cancelled plan to host a salon at the home of the Post's publisher. For $25,000, lobbyists and corporate executives would be granted exclusive access to

administration officials, members of Congress, and Post journalists. Mike Allen & Michael Calderone, *Washington Post Cancels Lobbyist Event Amid Uproar*, Politico.com, July 2, 2009, http://www.politico.com/news/stories/0709/24441.html (last visited July 27, 2009). This "scandal" brought to light that other news publications regularly host such events. Michael Calderone & Andy Barr, *Access Scandal Echoes Beyond the Washington Post*, Politico.com, July 4, 2009, http://www.politico.com/news/stories/0709/24496.html (last visited July 27, 2009). If Congress decides that media corporations are too politically involved, have a "corrosive and distorting effect" on public debate, or can garner too much "gratitude" from candidates, then *Austin* and *McConnell* would allow Congress to censor them. The same is true should Congress determine that media corporations have an "unfair" advantage as a result of the state-created benefits it is now considering giving to them to help them stay afloat. *See* Susan Milligan, *Senators Consider Options for Ailing Newspapers*, Boston Globe, May 7, 2009, at 14.

"Enough is enough." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007). To restore free speech on all topics and by all speakers as a right rather than a privilege, this Court should overturn *Austin* and the portion of *McConnell* upholding BCRA Section 203.

CONCLUSION

For too long, the First Amendment has been an afterthought in campaign-finance cases, as the government and often this Court have placed concern for circumventing campaign-finance laws above the concern that those laws were circumventing the First Amendment. The result has been an inexorable erosion of free speech to the extent that, today, we are seriously discussing whether government may prevent the distribution of films and even books, and the laws that have led to this discussion are treated as mere starting points in what will promise to be an endless effort to rid politics of any taint of "corruption."

To reverse this trend, this Court should return to first principles and overturn *Austin* and the portion of *McConnell* upholding BCRA Section 203. To leave unrepaired any longer the damage these cases have inflicted means continued erosion of the freedom of speech and, ultimately, the demise of the First Amendment.

Respectfully Submitted,

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AMICUS CURIAE BRIEF

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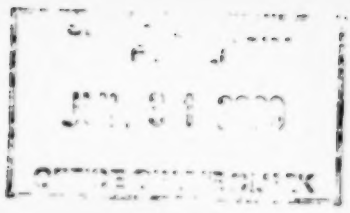

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States
District Court for the District of Columbia

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether, for the proper disposition of this case, the Court should overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), that addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Political Speech Is at the Heart of the First Amendment and Is Entitled to the Broadest Protection 3

II. Unlike Contributions to Candidates, Independent Expenditures, Which Are Not Coordinated with a Candidate or Campaign, Do Not Pose a Danger of Corruption or its Appearance 6

TABLE OF CONTENTS (continued)

III. This Court Has Consistently Invalidated Legislative Attempts at Limiting or Restricting Corporate Expenditures as Violative of First Amendment Free Speech 10

IV. *Austin* and *McConnell* Deviated from Established Precedent, And, as a Result, Should Be Overruled by this Court 15

CONCLUSION 21

TABLE OF CITATIONS

Cases	Page
Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)	*passim*
Buckley v. Valeo, 424 U.S. 1 (1976)	*passim*
Colorado Republican Campaign Committee v. FEC, 518 U.S. 604 (1996)	17
FEC v. Massachusetts Citizens For Life, Inc., 479 U.S. 238 (1986)	5, 6
FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985)	6, 7, 13, 14, 15, 17
First National Bank v. Bellotti, 435 U.S. 765 (1978)	6, 11, 12, 13, 17, 18
McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003)	*passim*
Mills v. Alabama, 384 U.S. 214 (1966)	4

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 4

Palko v. Connecticut,
302 U.S. 319 (1937) 5

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969) 18

Roth v. U.S.,
354 U.S. 476 (1957) 4

U.S. v. National Treasury Employees Union,
513 U.S. 454 (1995) 17

Whitney v. California,
274 U.S. 357 (1927) 5

Constitutional Provisions

U.S. CONST. amend. I ..... *passim*

Statutes, Rules and Regulations

2 U.S.C. § 434(f)(3)(A)(i) 19

2 U.S.C. § 441b ..... i, 19

18 U.S.C. § 591(g) 11

Federal Election Campaign Act of 1971,
86 Stat. 3, as amended 1974,
88 Stat. 1263 ..... 3, 6, 7, 10, 13, 19

SUP. CT. R. 37.3(a) 1

Other Authorities Page

William Shakespeare, *Hamlet*,
act 3, sc. 1 16

INTEREST OF *AMICUS CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a 501(c)(3) not-for-profit corporation that seeks to promote transparency, accountability, and integrity in government and fidelity to the rule of law. Since its establishment in 1994, Judicial Watch has investigated and monitored the activity of government officials and politicians and reported its findings to the public through radio, television, and print media and via the Internet. Due to the nature of its mission, Judicial Watch regularly discusses elected officials and candidates for public office via a multitude of media, and these discussions may happen to occur 30 to 60 days before elections. Judicial Watch assiduously avoids any type of electioneering or other advocacy for or against the election of any particular candidate for federal office. Nonetheless, Judicial Watch is concerned that, if the ruling under review is allowed to stand, its watchdog activities and public education efforts might be misconstrued as trying to influence and/or having the effect of influencing federal elections. Because such a result could substantially and adversely impact how Judicial Watch carries out its public interest mission, it

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[1] Pursuant to Rule 37.3(a), letters of consent have been submitted to the Clerk. All parties consent to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

has an obvious interest in this matter and therefore respectfully submits this *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

The Court's solicitude for free speech has led it to fashion the fundamental principle that government may curtail speech *only to the degree necessary* to meet a particular, compelling interest and *must avoid infringing on speech that does not pose the danger that has prompted regulation.*

Until *Austin,* preventing corruption and the appearance of corruption were the only legitimate interests identified for restricting campaign finances. This Court had held that independent expenditures, which are not coordinated with a candidate or campaign, do not pose a danger of corruption or its appearance, and, as a result, cannot be limited or restricted, even when made by a corporation. The Court had consistently invalidated legislative attempts at limiting or restricting corporate expenditures as violating the First Amendment.

The *Austin* Court deviated from this precedent, holding that independent expenditures made by corporations, even when not coordinated with a candidate or campaign, pose a danger of corruption or its appearance. Likewise deviating from precedent, it sanctioned the interest of equalizing the relative ability of individuals and groups to influence the outcome of elections. The *McConnell* Court compounded the error

made in *Austin* by expanding the scope of suppressed speech to include any reference to a candidate that might influence an election. Because this expansion is in direct conflict with long-established precedent, *Austin* and *McConnell* should be overruled.

ARGUMENT

I. Political Speech Is at the Heart of the First Amendment and Is Entitled to the Broadest Protection.

In *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), this Court declared that political speech is at the heart of the First Amendment and is entitled to "the broadest protection." In reviewing certain provisions of the Federal Election Campaign Act of 1971 ("FECA or Act"), 86 Stat. 3, as amended 1974, 88 Stat. 1263, the *Buckley* Court stated:

> The Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

424 U.S. at 14 (*quoting Roth v. U.S.*, 354 U.S. 476, 484 (1957)).

The rationale underlying this broad protection has two major aspects. First, the Framers of the First Amendment specifically intended to protect political speech: "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Id.* (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The second aspect is related to the first: the Framers intended to protect political speech because they understood that it was "integral to the operation of the system of government established by our Constitution." *Id.* That is, representative government depends for its very existence on "uninhibited, wide-open, and robust" debate on public issues. *Id.* (*quoting New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). As the Court explained,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Id. at 14-15. Or, as the Court stated elsewhere in the opinion, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Id.* at 49 n.55.

The *Buckley* Court thus was solicitous to protect political speech not only as a matter of individual liberty, and not only because it was the intention of the Framers, but because political speech is crucial to the survival of our representative government and its system of ordered liberty. This principle, in turn, presupposes that First Amendment protection of political speech is the precondition of all other freedoms protected by the Constitution. *See FEC v. Massachusetts Citizens For Life, Inc.*, 479 U.S. 238, 264 (1986) ("MCFL") ("Freedom of speech plays a fundamental role in a democracy . . . [It] 'is the matrix, the indispensable condition of nearly every other form of freedom.'") (*quoting Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

The First Amendment protects speech not only because it fosters free government, but because it fosters the development of the individual by protecting freedom of thought and conscience. Quoting Justice Brandeis, this Court has stated:

> Those who won our independence believed that *the final end of the State was to make men free to develop their faculties*; and that in its government the deliberative forces should prevail over the arbitrary. *They valued liberty both as an end and as a means.*

MCFL, 479 U.S. at 258 n.10 (*quoting Whitney v. California*, 274 U.S. 357, 375 (1927)) (emphasis added). Thus, free speech not only plays a vital role in protecting

democracy itself, but it allows people to develop their faculties to the fullest extent possible.

Considering these fundamental truths, it is no wonder that the *Buckley* Court was so avid of protecting political speech against infringement by the FECA.

II. Unlike Contributions to Candidates, Independent Expenditures, Which Are Not Coordinated with a Candidate or Campaign, Do Not Pose a Danger of Corruption or its Appearance.

The Court's solicitude for free speech caused it to fashion the fundamental principle that "[w]here at all possible, government must curtail speech *only to the degree necessary* to meet the particular problem at hand, and *must avoid infringing on speech that does not pose the danger that has prompted regulation.*" *MCFL*, 479 U.S. at 265 (emphasis added). This principle is a reformulation of the "strict scrutiny" test the Court applies in all cases where a regulation is challenged as a content-based restriction on speech. *Id.* at 251, 252; *see also Buckley*, 424 U.S. at 24, 25; *First National Bank v. Bellotti*, 435 U.S. 765, 786 (1978). In essence, because as a nation we value free speech so highly, our government is permitted to regulate it *only* where the government's interest is *compelling* and *only* to the extent *absolutely necessary* to achieve that interest.

Until *Austin*, "preventing corruption or the appearance of corruption" were the only "legitimate and compelling interests" identified for restricting campaign

finances. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496 (1985) (" *NCPAC*"). In *NCPAC*, the Court explained what it meant by corruption:

> Corruption is the subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors.

Id. at 497.

With this in mind, the Court in *Buckley* addressed the contribution and expenditure limits imposed by the FECA. Although the Court found that the FECA's contribution and expenditure limits implicate fundamental First Amendment interests, *Buckley*, 424 U.S. at 14, it enunciated a constitutional distinction between "contributions" and "independent expenditures." The Court found that contribution limits did not place significant burdens on protected speech and associational freedoms. The Court reasoned that

> a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction on the contributor's ability to engage in free communication.

Id. at 21, 22. This conclusion follows from the fundamental differences between independent expenditures and contributions. Whereas independent expenditures entail expressive and articulate communications to the public, a contribution to a candidate merely "serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 21. Contributions thus are not "political speech" in the same sense as independent expenditures because their communicative effect provides only a "rough index of the contributor's support for the candidate." *Id.*

Moreover, contributions differ from independent expenditures in that a limit on contributions does not result in diminishing the quantity of political speech. This principle is related to the idea that contributions do not constitute political speech in the same sense as independent expenditures. As the Court explained,

> [t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.

Id. at 21. The Court's reasoning in this regard was essentially that, whereas increasing the amount of an independent expenditure will result in more political speech by the person or group making the expenditure, increasing the size of a contribution (which by definition is made directly to the candidate or campaign) will not

increase the amount of political speech by the person or group making the contribution. This follows from the fact that, while contributions may allow a candidate to increase the amount that he spends on political speech, they do not constitute "articulate" or "expressive" political speech by the contributor as such. As the Court explained:

> While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. The Court concluded,

> [a] limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id.

The Court also found that contributions could be limited because they posed the danger of *quid pro quo* corruption (and the appearance thereof) to the political system. Independent expenditures by contrast, which are not coordinated with a candidate or campaign, do not

pose a danger of corruption or its appearance. This is because a candidate does not necessarily benefit from (and may well even be harmed by) an expenditure that is made independently of his campaign. As the Court recognized,

> [u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 47. Thus, because as a practical matter the candidate may well not benefit from an independent expenditure made without coordination, the danger of a *quid pro quo* is obviated. This not only alleviates the danger of corruption, but the appearance of corruption as well.

III. This Court Has Consistently Invalidated Legislative Attempts at Limiting or Restricting Corporate Expenditures as Violative of First Amendment Free Speech.

In light of these principles, the *Buckley* Court addressed the constitutionality of a FECA provision that prohibited any "person" from making independent

expenditures above $1,000. The Act defined "person" broadly to include corporations. 424 U.S. at 23, 39 n.45 (*citing* 18 U.S.C. § 591(g)). The Court found that the government's interest in preventing corruption and the appearance thereof was not applicable to independent expenditures because there was no threat of a political *quid pro quo* with this type of core independent political expression. *Id.* at 45-48. In other words, a candidate could not be corrupted by expenditures of which he had no knowledge, let alone any control. The Court held that the limit on independent expenditures, including those made by corporations, violated the First Amendment because there was no compelling interest to justify the burdens such restrictions imposed upon the exercise of free speech and association. *Id.* at 39-51.

In *Bellotti*, the Court again addressed a restriction on corporate expenditures. The challenged statute prohibited expenditures by corporations for the purpose of influencing the vote on referendum proposals. The Court framed the question presented as "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." *Belotti*, 435 U.S. at 778. In this regard, it noted,

> [i]f the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The

> inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.

Id. at 777 (footnotes omitted). The Court concluded that the corporate speech at issue was deserving of First Amendment protection as there was no support in the First or Fourteenth Amendment, or precedent, "for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . ." *Id.* at 784.

The Court recognized that any such attempt by a legislature to regulate who can speak is fraught with peril to First Amendment freedom of speech:

> In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue. If a legislature may direct business corporations to "stick to business," it also may limit other corporations – religious, charitable, or civic – to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.

Id. at 784-85 (citation and footnotes omitted).

As a result, the statute could stand only if the state could demonstrate a "subordinating interest which is compelling," and it used "closely drawn" means to further that interest. *Id.* at 786. The state argued that it had an "interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." *Id.* at 787. According to the state, "corporations are wealthy and powerful and their views may drown out other points of view." *Id.* at 789. The Court rejected this interest, as no evidence existed in the record or legislative history that corporate speech "threatened imminently to undermine democratic processes." *Id.*

The state also argued it had an interest "in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation." *Id.* at 787. The Court again rejected the state's argument because assuming, *arguendo*, that protection of shareholders is a "compelling" interest, it could find "no substantially relevant correlation between the governmental interest asserted and the State's effort" to prohibit corporations from speaking. *Id.* at 795 (citation omitted). Because the state could not demonstrate that the statute advanced any compelling interest or that it was closely drawn to advance any alleged interest, the statute was declared unconstitutional.

In *NCPAC*, 470 U.S. 480, the Court reviewed a FECA provision that prohibited certain groups from making independent expenditures above $1,000. The Court

rejected the state's argument that the speech rights of these groups were not entitled to full First Amendment protection (*i.e.*, that they could be treated differently) simply because they were political action committees ("PACs"). *Id.* at 494. It then recognized that PACs are not corrupting simply because they are *groups of individuals*; in other words, the structure of PACs does not, *ipso facto*, make them corrupting. *Id.* at 497. The Court held that the fact that PACs might be able to make *greater* independent expenditures due to the collective efforts of their members did not alter the calculus: because independent expenditures were made without the knowledge of candidates, there was no danger of a *quid pro quo* between a PAC and an (unknowing) candidate, regardless of the amount of the expenditure. *Id.* at 497, 498. Because there was no danger of corruption, the statute did not advance any compelling interest; as a result, it was unconstitutional.

Clearly, this Court has consistently held that independent expenditures are protected speech which require the broadest protection by the First Amendment. This Court has also consistently invalidated legislative attempts at limiting or restricting corporate expenditures as violative of First Amendment free speech because the government's interest in preventing corruption and the appearance thereof is inapplicable to independent expenditures, as there is no threat of a political *quid pro quo* with this type of core independent political expression.

But then came *Austin* and *McConnell* . . .

IV. *Austin* and *McConnell* Deviated from Established Precedent, And, as a Result, Should Be Overruled by this Court.

In *Austin*, the Court addressed a state statute that prohibited corporations from using "corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office." 494 U.S. at 654. The Court first determined that the statute burdened expressive activity. *Id.* at 658. The Court rightly recognized that the mere fact that an entity "is a corporation does not remove its speech from the ambit of the First Amendment." *Id.* at 657. As a result, the statute could not stand unless the state could demonstrate a compelling interest for its existence. *Id.* at 658.

The state argued that the statute was necessary to stem corruption or the appearance of corruption caused by the unique legal and economic characteristics of corporations that, in the Court's words, permits them "to use resources amassed in the economic marketplace to obtain an unfair political advantage in the political marketplace." *Id.* at 659. The Court did not find that the state had proven the existence of *quid pro quo* corruption or its appearance, "the only legitimate and compelling government interes[t] thus far identified for restricting campaign finances," *NCPAC*, 470 U.S. at 496, 497, but invented a new species of corruption: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to

the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 654. The Court stated that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660. "Ay, there's the rub." William Shakespeare, *Hamlet*, act 3, sc. 1.

Not only did the *Austin* Court deviate from *Buckley's* clear pronouncement that corporate independent expenditures, which are not coordinated with a candidate or campaign, do not pose a danger of corruption or its appearance, *Buckley*, 424 U.S. at 45-48, it embarked upon a path refuted by *Buckley*. Specifically, in *Buckley*, the government claimed its independent expenditure limit served its alleged interest of "equalizing the relative ability of individuals and groups to influence the outcome of elections . . . ." *Id.* at 48. The Court, in no uncertain terms, rejected this interest as incompatible with First Amendment free speech:

> But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The First Amendment's protection against

> government abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.

Id. at 48-49 (citations and internal quotation marks omitted).

In *Bellotti*, the Court again rejected such an argument, especially in light of the complete lack of evidence that corporate wealth threatens to imminently "undermine democratic processes." 435 U.S. at 785, 786, 789. And to be sure, it is the suppressor of speech's burden to prove the actual existence of the alleged harm:

> When the government defends a regulation on speech . . . it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, . . . and that the regulation will in fact alleviate these harms in a direct and material way.

U.S. v. National Treasury Employees Union, 513 U.S. 454, 475 (1995) (citation and internal quotation marks omitted); *see also Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 618 (1996) (Striking down a regulation of independent party expenditures because the government failed to "point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"); and *NCPAC*, 470 U.S. at 490 (Recognizing there must be real substance to the fear of corruption; mere suspicion, *i.e.*, "a tendency to

demonstrate distrust . . . is not sufficient," no matter how widely the suspicion is shared.). In *Austin*, the state utterly failed to make this showing.

The underinclusiveness of the statute only confirms the statute exists to quiet the voices of certain segments of society. While the statute suppresses the voices of corporations whose wealth allegedly "can unfairly influence elections," *Austin*, 494 U.S. at 660, it leaves uninhibited, *inter alia*, wealthy individuals, many of whom gained their wealth through the corporate form, and mega media corporations (some of which are owned by for-profit non-media corporations), who undoubtedly "pose a much more realistic threat to valid interests than do . . . similar entities not regularly concerned with shaping popular opinion on public issues." *Bellotti*, 435 U.S. at 796, 797 (Burger, C. J., concurring); *see also id.* at 797 ("In *Tornillo* [418 U.S. 241, 250 (1974)], for example, we noted the serious contentions advanced that a result of the growth of modern media empires 'has been to place in a few hands the power to inform the American people and shape public opinion.'").[2]

---

[2] The so-called "institutional press" is not deserving of special protection as the First Amendment applies equally to all persons. *Bellotti*, 435 U.S. at 782 ("the press does not have a monopoly on either the First Amendment or the ability to enlighten"); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.") (citations omitted).

In *McConnell*, the Court upheld against a First Amendment challenge Congress' amendment of the FECA provision prohibiting corporate independent expenditures, 2 U.S.C. § 441(b), which, until *McConnell*, were defined as expenditures that in "explicit" words or "express terms advocate the election or defeat of a clearly identified candidate," *i.e.*, express advocacy. *Buckley*, 424 U.S. at 43, 44. The Court upheld Congress' amended provision that not only prohibits corporate express advocacy, but any corporate "electioneering communication," which it defines broadly as *any* "broadcast, cable, or satellite communication" that:

> (I) refers to a clearly identified candidate for Federal office;
> (II) is made within--
> (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
> (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and
> (III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate.

2 U.S.C. § 434(f)(3)(A)(i). The Court reasoned that the "justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect." *McConnell*, 540 U.S. at 206. Herein lies the error.

Buckley clearly stated that issue advocacy, which unquestionably cannot be restricted in any way consonant with the First Amendment, may include discussion of candidates, including discussion that incidentally advocates a candidate's success or defeat:

> Public discussion of public issues which also are campaign issues *readily and often unavoidably* draws in candidates and their positions, their voting records and other official conduct. Discussion of those issues, as well as more positive efforts to influence public opinion on them, tend *naturally and inexorably* to exert some influence on voting at elections.
>
> * * *
>
> So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to *promote the candidate* and his views.

Buckley, 424 U.S. at 43 n.50 and 45 (emphasis added).

In short, *McConnell* suppresses speech that this Court has unambiguously held cannot be suppressed. It "compounds the error made in *Austin* [], and silences political speech central to the civic discourse that sustains and informs our democratic processes." *McConnell*, 540 U.S. at 323 (Kennedy, J., Rehnquist, C.J., and Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, Judicial Watch respectfully submits that the Court should overrule *Austin* and *McConnell*.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-205

IN THE
Supreme Court of the United States

CITIZENS UNITED,
Appellant,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

On Reargument of Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* JUSTICE AT STAKE, AMERICAN JUDICATURE SOCIETY, THE CENTER FOR GOVERNMENTAL STUDIES, CITIZEN ADVOCACY CENTER, COMMON CAUSE, COLORADO JUDICIAL INSTITUTE, DEMOCRACY NORTH CAROLINA, THE ILLINOIS CAMPAIGN FOR POLITICAL REFORM, JUSTICE FOR ALL (ARIZONA), MICHIGAN CAMPAIGN FINANCE NETWORK, NORTH CAROLINA CENTER FOR VOTER EDUCATION, OHIO CITIZEN ACTION, PENNSYLVANIANS FOR MODERN COURTS, PUBLIC CAMPAIGN, TAKEACTION MINNESOTA, TEXANS FOR PUBLIC JUSTICE, TRANSPARENCY INTERNATIONAL USA, WISCONSIN DEMOCRACY CAMPAIGN, CHICAGO APPLESEED, CHICAGO COUNCIL OF LAWYERS, AND FORMER CHIEF JUSTICE NORMAN S. FLETCHER (GEORGIA, RETIRED) IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THIS COURT'S DECISION WILL AFFECT JUDICIAL SELECTION IN THE MAJORITY OF STATES	3
II. UNREGULATED CORPORATE TREASURY SPENDING IN JUDICIAL ELECTIONS WOULD ERODE JUDICIAL INTEGRITY	11
A. The Public Believes That Money Spent In Campaigns Influences Judges' Decisions In Particular Cases	13
B. There Is A Substantial Risk That Money Spent In Campaigns Affects Judicial Decisions	15
C. Litigants, Including Corporations, Feel Undue Pressure To Spend Money In Campaigns When Finance Regulations Are Removed	17
III. EXPANDING CORPORATE TREASURY SPENDING IN JUDICIAL ELECTIONS WOULD INCREASE CAPERTON DUE PROCESS CLAIMS	18
CONCLUSION	20
APPENDIX	1a

TABLE OF AUTHORITIES

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Page

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Page

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Page

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INTEREST OF *AMICI CURIAE* [1]

Amici curiae represent 20 national, regional, and state organizations and a former chief justice of the Georgia Supreme Court. *Amici curiae* are all committed to preserving judicial independence and integrity. *Amici curiae* believe that further restricting government's ability to regulate organizational campaign spending, including from corporate and other outside entities, could have unintended consequences for the judiciary and respectfully submit this brief to highlight this important issue.

Justice at Stake, and its partners, believe that democracy depends on fair and impartial courts that can protect individual rights, guarantee equal justice, and make decisions based solely on the facts and the law-without fear of intimidation. Justice at Stake partners and allies have come together to help Americans keep special interests and political pressure out of the courtroom.

The majority of state judges are subject to some election process, and *amici curiae* believe that appropriate state regulation of money in judicial selection is vital to protecting the actual and perceived integrity of the judiciary.

A description of each *amicus* organization and individual may be found in the Appendix to this brief.

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As part of the broader list of threats articulated by other *amici curiae*, Justice at Stake and its allies write to emphasize that overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and consequently portions of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), would have a profound and negative effect on the selection of state court judges and could damage the integrity of the judiciary.

Special interest spending on judicial elections-by corporations, labor unions, and other groups-poses an unprecedented threat to public trust in the courts and to the rights of litigants. This has been recognized and discussed by journalists, academics, and leading jurists, including the Conference of Chief Justices. This Court itself held last term in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009), that some independent expenditures in judicial campaigns are so excessive that they in fact deny litigants due process under the law. If corporate treasury spending were unregulated in judicial elections, these concerns would only get worse.

Alarmed about the damage of unbridled politicizing of judicial elections, many states are in the process of responding with significant reform efforts aimed at shoring up the public's confidence in the fairness and integrity of the nation's elected judges. Revisiting how campaigns are funded is one important part of this effort. Eliminating states' longstanding ability to regulate corporate influence on judicial elections will cripple these essential reform efforts and exacerbate the recent explosion of special interest pressure on the courts.

Unleashing corporate treasury funds on judicial elections also will distract judges from their most important job: guaranteeing impartial justice to the litigants who come before them. And because escalating corporate campaign expenditures will inevitably breed more recusal and due process motions under the *Caperton* decision, overruling *Austin* and *McConnell* will make the job of sitting judges even more difficult.

ARGUMENT

I. THIS COURT'S DECISION WILL AFFECT JUDICIAL SELECTION IN THE MAJORITY OF STATES.

Although various states have elected judges for many years, the volume and corrosive potential effect of campaign contributions and third-party expenditures on judicial candidates is now more significant than ever before. Total campaign expenditures for state supreme court races have more than doubled in the last ten years, and corporations—along with labor unions, trade associations, attorneys, and others seeking victory in the courtroom—are increasingly seeking to dominate these campaigns.

Unlike the federal system of judicial appointment by the president followed by Senate confirmation for lifetime tenure, 39 states use some form of judicial election for their appellate or trial courts.[2] The

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[2] *See generally* American Judicature Society, *Methods of Judicial Selection*, *available at* http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm; *see also* American Bar Association Standing Committee on Judicial Independence, *Public Financing of Judicial Campaigns* 5 (2002); Larry C. Berkson, American Judicature Society, *Judicial Selection in the United States: A Special Report* 2-3 (1980) (updated

majority of the country's approximately 10,000 state judges are selected or retained through some variety of election.[3] There is no uniformity in election processes or rules among the states. Elections vary from traditional partisan contests to nonpartisan races to retention elections, in which incumbent judges remain in office unless a majority of the electorate votes for removal.

The use of judicial elections as a selection method has not always been so common. When the Federal Constitution was adopted in 1789, all state constitutions provided for the appointment of judicial officers. Starting with Georgia in 1812, states began adopting varying systems for electing judges to make courts more democratic and accountable and to secure a judiciary that was "free from the corrosive effects of politics and able to restrain legislative power."[4] By the time the Fourteenth Amendment was ratified, 24 of 34 states elected some or all judges.[5]

In 2007 the Conference of Chief Justices adopted a resolution urging action to address growing problems

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by Rachel Caufield in 2004), *available at* http://www.judicialselection.us/uploads/documents/Berkson_1196091951709.pdf; Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 4-5 (2002), *available at* http://www.brennancenter.org/page/-/d/ji3.pdf.

[3] Roy Schotland, *Republican Party of Minnesota v. White: Should Judges Be More Like Politicians?*, 41 No. 3 Judges' J. 7, 9 (2002).

[4] Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 Historian 337, 338-39 (1983).

[5] *See* Berkson, *supra* note 2, at 1; E. Haynes, *Selection and Tenure of Judges* 99-135 (1944).

in judicial elections.[6] As the Conference stated in a recent amicus brief to this Court, "if judicial elections create problems with fairness—real and perceived—of judicial outcomes, the Conference of Chief Justices and other groups dedicated to enhancing the effective administration of justice in America must address those problems in ways that go beyond mere advocacy for judicial selection reform."[7] Regulation of campaign finance and selection system change are both viable approaches to the challenges of increasing money in judicial elections.

Funding of judicial elections thus has emerged as a central concern for groups seeking to enhance the effective administration of justice. As in most competitive campaigns for elected office, the cost of running for judicial office has reached unprecedented levels. Nationally, state supreme court candidates raised and spent over $200.4 million in judicial elections from 1999 to 2008.[8] This figure is more than double the $85.4 million raised for the same purpose from 1989 to 1998.[9] Between 1993 and 2002, winning can-

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[6] Conference of Chief Justices, Resolution of February 7, 2007, *available at* http://ccj.ncsc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html.

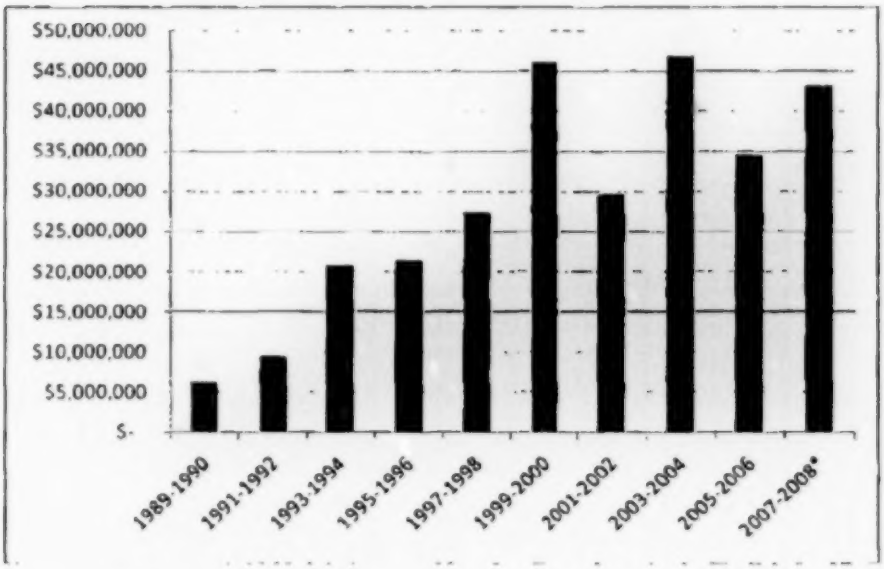
[7] Brief of The Conference of Chief Justices as *Amicus Curiae* In Support of Neither Party at 6-7, *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009).

[8] *See generally* National Institute on Money in State Politics, *available at* http://www.followthemoney.org/index.phtml; James Sample *et al.*, Justice at Stake, *The New Politics of Judicial Elections 2006* 30 (2006), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicial Elections2006.pdf.

[9] *Id.*

didates in supreme court elections spent $91 million, while losing candidates spent $53 million.[10]

Increasing Fundraising in
State Supreme Court Elections [11]



[10] Deborah Goldberg and Samantha Sanchez, Justice at Stake, *The New Politics of Judicial Elections 2002* 16 (2002), *available at* http://www.gavelgrab.org/wp-content/resources/New PoliticsReport2002.pdf. Increased campaign spending affects electoral support: For example, for every 1 percent increase in challenger spending, incumbent electoral support declines by approximately 1.8 percent. Chris W. Bonneau, *The Effects of Campaign Spending in State Supreme Court Elections*, 60 Polit. Res. Q. 489, 497 (2007).

[11] This table is based on Justice at Stake analysis of contribution data maintained by the National Institute on Money in State Politics. *See* National Institute on Money in State Politics, *Industry Influence Search Tool*, *available at* http://www.follow themoney.org/database/IndustryTotals.phtml; *see also* Roy A. Schotland, *New Challenges To States' Judicial Selection*, 95 Geo. L. J. 1077, 1080 (2007); Chris W. Bonneau, *Patterns of Campaign Spending and Electoral Competition in State Supreme Court Elections*, 25 Just. Sys. J. 21, 24-27 (2004). The 2007 to 2008 data is preliminary.

Judicial election spending records have been smashed in many states during the past decade. For example, in 2004, $9.3 million was expended in the Illinois Supreme Court election, exceeding the spending in eighteen U.S. Senate contests that year.[12] This Illinois race was the most expensive contested judicial election in American history.[13] On election night, the victor, Judge Lloyd Karmeier, called the spending "obscene for a judicial race" and asked, "What does it gain people? How can people have faith in the system?"[14]

In the 2005 to 2006 election cycle, candidates for all open Alabama Supreme Court seats raised a combined $13.4 million, surpassing the previous state record by more than a million dollars.[15] The three candidates for chief justice raised a combined $8.2 million, making it the most expensive judicial race in state history, and the second most expensive contested judicial campaign in American history.[16]

These official campaign contributions only reveal a small portion of the recent escalation in judicial election spending. In many cases, independent ex-

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[12] Deborah Goldberg *et al.*, Justice at Stake, *The New Politics of Judicial Elections 2004* vi (2004), *available at* http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf.

[13] Jesse Rutledge, ed., Justice at Stake, *The New Politics Of Judicial Elections in the Great Lakes States, 2000–2008* 1 (2008), *available at* http://www.followthemoney.org/press/Reports/NPJEGreatLakes2000-2008.FINAL.pdf.

[14] *Tort Reformers Score Victories in Midwest Judicial Races*, Insurance J., Nov. 22, 2004, *available at* http://www.insurancejournal.com/magazines/midwest/2004/11/22/features/49934.htm.

[15] Sample *et al.*, *supra* note 8, at 5.

[16] *Id.* at 15, 26.

penditures by special interest groups have exceeded spending by judicial candidates themselves. These numbers are more difficult to track because often states that do choose to permit corporate independent expenditures often do not require reporting of those expenditures. For example, in the 2008 Wisconsin Supreme Court election, third-party interest groups outspent official candidates four-to-one.[17] Focusing only on television advertising, special interest groups were responsible for almost nine out of every ten dollars spent during the campaign.[18] One corporate group in particular attacked incumbent Justice Louis Butler in advertisements by referring to him as "Loophole Louie" and accusing him of preferring criminals over the police.[19]

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[17] *See* Stacy Forster, *Spending in Supreme Court Race Just Under $6 Million*, Milwaukee J. Sentinel (Jul. 22, 2008), *available at* http://blogs.jsonline.com/allpoliticswatch/archive/2008/07/22/spending-in-supreme-court-race-just-under-6-million.aspx. In the same election, another report showed that 95 percent of television advertising was paid for by outside interest groups while the candidates themselves paid for only 5 percent of the advertising in the month preceding the last two weeks of the campaign. Press Release, Brennan Center for Justice *et al.*, *Special Interests Dominate Wisconsin Airwaves in High Court Race* (Mar. 20, 2008), *available at* http://brennan.3cdn.net/6dd3e14a629d0584f3_d3m6bhjqu.pdf.

[18] Brennan Center for Justice, *Buying Time—2008: Wisconsin* (May 12, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_2008_wisconsin.

[19] Stacy Forster, *WMC Ad Takes On "Loophole Louie," Campaign Watchdog Raps It*, Milwaukee J. Sentinel (Mar. 26, 2008), Mar. 26, 2008, *available at* http://blogs.jsonline.com/allpoliticswatch/archive/2008/03/26/wmc-ad-takes-on-quot-loophole-louie-quot-campaign-watchdog-raps-it.aspx; *see also* Dee J. Hall, *High Court Races as Barroom Brawls*, Wisconsin State J., Apr. 6, 2008, at A1, *available at* 2008 WLNR 6546125.

This recent Wisconsin election is just one example, of many, in which outside interests have increasingly sought to influence judicial elections through independent expenditures.[20]

In response to this escalating arms race, the American Bar Association and other organizations have endorsed adopting a system of public financing for judicial elections in states that elect judges, which would restrain financial influences in elections. However, because of budget constraints and other political obstacles, few jurisdictions have yet moved to a fully functioning public financing system.[21] In all states with judicial elections except New Mexico, Wisconsin and North Carolina, judicial candidates are entirely dependent on private funds to finance their campaigns.[22]

Instead of providing public funds for judicial campaigns, most states primarily regulate how private financing of judicial elections can occur,

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[20] *See generally* Thomas R. Phillips, *The Merits of Merit Selection*, 32 Harv. J.L. & Pub. Pol'y 67, 81-82 (2009); Brennan Center for Justice, *Buying Time—Spending Rockets Before Elections* (Nov. 13, 2008), *available at* http://www.brennancenter.org/content/resource/buying_time_spending_rockets_before_elections/.

[21] *See generally Public Financing of Judicial Campaigns*, *supra* note 2, at 30; Brennan Center for Justice, *State Judicial Elections*, *available at* http://www.brennancenter.org/content/section/category/state_judicial_elections; Committee for Economic Development, *Justice for Hire: Improving Judicial Selection* 1-4 (2002), *available at* http://www.ced.org/images/library/reports/justice_for_hire/report_judicialselection.pdf.

[22] Deborah Goldberg, Brennan Center for Justice, *Public Funding of Judicial Elections: Financing Campaigns for Fair and Impartial Courts* 4 (2002), *available at* http://brennan.3cdn.net/41535ba38d3d460fc6_kwm6b1ecu.pdf.

including the extent to which corporate and labor union funds can be used. And, as judicial elections are becoming increasingly costly and politicized, some reform efforts—relying on this Court's precedents in *Austin* and *McConnell*—are focusing on how corporate and other financing is regulated.

Data show that looser limits on corporate and other campaign financing translate to a greater potential for runaway spending on state supreme court elections.[23] For example, in Alabama and Illinois, which are among the states with the loosest regulations,[24] contributions to judicial campaigns between 2000 and 2008 totaled over $41 million and $20 million, respectively.[25] In contrast, in Georgia and

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[23] *See generally* Ciara Torres-Spelliscy *et al.*, Brennan Center for Justice at New York University School of Law, *Electoral Competition and Low Contribution Limits* 3 (2009), *available at* http://www.brennancenter.org/page/-/publications/Electoral.Competition.pdf (explaining that lower contribution limits increase the chance that incumbents will face viable election challenges and increase the overall competitiveness of campaigns).

[24] Alabama does not limit judicial campaign contributions from individuals or PACs, but limits corporate contributions to $500; Illinois does not impose any limits on judicial campaign contributions. *See* American Judicature Society, *Judicial Campaigns and Elections: Campaign Financing*, *available at* http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm.

[25] *See* National Institute on Money in State Politics, *Advanced Search Tool*, *available at* http://www.followthemoney.org/database/advancedsearch.phtml. Notably, in Illinois, where the winner himself called the $9.3 million spent in one election "obscene," there currently are no limits on corporate spending. *See* American Judicature Society, *Judicial Campaigns and Elections: Illinois*, *available at* http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_financing.cfm?state=IL; National Institute on Money in State Politics,

Arkansas, which have tighter regulations,[26] contributions to judicial campaigns between 2000 and 2008 totaled only approximately $3.7 million and $1.9 million, respectively.[27]

Overruling Austin would pave the way to more "obscene" scenarios like the one experienced in Illinois and could produce factual situations that are even more extreme than the one presented in *Caperton*, where a single executive spent millions of dollars to elect a judge who would help decide his anticipated appeal.

II. UNREGULATED CORPORATE TREASURY SPENDING IN JUDICIAL ELECTIONS WOULD ERODE JUDICIAL INTEGRITY.

There is no question that "[j]udicial integrity is . . . a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (J. Kennedy, concurring). Preserving the integrity of the judiciary requires both that litigants actually receive their constitutional due process before a neutral

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available at http://www.followthemoney.org/database/state_overview.phtml?s=IL&y=2004.

[26] Georgia limits individual, PAC, and corporate contributions to $6,100. *See* Ga. Code Ann. § 21-5-41 (2006); State Ethics Commission, Memorandum of February 24, 2009, *available at* http://ethics.georgia.gov/references/contributionlimits.aspx. Arkansas limits contributions from individuals to $1,000 and from political parties and PACs to $2,500. *See* American Judicature Society, *supra* note 24.

[27] *See* National Institute on Money in State Politics, *supra* note 25. Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, The Charleston Gazette, May 16, 2008, *available at* http://www.wvgazette.com/News/200805150741.

decision—maker-which the *Caperton* decision acknowledged is not always possible when a litigant spends extraordinary amounts on a judicial election—and that the public continues to place its confidence in the decisions of the judiciary. As this Court has explained, "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

As Citizens United's counsel, Theodore Olson, has acknowledged: "The improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today."[28] Overruling *Austin* and *McConnell* would prevent states from regulating how non-voting corporations influence judicial elections and would risk dangerously eroding judicial integrity, both real and perceived. This Court has repeatedly recognized that corporations have unique state-conferred abilities to accumulate wealth and exert a distorted political advantage. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986). Overruling *Austin* would not only disregard this long-held observation but would undermine this Court's recognition just last term in *Caperton* that extreme independent expenditures can cause due process concerns. It might also trigger a domino effect, encouraging states to dismantle restrictions on union and other group spending.

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[28] Paul J. Nyden, *Mining Appeal Moving Along: Olson to Argue Harman Case Against Massey Before Supreme Court*, The Charleston Gazette, May 16, 2008, *available at* http://www.wvgazette.com/News/200805150741.

In the words of Justice O'Connor: "Justice is a special commodity. The more you pay for it, maybe the less it's worth."[29]

A. The Public Believes That Money Spent In Campaigns Influences Judges' Decisions In Particular Cases.

The appearance of bias is as dangerous as actual bias. Perceptions of a biased judiciary lead to distrust, which undermines the effective administration of justice. *See, e.g., White*, 536 U.S. at 789 (J. O'Connor, concurring) ("[E]ven if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."). Data repeatedly show that the public firmly believes that judicial outcomes are in fact influenced by campaign contributions.

- One recent survey conducted in 2007 for the Annenberg Public Policy Center showed that 69 percent of the public believe that raising money for elections affects a judge's rulings to a moderate or great extent.[30]
- A 2002 study by the Texas State Bar and the Texas Supreme Court found that 79 percent

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[29] Stephen Kaufman, "Contributions to Judicial Races Worrisome, Justice O'Connor Says," (Oct. 2, 2008), *available at* http://www.america.gov/st/usg-english/2008/October/20081006101039esnamfuak0.1795618.html.

[30] Annenberg Public Policy Center, *Public Understanding of and Support for the Courts* 3 (2007), *available at* http://www.law.georgetown.edu/Judiciary/documents/finalversionJUDICIALFINDINGSoct1707.pdf.

of attorneys surveyed believed that campaign contributions have a significant influence on a judge's decision.[31]

- In 2004, 70 percent of Americans surveyed by Justice at Stake believed that judicial campaign contributions have at least some influence on judges' decisions in the courtroom.[32] Likewise, in 2001, 76 percent of those surveyed believed campaign contributions influence judges' decisions.[33]

These surveys of the American public are consistent with recent academic research showing that "the receipt of campaign contributions can indeed threaten legitimacy. For many citizens, contributions to candidates for judicial office imply a conflict of interest, even a quid pro quo relationship between the donor and the judge, which undermines perceived impartiality and legitimacy."[34]

These data indicate that elected courts are already facing a public perception of bias. Increasing

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[31] Alexander Wohl, *Justice for Rent*, The Am. Prospect, Nov. 30, 2002, *available at* http://www.prospect.org/cs/articles?article=justice_for_rent.

[32] Justice At Stake Campaign, *March 2004 Survey Highlights: Americans Speak Out On Judicial Elections* (2004), *available at* http://faircourts.org/files/ZogbyPollFactSheet.pdf.

[33] Greenberg Quinlan Rosner Research Inc. & Am. Viewpoint, *Justice At Stake Frequency Questionnaire* 4 (2001), *available at* http://www.gavelgrab.org/wp-content/resources/polls/JASNationalSurveyResults.pdf.

[34] James L. Gibson and Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can the Legitimacy of Courts Be Rescued by Recusals?* 6 (2009), *available at* http://polisci.wustl.edu/media/download.php?page=faculty&paper=157.

expenditures and influence from corporations with cases before the courts would only exacerbate these concerns and stymie important reform efforts.

B. There Is A Substantial Risk That Money Spent In Campaigns Affects Judicial Decisions.

The effects of judicial campaign contributions and independent expenditures extend beyond public perception. Reports show that some campaign contributions are in fact correlated with positive procedural and substantive outcomes for donors, which certainly raises judicial integrity issues.

For example, a 2006 New York Times report reviewed twelve years of Ohio Supreme Court decisions and found that Ohio justices routinely sat on cases after having received campaign contributions from the parties involved; those justices then voted in favor of their contributors 70 percent of the time.[35]

Likewise, a 2001 report concluded that "across the board, the more a petitioner [donated to candidates running for the Texas Supreme Court], the greater the likelihood that the court would accept a given petition."[36]

Some judges have candidly acknowledged the practical implications of the cost of judicial campaigns for court decisions. In the same New York Times article, one Ohio justice candidly acknowledged:

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[35] Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, at A1, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html.

[36] Texans for Public Justice, *Pay to Play: How Big Money Buys Access to the Texas Supreme Court* 10 (2001), *available at* http://www.tpj.org/docs/2001/04/reports/paytoplay/paytoplay.pdf.

> "I never felt so much like a hooker down by the bus station in any race I've ever been in as I did in a judicial race," said Justice Paul E. Pfeifer, a Republican member of the Ohio Supreme Court. "Everyone interested in contributing has very specific interests."
>
> "They mean to be buying a vote," Justice Pfeifer added. "Whether they succeed or not, it's hard to say."[37]

As former California Supreme Court Justice Otto Kaus observed, trying to set aside the political consequences of high-profile judicial decisions as an elected judge is "like ignoring a crocodile in your bathtub."[38] There is no reason to doubt that the jaws of that crocodile would loom as large—or larger—if judges knew their decisions affected well-known corporate interests that had contributed to or expended large amounts on their judicial campaigns.[39]

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[37] Liptak & Roberts, *supra* note 35, at A1.

[38] *White*, 536 U.S. at 789. (J. O'Connor, concurring) (citing Julian Eule, *Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal*, 65 U. Colo. L. Rev. 733, 739 (1994)).

[39] As the Court has observed, corporations also have the power to exert a corrosive and distorting influence. *Massachusetts Citizens for Life*, 479 U.S. at 257. Well-funded single-issue groups have an easier time influencing a "comparatively small, highly motivated block of voters to affect" a judicial election. *Public Financing of Judicial Campaigns*, *supra* note 2, at 18 (further stating that "these groups politicize judicial elections because they seek to link an incumbent's tenure in office to her position on a single, politically incendiary issue").

C. Litigants, Including Corporations, Feel Undue Pressure To Spend Money In Campaigns When Finance Regulations Are Removed.

The pressures created by corporate giving to judicial campaigns extend to businesses, as well. For example, in an *amicus* brief filed in *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006), 39 national corporations explained that they "often have reasons for concern about—and many of them have had at least one experience of—receiving what appears to be less than fair and impartial justice in jurisdictions where they are not located and have not contributed to or been solicited by judicial candidates."[40] The corrosive effect of corporate giving thus works in both directions. Overruling *Austin* increases the likelihood of an inverse scenario from that presented in *Caperton*, where a corporate litigant fears a lack of due process under law by virtue of not having contributed to or spent large amounts on a judicial election.

A legal environment that assures impartial and predictable outcomes serves the best interests of corporations. As the Committee for Economic Development has noted, the business community's belief "that justice is even-handed affects economic decision-making, reduces the perception of risk, and encourages consistent adherence to transparent rules of law."[41]

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[40] Brief of *Amicus Curiae* Concerned Corporations in Support of Petitioners at 3, *Dimick v. Republican Party of Minn.*, 546 U.S. 1157 (2006) (No. 05-566), 2006 WL 42102.

[41] Brief of *Amicus Curiae* the Committee for Economic Development in Support of Petitioners at 5, *Caperton v. A.T. Massey*

Moreover, even where corporations have no intention of skewing the results of litigation, a high volume of corporate expenditures on judicial campaigns creates an appearance of seeking favor that adversely affects the public perception of both the courts and the corporations.

III. EXPANDING CORPORATE TREASURY SPENDING IN JUDICIAL ELECTIONS WOULD INCREASE *CAPERTON* DUE PROCESS CLAIMS.

Just last term in *Caperton*, this Court acknowledged that self-interested campaign spending can in fact create a Fourteenth Amendment due process threat to the guarantee of an impartial tribunal. The Court explained that "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the consent of the other parties-a man chooses the judge in his own cause." *Caperton*, 129 S.Ct. at 2265. In *Caperton*, the Court held that campaign contributions and expenditures are unconstitutionally dangerous where "under a realistic appraisal of psychological tendencies and human weakness" the spending "poses such a risk of actual bias or prejudgment" that the elected judge cannot implement the guarantee of due process and there would be a "possible temptation to the average judge to lead him not to hold the balance nice, clear and true." *Id.* at 2263-64.

Both the majority and the dissent in *Caperton* worried that the decision may be used to bring "*Caperton* motions" in multiple other cases where a judge sits on a case involving a campaign supporter.

Coal Co. Inc., 129 S.Ct. 2252 (2009) (No. 08-22), 2008 WL 3165832.

See id. at 2265 (J. Kennedy), 2272 (C.J. Roberts, dissenting). However, the majority argued that the *Caperton* fact pattern was an exceptional and extreme one, not likely to be seen again because in that case just one individual had spent more than $3 million on a single campaign. *Id.* at 2265.

If corporate treasury spending were unleashed on judicial campaigns, it would inevitably escalate the cost and controversy of judicial elections. There is no reason to doubt that, in a regime lacking the regulations permitted by *Austin* and *McConnell,* corporations with their "immense aggregations of wealth" would make expenditures of *Caperton* magnitude more commonplace in judicial elections-causing a spike in legitimate *Caperton* recusal and due process motions. And, as other groups felt pressure to match this corporate treasury spending, these issues would only snowball. Relying so much on the due process limitations articulated in *Caperton* would be highly risky, since that decision was not intended to supplant an overarching framework of state regulation designed to preserve the integrity of the judiciary amid a rising tide of campaign expenditures.

CONCLUSION

Overruling this Court's well-reasoned and long-standing precedents in *Austin* and *McConnell* could dramatically skew the future course of the judiciary in America. Courts can only be impartial if they are independent. To ensure due process, judges must be able to make decisions without looking over their shoulders at wealthy donors whose cases they must decide. *Austin* and *McConnell* should not be overruled.

Respectfully submitted,

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July 31, 2009

APPENDIX

APPENDIX

LIST OF *AMICI CURIAE*

Justice at Stake is a non-partisan campaign of more than 50 organizations working to keep courts fair and impartial. Justice at Stake Campaign partners educate the public and work for reforms to keep special interest pressure out of the courtroom.[1]

The American Judicature Society works to maintain the independence and integrity of the courts and increase public understanding of the justice system. Founded in 1913, the society is a non-partisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice. Its mission is to secure and promote an independent and qualified judiciary and fair system of justice.

The Center for Governmental Studies (CGS), a non-profit, non-partisan organization, helps civic organizations, decision-makers and the media to strengthen democracy and improve government processes by providing rigorous research, nonpartisan analysis, strategic consulting and innovative media models of public information and civic engagement. CGS has issued two reports on judicial campaign financing, one concerning Los Angeles County's judicial elections and one regarding North Carolina's judicial public campaign financing program.

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[1] The arguments expressed in this brief do not necessarily express the opinion of every Justice at Stake partner or board member. Members of Justice at Stake's board of directors who are sitting judges did not participate in the formulation or approval of this brief.

The Citizen Advocacy Center is a non-profit community legal organization dedicated to building democracy by strengthening the citizenry's capacities, resources, and institutions for self-governance. Since 1994, Citizen Advocacy Center community lawyers have empowered the citizenry to be active participants in the democratic process as well as protected the rights of the citizenry to ensure such participation is meaningful.

Common Cause is one of the nation's oldest and largest citizen advocacy organizations, with organizations in 35 states, and nearly 400,000 members and activists around the country. Common Cause is a strong proponent of fair and impartial judiciary, and supports reform initiatives for judicial election, selection and retention that eliminate the undue influence of special interest money on the judiciary. Common Cause seeks such reforms through state chapters in many states, including Georgia, Ohio, Pennsylvania, and Wisconsin.

The Colorado Judicial Institute is a 29-year old non-partisan, non-profit organization that seeks to preserve and enhance the independence and excellence of Colorado courts, further public understanding of the Colorado judicial system, and ensure that the courts meet the needs of the people.

Democracy North Carolina is a non-partisan organization that uses research, organizing, coalition-building, and public education to enhance the vitality of democracy in North Carolina and help fulfill the promise of "one person, one vote." It was a major leader in the successful effort to make North Carolina the first state in the nation with a robust public financing program for candidates in statewide judicial elections.

The Illinois Campaign for Political Reform is a non-profit, non-partisan public interest group that conducts research and advocates reforms to promote public participation, address the role of money in politics and encourage integrity, accountability and transparency in government.

Justice for All is the Arizona counterpart to Justice at Stake. Justice for All is dedicated to the preservation of an independent, impartial judiciary and the merit selection/retention system of appointing and retaining judges.

The Michigan Campaign Finance Network conducts research and provides public education on money in Michigan politics. It has published analysis of the last five Michigan Supreme Court election campaigns.

The North Carolina Center for Voter Education is dedicated to improving the quality and responsiveness of elections through public education and research. The Center is a non-partisan, non-profit organization based in Raleigh, North Carolina.

Ohio Citizen Action was founded in 1975 and has 80,0000 members. Ohio Citizen Action's Money in Politics Project has identified sources of campaign contributions and the economic and policy interests of donors.

Pennsylvanians for Modern Courts is a statewide non-profit, non-partisan organization founded to improve and strengthen the justice system in Pennsylvania by reforming the judicial selection process; improving court administration, court financing and the jury system; eliminating bias; and assisting citizens in navigating the courts and the justice system, whether as litigants, jurors, or witnesses. The organ-

ization's mission is to ensure that Pennsylvania has fair and impartial courts that serve all Pennsylvanians.

Public Campaign is a non-profit, non-partisan organization dedicated to campaign reform that dramatically reduces the role of special interest money in American politics. Public Campaign works for reform with a broad range of organizations, including local community groups and national organizations whose members are not fairly represented under the current campaign finance system.

TakeAction Minnesota's mission is to unite the power of diverse individuals, communities, and organizations in active grassroots democracy that builds social, racial, and economic justice.

Texans for Public Justice is a Texas-based nonprofit research and advocacy organization established in 1997. One of the organization's missions is to research the role of campaign contributions in the Texas judicial system and to promote a range of judicial reforms.

Transparency International-USA works in the U.S. and abroad to combat corruption and promote transparency and integrity in government, business and development assistance.

The Wisconsin Democracy Campaign is a nonpartisan watchdog group that tracks the money in state politics and advocates for campaign finance reform and other reforms promoting clean, open and honest government.

The Chicago Council of Lawyers is a public interest bar association which strives for the fair and effective administration of justice.

Chicago Appleseed is a research and advocacy organization which promotes social justice and government effectiveness by identifying injustice in the community, investigating its causes, and finding effective solutions.

The Honorable Norman S. Fletcher was appointed to the Supreme Court of Georgia in 1989 and served as Chief Justice from 2001-2005.

AMICUS CURIAE BRIEF

No. 08-205

In The Supreme Court of the United States

CITIZENS UNITED,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AND CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Constitution Protects The Rights Of Individual Citizens To Participate Effectively In The Political Process And Allows Regulation Of Corporate Influence In Elections 4

II. The Constitution's Text And History Allow Federal And State Governments To Impose Greater Restrictions Upon Corporations Than Upon Individual Citizens 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Austin v. *Michigan Chamber of Commerce*,
494 U.S. 652 (1990) 19

Bank of Augusta v. Earle,
38 U.S. (13 Pet.) 519 (1839) 16

Cort v. Ash,
422 U.S. 66 (1975) 10

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978) 17, 18

Head & Amory v. Providence Ins. Co.,
6 U.S. (2 Cranch.) 127 (1804) 14

McConnell v. FEC,
540 U.S. 93 (2003) 19

Northern Securities Co. v. United States,
193 U.S. 197 (1904) 17, 18

Northwestern Nat'l Life Ins. Co v. Riggs,
203 U.S. 243 (1906) 17

Paul v. Virginia,
75 U.S. (8 Wall.) 168 (1868) 17

Sinking Fund Cases,
99 U.S. 700 (1878) 18

Trustees of Dartmouth College v. Woodward,
17 U.S. (4 Wheat.) 518 (1819) 14, 17

TABLE OF AUTHORITIES—continued

Page

Tomlinson v. Jessup,
82 U.S. 454 (1872) 18

Western Turf Ass'n v. Greenberg,
204 U.S. 359 (1907) 17

United States v. UAW,
352 U.S. 567 (1957) 9, 10

United States v. White,
322 U.S. 694 (1944) 15

Constitutional Provisions and Legislative Materials

23 Cong. Rec. 6063 (1892) 7

26 Cong Rec. 7775 (1894) 8

40 Cong. Rec. 96 (1905) 10

41 Cong. Rec. 22 (1906) 10

Act of Aug. 19, 1911 (Amendments to the Publicity Act), 37 Stat. 25 (Aug. 19, 1911) 12

Annals of Congress, 1st Cong., 3rd Sess.
1949 (1791) 14

S. Rep. No. 59-3056 (1906) 10

Tillman Act of 1907, 34 Stat. 864
(Jan. 26, 1907) 10

TABLE OF AUTHORITIES—continued

Page

U.S. CONST., amend. II 15

U.S. CONST., amend. V 15

U.S. CONST., amend. XV 4

U.S. CONST., amend. XVII 4

U.S. CONST., amend. XIX 5

U.S. CONST., amend. XXIV 5

U.S. CONST., amend. XXVI 5

Books and Articles

Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239 (2005) 5

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AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) 13-14

Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VANDERBILT L. REV. 1347 (1996) 11

TABLE OF AUTHORITIES—continued

Page

Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997)..... 11

Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION (3d ed. 1874)..... 6

Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1 (2008)..... 15

Rutherford B. Hayes, THE DIARY AND LETTERS OF RUTHERFORD B. HAYES, NINETEENTH PRESIDENT OF THE UNITED STATES (Charles Richard Williams ed., Ohio State Archaeological & Historical Society 1922)..... 6

JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970 (1970)..... 14

N.Y. TRIBUNE, Sept. 18, 1905..... 9

Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599 (2008)..... 5, 8

Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469 (2001)..... 11, 12

TABLE OF AUTHORITIES—continued

Page

MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS (2005) 6

Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133 (1998) 12, 13

Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243 (1999) 9

INTEREST OF *AMICI CURIAE*[1]

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in more than 850 communities and in every state, with more than 150,000 members and supporters nationwide. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than three decades.

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the

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[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Constitution and to preserve the rights and freedoms it guarantees.

SUMMARY OF ARGUMENT

Since our Nation's founding, our constitutional story has been one of democratic progress, moving American democracy toward broader enfranchisement and more meaningful political participation for individual American citizens. *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 423 (2005). Through constitutional amendments, our modern democracy has been constructed on the foundation of our original Constitution: the Fifteenth Amendment guaranteed the right to vote free from racial discrimination; the Seventeenth Amendment gave the people in each State the right to vote for U.S. senators; the Nineteenth Amendment extended the franchise to women; the Twenty-fourth Amendment freed the federal election process from poll taxes; and the Twenty-sixth Amendment secured the right to vote for young adults. Statutory enactments, such as the Voting Rights Act in 1965 and campaign finance regulation beginning with the Tillman Act in 1907, have also been central to the story of our hard-won, modern, inclusive democracy.

Prevention of improper corporate influence in the electoral process—like the extension of the franchise, anti-discrimination mandates, and the bedrock equality principle of one-person, one-vote—is a pillar of our modern democracy. Concern that corporations were corrupting elections motivated passage of the Tillman Act of 1907, the first piece of

federal corporate campaign finance legislation, as well as the ratification of the Seventeenth Amendment in 1913, which was intended to prevent corporate influence in the selection of U.S. senators. The idea that government can act to prevent improper corporate influence in elections is thus woven into the very fabric of our constitutional system and has been reflected in more than a century of campaign finance regulation.

While our Constitution reflects an increasingly expansive view of individual participation in the political process, it does not reflect a similar solicitude for corporate participation. To the contrary, our constitutional history reflects a growing concern over the influence of corporations, and the distinction between the legal protections afforded to living persons and corporations has been part of our constitutional law from the Founding. Corporations are never specifically mentioned in the Constitution, and from the earliest days this Court has held that the government need not treat corporations the same way it treats individual citizens. The Tillman Act and the Seventeenth Amendment built upon this solid foundation of constitutional text and history in preventing corporations from dominating our electoral system.

If the Court takes this opportunity to "return to first principles," as suggested by Citizens United, Supp. Br. for Appellant at 2, *amici* submit that these first principles support preserving, not dismantling, corporate campaign finance regulations. To change course and create a new

constitutional right for corporations to make unlimited expenditures in candidate elections would reverse our centuries-long march of progress toward greater democracy and run contrary to constitutional text and history.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE RIGHTS OF INDIVIDUAL CITIZENS TO PARTICIPATE EFFECTIVELY IN THE POLITICAL PROCESS AND ALLOWS REGULATION OF CORPORATE INFLUENCE IN ELECTIONS.

As constitutional scholar Akhil Amar has observed, the Constitution's "chronological format highlights the grand arc of constitutional history," demonstrating, at a glance, "how democracy has swept forward across the centuries." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 459 (2005). While "America's Founding gave the world more democracy than the planet had thus far witnessed," *id.* at 14, it nonetheless took almost two centuries of constitutional amendments and statutory enactments to achieve our modern American democracy.

With the Fifteenth Amendment, ratified in 1870,[2] the franchise was guaranteed to citizens regardless of race or color; with the Seventeenth Amendment, ratified in 1913,[3] citizen participation was advanced through direct election of U.S.

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[2] U.S. CONST., amend. XV.

[3] U.S. CONST., amend. XVII.

senators; with the Nineteenth Amendment, ratified in 1920,[4] women gained the right to vote; and with the Twenty-fourth Amendment, ratified in 1964,[5] and the Twenty-sixth Amendment, ratified in 1971,[6] the Constitution extended the right to vote to the poor and young adults, respectively. *See generally* AMAR, AMERICA'S CONSTITUTION, at 18-19, 408. While none of these amendments speaks directly to campaign finance, concerns about corporate influence in politics and elections have, throughout this history, intertwined with constitutional efforts to safeguard the rights of individual voters. Preventing improper influence of corporate wealth in elections has gone hand-in-hand with modern democracy's embrace of the principle of political equality. *See* Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQ. 239 (2005).

Serious concerns about corporate influence in government began in the post-Civil War era, around the time the Fifteenth Amendment was ratified. This "Gilded Age" is when the story of campaign finance reform properly begins, "when a variety of political reform movements began to question the growing influence of trusts and other organized economic interests within the American democratic system." Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 603 (2008).

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[4] U.S. CONST., amend. XIX.
[5] U.S. CONST., amend. XXIV.
[6] U.S. CONST., amend. XXVI.

Industrialization, economic growth, and government contracts awarded during the war combined to give American corporations remarkable wealth and power in the aftermath of the Civil War. In 1864, President Abraham Lincoln presciently predicted that "as a result of the war, corporations have become enthroned, and an era of corruption in high places will follow." MELVIN I. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 7 (2005). In 1874, conservative jurist Thomas Cooley similarly warned that "the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually [have] greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence." Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 279 n.2 (3d ed. 1874). By 1888, corporate power in politics had become so overwhelming that President Rutherford Hayes remarked with dismay in his diary that the United States had become "a government of corporations, by corporations, and for corporations." Rutherford B. Hayes, THE DIARY AND LETTERS OF RUTHERFORD B. HAYES, NINETEENTH PRESIDENT OF THE UNITED STATES 374 (Charles Richard Williams ed., Ohio State Archaeological & Historical Society 1922), available at http:// www.ohiohistory.org/onlinedoc/hayes/volume04/Chapter45/March11.txt.

Reformers began to heed these warnings about corporate financial influence in elections. The

process by which United States senators were selected by state legislatures was seen as particularly prone to corporate corruption, and reform of this process ranked high on reformers' agenda.[7] While the Seventeenth Amendment was not ratified until 1913, corporate influence in the selection of U.S. senators was seen as a sufficiently serious problem before the turn of the century that prominent members of Congress spoke out against it. In 1892, Representative Tucker observed that:

> [t]he wonderful growth of our country has been greatly accelerated by the combinations of wealth in corporate forms [but] when they leave their legitimate fields of operation and seek to control, against the interests of the people, the legislation of the country, whether they be banks or railroads, corporations or trusts, or combines, they will meet with the indignant protests of all true friends of the people . . . The standard for the exalted position of United States Senator is thus debased by corporate influence."

23 Cong. Rec. 6063 (1892).

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[7] The selection of U.S. senators by state legislatures was viewed as particularly susceptible to corporate corruption because special interests could pay off state lawmakers to vote a certain way in Senate contests. Supporters of direct election of senators by the people believed that "it is harder to bribe a large group of ad hoc decisionmakers—such as ordinary voters—than a small group of standing officials." AMAR, AMERICA'S CONSTITUTION, at 413.

Political leader William Jennings Bryan further explained that the concern over corporate political influence had grown since the time of the Founding, and required new regulation. In arguing for direct election of senators, he said:

> We all recognize that there is a reason for the election of Senators by a direct vote today that did not exist at the time the constitution was adopted. We know that today great corporations exist in our States, and that these great corporations, different from what they used to be one hundred years ago, are able to compass the election of their tools and their agents through the instrumentality of Legislatures, as they could not if Senators were elected directly by the people.

26 Cong Rec. 7775 (1894).

In addition to seeking structural change in senatorial elections, reformers also responded to criticism of businesses financing political campaigns by proposing regulation of corporate political activity. "Campaign finance reform was viewed as a logical complement" to other reforms aimed at combating political corruption and providing political equality. Pasquale, *supra*, at 605.

Accusations of corporate corruption in the election of Theodore Roosevelt in 1904 created an opportunity for the country to consider corporate campaign finance regulation. As Justice

Frankfurter explained, "[c]oncern over the size and source of campaign funds so actively entered the presidential campaign of 1904 that it crystallized popular sentiment for federal action to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *United States v. UAW*, 352 U.S. 567, 571-72 (1957). As Roosevelt's defeated challenger stated, "[t]he greatest moral question which now confronts us is, Shall the trusts and corporations be prevented from contributing money to control or aid in controlling elections?" *Id.* at 572.

Public sentiment in favor of corporate campaign finance regulation was informed not just by a belief that corporations were wielding too much power in elections by virtue of their extraordinary wealth, but also by the belief that the political process should be left to the American people themselves, not artificial corporate entities. In 1905, the New York Tribune expressed its views, which were widely shared: "A corporation is not a citizen . . . . It is an artificial creation . . . and attempts by it to exercise rights of citizenship are fundamentally a perversion of its power." N.Y. TRIBUNE, Sept. 18, 1905, at 6 *quoted in* Adam Winkler, *The Corporation in Election Law*, 32 LOY. L.A. L. REV. 1243, 1255 (1999).

President Roosevelt responded to the calls for corporate campaign finance reform, recommending in his annual message to Congress that "[a]ll contributions by corporations to any political committee or for any political purpose should be

forbidden by law." 40 Cong. Rec. 96 (1905). In his message to Congress the following year, Roosevelt "listed as the first item of congressional business a law prohibiting political contributions by corporations." *UAW*, 352 U.S. at 575 (citing 41 Cong. Rec. 22 (1906)).

In turn, Congress passed the Tillman Act of 1907, 34 Stat. 864 (Jan. 26, 1907), which prohibited corporate contributions in federal elections and prevented national banks or corporations organized under the laws of Congress from making "a money contribution in connection with any election to any political office." *Id.* The Senate Report explained that the Tillman Act was "calculated to promote purity in the selection of public officials." S. Rep. No. 59-3056, at 2 (1906). As this Court noted, the Act was intended to "eliminate the apparent hold on political parties which business interests . . . seek and sometimes obtain by reason of liberal campaign contributions." *Cort v. Ash*, 422 U.S. 66, 82 (1975) (citation omitted).

Having achieved the first federal campaign finance regulation, reformers re-focused on attacking corruption in senatorial elections. The Seventeenth Amendment imported the Tillman Act's opposition to corporate election influence into the Constitution. Proposed in 1912 and ratified the following year, the Seventeenth Amendment provided that U.S. senators would be chosen directly by each state's voters rather than by state legislatures. Supporters of direct election, like the supporters of the Tillman Act, argued that "their system would result in cleaner, less corrupt

government and would counter the undue effects of large corporations, monopolies, trusts, and other special-interest groups in the Senate election process." AMAR, AMERICA'S CONSTITUTION, at 412. *See also* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VANDERBILT L. REV. 1347, 1353 (1996) (observing that "state legislative corruption and special interest group control were perhaps the greatest evils associated with indirect election"). While there were concerns among some in Congress about the efficacy of the Seventeenth Amendment in eliminating corporate influence,[8] there was general consensus that corporate wealth in the political process was a problem requiring an attempt at a solution.

Given the similar motivations behind the Tillman Act and the Seventeenth Amendment, the Amendment's history is particularly relevant to questions about the constitutionality of corporate-focused campaign finance reform. The interaction of the First Amendment and campaign finance reform "must account for or consider the Seventeenth Amendment, which, while not facially concerned with political speech, was enacted in part to curb the influence of money in the selection of United States Senators." Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469, 1505 n.178 (2001). "[T]he Seventeenth Amendment's language and history . . . supports the view that in reposing the power to elect Senators directly in the people,

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[8] *See* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 541 (1997).

Congress also intended that the people have residual authority to effectuate one of the principal purposes of the Amendment, the reduction of the influence of money in selecting Senators." *Id.*

The ratification of the Seventeenth Amendment, coming so close on the heels of the Tillman Act's ban on corporate contributions and the attendant national conversation on corporate influence in political campaigns, strongly suggests that our political leaders and the people themselves understood regulation of corporate political activities to be constitutional—and good for modern democracy. Indeed, the Congress that passed the Seventeenth Amendment also enacted campaign finance regulation that required certain disclosures and imposed spending limits. Act of Aug 19, 1911, 37 Stat. 25 (1911).

In its efforts to enhance the power of the people and prevent corruption by special interests, the Progressive-era movement sought, in addition to campaign finance reform, passage of the Seventeenth and Nineteenth Amendments. *See* Adam Winkler, *Beyond Bellotti*, 32 LOY. L.A. L. REV. 133, 137-38 (1998). This era bridged the first Reconstruction, in which the Fifteenth Amendment was ratified to guarantee the franchise regardless of race, and the Second Reconstruction of the civil rights movement, in which the promise of the Fifteenth Amendment was made a reality through the Voting Rights Act and the poor and young were brought into the electorate through the Twenty-fourth and Twenty-sixth Amendments. Along with these Amendments, the Tillman Act and

subsequent campaign finance reform legislation stand for the principle that democratic self-governance belongs to individuals, not business corporations. While the Constitution provides for equal political participation for individual Americans, corporations have "no obvious standing to participate in a democratic polity." *Id.* at 194.

II. THE CONSTITUTION'S TEXT AND HISTORY ALLOW FEDERAL AND STATE GOVERNMENTS TO IMPOSE GREATER RESTRICTIONS UPON CORPORATIONS THAN UPON INDIVIDUAL CITIZENS.

While the text and history of the Constitution show an ever-expanding concern for the rights of individuals to vote and participate in the political process, constitutional text and history do not suggest an intention to treat corporations in the same manner. To the contrary, the Constitution gives federal and state governments broad power to regulate the acts of corporations.

From the very beginnings of our Nation's history, the legal protections afforded to living persons and corporations have been fundamentally different. At the Founding, the Bill of Rights was added to the Constitution to protect the fundamental rights of the citizens of the new nation—the "We the People" who ordained and established the Constitution—reflecting the promise of the Declaration of Independence that all Americans "are endowed by their Creator with certain unalienable rights." *See* AKHIL REED AMAR,

THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 3-133 (1998).

Corporations—never specifically mentioned in the Constitution itself—stood on an entirely different footing. A corporation, Chief Justice John Marshall explained, "is an artificial being, invisible, intangible, and existing only in contemplation of the law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it . . . ." *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). James Madison described the charter of incorporation as a bill that "creates an artificial person previously not existing in law." Annals of Congress, 1st Cong., 3rd Sess. 1949 (1791). *See also Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch.) 127, 167 (1804) (describing corporation as "mere creature of the act to which it owes its existence").

At the Founding, corporations existed at the behest, and by the creation, of the government to serve public purposes, such as "supplying transport, water, insurance, or banking facilities." JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 15 (1970). Because charters conferred on corporations special privileges that enabled them to amass wealth and property, the Constitution's framers were "suspicio[us] of corporate charters based on the view that special privileges generally led to monopoly" and specifically rejected proposed constitutional language that would have given Congress an

explicit power to charter corporations. *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 6, 7-10 (2008).

Consistent with this original understanding, both the Constitution's text and the Court's early case-law reflect that the Constitution's individual-rights guarantees do not apply equally to corporations, and that federal and state governments have broad power to regulate the acts of corporations.

Many of the individual-rights provisions of the Constitution—including the Bill of Rights and the Civil War Amendments, which were added to the Constitution to ensure the equal citizenship of the newly freed slaves—use words that make little sense as applied to corporations. For example, as artificial entities, corporations themselves cannot "keep and bear Arms." U.S. CONST., amend. II. A corporation cannot claim the right not to be "compelled to be a witness against himself." U.S. CONST., amend. V; *see United States v. White*, 322 U.S. 694 (1944) (finding that corporations do not enjoy the privilege against self-incrimination). With respect to the voting amendments, only individual citizens enjoy the right to vote. The constitutional right to vote "in letter and spirit encompassed not merely the equal right to *vote for legislators* and other elected officials, but also the equal right to vote *in legislatures*, the equal right to be *voted for* and *serve in* any elective post, and the

equal right to vote *in juries*[9] of all sorts." AMAR, AMERICA'S CONSTITUTION, at 399. Corporations do not share in these rights—they cannot vote in elections, stand for election, or serve as an elected official or member of a jury.

Indeed, early in this Nation's history, the Supreme Court confirmed that corporations do not share in the substantive protections the Constitution affords to American citizens. In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), the Supreme Court held that corporations were not entitled to the protection of Article IV's Privileges and Immunities Clause, which provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Court reasoned that a corporation could not claim both the special privileges conferred by corporate status and the protections the Constitution guarantees to individuals. "If . . . members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens . . . they must at the same time take upon themselves the liabilities of citizens," an approach inconsistent with the corporation's special privileges. *Id.* at 586.

Bank of Augusta and other precedents of the Court settled that the foundational document setting out the corporation's substantive legal rights was the corporate charter, not the

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[9] Most states at the Founding and in the early twentieth century provided that jurors should be drawn from the pool of eligible voters. *See* AMAR, AMERICA'S CONSTITUTION, at 426.

Constitution. *Accord First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) (noting that "it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons"). Although the Constitution might protect the vested rights of a corporation spelled out in the corporate charter, *see Dartmouth College*, 17 U.S. at 636-45, the Constitution did not, of its own force, grant any substantive fundamental rights to corporations. *See Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868) ("The term citizen [in the Privileges and Immunities Clause] applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."); *Northwestern Nat'l Life Ins. Co v. Riggs*, 203 U.S. 243, 255 (1906) ("The liberty referred to in th[e Fourteenth] Amendment is the liberty of natural, not artificial, persons."); *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907) (holding that a corporation was not a citizen protected by the Privileges or Immunities Clause of the Fourteenth Amendment).

Not only did the legal rights of corporations derive from their charters, not the Constitution, but corporations—being creatures of the charter creating them—could be extensively regulated to ensure that corporations did not abuse the special privileges conferred on them by the government, whether federal or state. *See Northern Securities Co. v. United States*, 193 U.S. 197, 332-51 (1904) (recognizing congressional power to regulate

corporations under its Article I powers); *Sinking Fund Cases*, 99 U.S. 700, 721 (1878) ("[W]hatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment."); *Tomlinson v. Jessup*, 82 U.S. 454, 459 (1872) (holding that reservation clause giving the State the right to amend the corporate charter "affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State"). While the Court has noted that states may not "define the rights of their creatures without constitutional limit," *Bellotti*, 435 U.S. at 778 n.14, it has never held that corporations enjoy the full measure of rights that individuals enjoy under the First Amendment. *See id.* at 777.

Accordingly, if a "return to first principles is in order," Supp. Br. of Appellant at 2, it is important to recall precisely what those first principles are with respect to regulation of corporate activity. Far from treating living persons and corporations identically, the Constitution's text and history recognize that "[a] corporation . . . is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business," *Northern Securities*, 193 U.S. at 362 (Brewer, J., concurring), and necessarily "subject to legislative control so far as its business affects the public interest." *Sinking Fund Cases*, 99 U.S. at 719.

* * *

From the Declaration of Independence, through our Nation's Founding, and as reflected in our amended Constitution, broad citizen participation in fair elections has been a central ideal of American democracy. Our modern system, more democratic than any before in history, achieves this ideal in part through regulation of corporate influence in the election process. Corporate campaign finance reform is intertwined with and incorporated into our modern constitutional democracy. The Constitution allows federal and state government to regulate corporations and does not require that artificial corporate entities be treated the same as individual citizens.

CONCLUSION

For the foregoing reasons, the judgment of the district court—and the continued vitality of *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell v. FEC*, 540 U.S. 93 (2003)—should be affirmed.

Respectfully submitted.

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July 2009

AMICUS CURIAE BRIEF

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF OF AMICI CURIAE SENATOR JOHN MCCAIN, SENATOR RUSSELL FEINGOLD, FORMER REPRESENTATIVE CHRISTOPHER SHAYS, AND FORMER REPRESENTATIVE MARTIN MEEHAN IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. OVERRULING *AUSTIN* OR *MCCONNELL* WOULD DISREGARD PRINCIPLES OF *STARE DECISIS* AND PROCEDURAL REGULARITY 3

A. There Is No Special Justification For Overruling *Austin* Or *McConnell* 3

B. Overruling *Austin* Or *McConnell* Would Be Procedurally Inappropriate 7

II. *MCCONNELL* AND *AUSTIN* WERE CORRECTLY DECIDED 12

CONCLUSION 18

APPENDIX

TABLE OF AUTHORITIES

CASES

Page(s)

Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977) 16

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 (1936) 9

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) ..... *passim*

Buckley v. *Valeo*, 424 U.S. 1 (1976) 6

Caperton v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) 2, 12, 13

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 1

Dickerson v. *United States*, 530 U.S. 428 (2000) 3, 5, 6

FEC v. *Beaumont*, 539 U.S. 146 (2003) 6

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 6, 14, 15

FEC v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) 14

FEC v. *National Rifle Ass'n of America*, 254 F.3d 173 (D.C. Cir. 2001) 8

FEC v. *National Right to Work Committee*, 459 U.S. 197 (1982) 6, 14

FEC v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) 5, 9, 10, 15

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 15

Hubbard v. *United States*, 514 U.S. 695 (1995) 4

TABLE OF AUTHORITIES—Continued

Page(s)

McConnell v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003) 13, 14

McConnell v. *FEC*, 540 U.S. 93 (2003) ..... *passim*

Miranda v. *Arizona*, 384 U.S. 436 (1966) 6

Mitchell v. *W.T. Grant Co.*, 416 U.S. 600 (1974) 12

Pipefitters Local Union No. 562 v. *United States*, 407 U.S. 385 (1972) 8

Planned Parenthood of Southeastern Pennsylvania v. *Casey*, 505 U.S. 833 (1992) 3, 4, 5, 6

Quill Corp. v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992) 5

Randall v. *Sorrell*, 548 U.S. 230 (2006) 4, 7

Republican Party of Minnesota v. *White*, 536 U.S. 765 (2002) 13

Vasquez v. *Hillery*, 474 U.S. 254 (1986) 7

Virginia v. *Hicks*, 539 U.S. 113 (2003) 18

Webster v. *Reproductive Health Services*, 492 U.S. 490 (1989) 8

Welch v. *Texas Department of Highways & Public Transportation*, 483 U.S. 468 (1987) 3

Ysursa v. *Pocatello Educational Ass'n*, 129 S. Ct. 1093 (2009) 16

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

2 U.S.C. § 441b 4, 11, 17, 18

OTHER AUTHORITIES

Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005* (2005), http://www.ici.org/pdf/fm-v14n5.pdf 16

U.S. Congress Joint Economic Committee, *The Roots of Broadened Stock Ownership* (2000), www.house.gov/jec/tax/stock/stock.pdf 16

INTEREST OF AMICI CURIAE[1]

The interest of the amici curiae, BCRA's principal sponsors, is stated in their previous brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

If judicial modesty is a virtue, then "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*." *City of Boerne* v. *Flores*, 521 U.S. 507, 536 (1997). By that standard, this Court's order that the parties brief and argue whether *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell* v. *FEC*, 540 U.S. 93 (2003), should be overruled is a modest proposal only in the Swiftian sense.

The Court's directive dramatically changes the issue in this case. No longer is it only whether BCRA and its implementing regulations can apply to on-demand satellite transmission of a movie by a nonprofit corporation that accepts some funding from business corporations, and whether that movie is the functional equivalent of express advocacy. The Court now asks whether *all* restrictions on use of treasury funds of *for-profit* corporations (and unions) for express advocacy should be held facially unconstitutional.

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[1] Letters consenting to the filing of this brief have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici or their counsel made a monetary contribution to its preparation or submission.

Overruling *Austin* or *McConnell* in this case would be unwarranted and unseemly. *Stare decisis* requires respect for precedents absent a special justification for overruling them. No such justification exists. *Austin* and *McConnell* (and their antecedents) are vital cornerstones of modern campaign finance regulation and have engendered much reliance. Overruling them would severely jolt our political system by suddenly overturning not only federal statutes that have stood for decades, but also laws of many States. The foundations of *Austin* and *McConnell* have not been undermined by precedential development, and their holdings have not proved unworkable. Nor does the Court have new information that undermines their factual basis; there is *no* factual record in this case that even bears on, let alone undermines, the justifications for the long-standing restrictions on the use of corporate treasury funds for express candidate advocacy.

More fundamentally, *Austin* and *McConnell* were correctly decided. Unlimited expenditures supporting or opposing candidates may create at least the appearance of corruption, as *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), illustrates. The tremendous resources business corporations and unions can bring to bear on elections, and the greater magnitude of the resulting apparent corruption, amply justify treating corporate and union expenditures differently from those by individuals and ideological nonprofit groups. So, too, does the countervailing free-speech interest of the many shareholders who may not wish to support corporate electioneering but have no effective means of controlling what corporations do with what is ultimately the shareholders' money. *Austin* was rightly concerned with the corruption of the system that will result if campaign discourse becomes dominated not by

individual citizens—whose right it is to select their political representatives—but by corporate and union war-chests amassed as a result of the special benefits the government confers on these artificial "persons." That concern remains a compelling justification for restrictions on using corporate treasury funds for electoral advocacy—constraints that ban no speech but only require that it be funded by individuals who have chosen to do so.

ARGUMENT

I. OVERRULING *AUSTIN* OR *MCCONNELL* WOULD DISREGARD PRINCIPLES OF *STARE DECISIS* AND PROCEDURAL REGULARITY

A. There Is No Special Justification For Overruling *Austin* Or *McConnell*

Stare decisis is "of fundamental importance to the rule of law." *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). This Court has often emphasized that overruling one of its precedents is an extraordinary action requiring "special justification." *See Dickerson* v. *United States*, 530 U.S. 428, 443 (2000).

The controlling opinion in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey* identified several "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law." 505 U.S. 833, 854 (1992). These include whether the decision has engendered "reliance that would lend a special hardship to the consequences of overruling," whether the rule established by a decision "def[ies] practical workability," whether recent decisions have "left the old rule no more than a remnant of abandoned doctrine," and whether "facts

have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Id.* at 854-855. None of these considerations supports overruling precedent here.

1. Overruling *Austin* and *McConnell* would deeply disturb settled expectations regarding the role of corporations in the electoral process. It would overturn not only BCRA's restriction on use of corporate and union treasury funds for electioneering communications, but also the provision originating in the Taft-Hartley Act of 1947 that requires corporations and unions to use segregated funds (PACs) for expenditures in connection with federal elections. 2 U.S.C. § 441b. It would also—at a stroke—invalidate laws of twenty-two States that prohibit corporations from using treasury funds for campaign advocacy and jeopardize statutes in two others that strictly limit corporate expenditures.[2]

That alone is a powerful reason for adhering to precedent. "*Stare decisis* has special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.'" *Hubbard* v. *United States*, 514 U.S. 695, 714 (1995). Just as "*Buckley* has promoted considerable reliance" because "Congress and state legislatures have used *Buckley* when drafting campaign finance laws," *Randall* v. *Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.), so, too, have legislatures relied extensively on the longstanding principle that use of corporate treasury funds for express advocacy may be limited. The requirement that

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[2] These laws are compiled in the Appendix to this brief.

business corporations and unions use segregated funds for candidate advocacy has become "embedded," *Dickerson*, 530 U.S. at 443, in our national political culture in the generations since the Taft-Hartley Act and is "part of the basic framework," *Quill Corp.* v. *North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317 (1992), of how corporations and unions conduct their political activities.

2. The constitutional principle that a corporation can be restricted from using treasury funds for express advocacy has not proved unworkable. Although regulating only express advocacy proved *insufficient* to prevent potentially corrupting corporate expenditures, *see McConnell*, 540 U.S. at 126-127, identifying express advocacy was not itself unworkable. Nor did *McConnell*'s application of the principle to the "functional equivalent of express advocacy," *id.* at 206, as refined in *FEC* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) (*WRTL*), render the rule unworkable. Indeed, the controlling opinion in *WRTL* devised its test principally for "clarity," *id.* at 474 n.7, and there is no reason to think it is less clear today than two years ago. That Citizens United contests application of the *WRTL* standard hardly demonstrates that it is "unworkable."

3. Nor has "evolution of legal principle ... implicitly or explicitly left [*Austin* or *McConnell*] behind as a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857. The federal prohibition on use of corporate and union treasury funds for express advocacy has existed since 1947, and this Court's decisions have not indicated any infirmity in it. As *McConnell* pointed out in upholding the constitutionality of regulating the functional equivalent of express advocacy, that result rested not only on *Austin*, but on the Court's campaign finance jurisprudence from

Buckley v. *Valeo*, 424 U.S. 1 (1976), onward, with special emphasis on *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*), and *FEC* v. *Beaumont*, 539 U.S. 146 (2003). *See McConnell*, 540 U.S. at 203-206. The constitutionality of regulating express advocacy by business corporations also provided the analytical starting point for *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), which recognized a special exception for ideological nonprofit organizations that accept no funding from for-profit corporations.

That some Justices have vehemently disagreed with *Austin* and *McConnell* does not make them doctrinal relics. *Cf. Casey*, 505 U.S. at 860 (noting that *Roe* v. *Wade* "engendered disapproval" from the outset). If anything, it demonstrates that the arguments advanced against *Austin* do not rest on new doctrinal developments, but are the same ones already *twice* deemed unpersuasive by the Court.

WRTL further demonstrates that *Austin* and *McConnell* have not been left behind by doctrinal development. *WRTL*'s controlling opinion disclaimed overruling *McConnell* and drew a constitutional line that was based on *McConnell*'s principles but designed to avoid overbreadth. By "reduc[ing] the impact" of *McConnell* "while reaffirming the decision's core ruling," *Dickerson*, 530 U.S. at 443-444, *WRTL* strengthened *McConnell*'s *stare decisis* effect, just as subsequent decisions limiting but reaffirming *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were held in *Dickerson* to enhance *Miranda*'s precedential stature.

4. There is no basis for concluding that the factual premises of *Austin* and *McConnell* have changed or proven unfounded. In contrast to *Austin* (where there

was an evidentiary record on corporate and PAC campaign spending in Michigan and the adequacy of PACs as mechanisms for channeling corporate speech) and *McConnell* (which involved a massive evidentiary record detailing the impact of large-scale corporate and union expenditures that were the functional equivalent of express advocacy), in this case there is no factual record that has any bearing on the justifications for restricting the use of corporate treasury funds for candidate advocacy. There is, therefore, no possible basis for concluding that "'facts newly ascertained,'" *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986), necessitate overruling *Austin* or *McConnell*.

B. Overruling *Austin* Or *McConnell* Would Be Procedurally Inappropriate

1. Sound judicial process counsels against reaching out to decide this case on the broadest possible basis. Until now, Citizens United itself never asked this Court to overrule *McConnell* and made only a perfunctory argument for overruling *Austin*. That argument was not raised in the district court or the jurisdictional statement, and even when Citizens United did raise it in two paragraphs of its merits brief, it addressed none of the criteria this Court has used to identify a special justification for overruling a decision. *See* Appellant Br. 30-31. Ordinarily, this Court would not consider an argument that it should overrule a precedent that was raised "[o]nly as a backup argument, an afterthought almost," and was marked by a complete "fail[ure] to discuss the doctrine of *stare decisis* or the Court's cases elaborating on the circumstances in which it is appropriate to reconsider a prior constitutional decision." *Randall*, 548 U.S. at 263 (Alito, J., concurring).

Citizens United has advocated a number of much narrower grounds for deciding the case in its favor, some of which do not require constitutional adjudication at all. *See Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 400-401 (1972). Its arguments question whether its film contains the functional equivalent of express advocacy under the *WRTL* standard, whether that standard can constitutionally be applied to "on-demand" television programming, and whether the FEC's regulations even reach on-demand programming.

Citizens United has also argued that the criteria set forth in *MCFL* should be expanded to cover nonprofit corporations that have received some contributions from business corporations. Under such an approach, nonprofit corporations whose receipts from business corporations are so modest that they plainly are not being used as conduits would not need to establish and maintain a PAC to fund express advocacy or its functional equivalent.[3]

We continue to believe that the judgment below should be affirmed; but if this Court concludes otherwise, a decision on any one of those narrower bases, as opposed to a wholesale overruling of *Austin* and *McConnell*, would be more consistent with the "venerable principle," *Webster* v. *Reproductive Health Servs.*, 492 U.S. 490, 525 (1989) (O'Connor, J., concurring), that the Court will not "'formulate a rule of constitutional law broader than is required by the precise facts to

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[3] *Cf. FEC* v. *NRA*, 254 F.3d 173 (D.C. Cir. 2001) (*MCFL* applies to organizations accepting *de minimis* contributions from business corporations).

which it is to be applied.'" *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

2. Moreover, because Citizens United framed this case below as a narrow, as-applied challenge involving application of the *WRTL* test to Citizens United's movie, there is *no* evidentiary record bearing on whether requiring business corporations to use segregated funds for candidate advocacy is facially constitutional. Because of the way Citizens United structured its case, the FEC had no occasion to develop a record with respect to the broader issue, and it appropriately carried its burden just by showing that the film satisfied the *WRTL* standard. As the controlling opinion in *WRTL* explained (551 U.S. at 465):

> This Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent. *McConnell*, [540 U.S.] at 206. So to the extent the ads in these cases fit this description, the FEC's burden is not onerous; all it need do is point to *McConnell* and explain why it applies here.

As a result, there is no record evidence that sheds any light on many factual questions that might bear on the broad issues of whether restrictions on the way business corporations fund express advocacy serve a compelling interest and whether requiring them to use segregated funds unacceptably burdens their speech. Such questions might include:

- The magnitude of candidate advocacy that would result if business corporations and unions were free to use treasury funds;

- The effect of such expenditures on political campaigns, candidates, and officeholders, and on public perceptions of corruption;

- Whether corporate shareholders are able to monitor and control corporate political spending or alter investments based on their views regarding such spending;

- Whether legislation comporting with *Austin*, *McConnell*, and *WRTL* has had a chilling effect on speech other than traditional campaign advertising;

- Whether segregated-fund requirements significantly burden for-profit corporations and unions;

- Whether, as Citizens United contends, wealthy individuals have as much ability to engage in massive election spending as business corporations and unions;

- Whether corporate political expenditures discourage citizen participation in the process of selecting representatives for public office.

As the Court recognized in *WRTL*, "*McConnell*'s analysis was grounded in the evidentiary record before the Court." 551 U.S. at 466. And even the *McConnell* record reflected the fact that BCRA's challengers in that case did "not contest that the Government has a compelling interest in regulating advertisements that expressly advocate the election or defeat of a candidate for federal office." 540 U.S. at 205. Thus, although the record in *McConnell* contained considerable evidence bearing on the corrupting effect of such corporate ex-

press advocacy, it did not have reason to address the justifications for *Austin*.[4]

Here, by contrast, there is no record at all against which to assess the justifications for *Austin* and *McConnell*. For the Court to overrule either decision in the absence of a record—or a fair opportunity to develop one—would be manifestly improper. And because the absence of a record is attributable to the way Citizens United framed its challenge, the Court should rule on that as-applied challenge and leave the development of the necessary record for a case in which the broader issue truly requires decision.

3. These procedural concerns are heightened because the significant expansion of the potential impact of this Court's ruling—to encompass not only BCRA, but also the expenditure provision of 2 U.S.C. § 441b, and the laws of many States—greatly increases the number of affected parties who had no reason to participate earlier. In particular, the States have not heretofore been heard in this case—because the narrow arguments Citizens United raised did not significantly affect their interests—and now have only a limited opportunity to defend their laws.

Given the unusual circumstances here, overruling precedents may well suggest that the outcome rested on "a ground no firmer than a change in [the Court's] membership," which would "invite[] the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court

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[4] And because Congress relied on *Austin* in enacting BCRA, it had no need to create a full legislative record justifying *Austin*.

and to the system of law which it is our abiding mission to serve." *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting). Such a decision could threaten the Court's legitimacy in the eyes of the Nation and undermine the respect this Court's precedents should command.

II. *McConnell* And *Austin* Were Correctly Decided

The holdings of *Austin* and *McConnell*—that it is constitutional to require business corporations to use segregated funds contributed by shareholders, officers and employees for express candidate advocacy or its functional equivalent—remain sound today. The interests in preventing actual or apparent corruption of the electoral process and protecting shareholders provide compelling justification for such requirements, which neither unduly burden nor overbroadly inhibit protected speech.

1. This Court's decision in *Caperton* dramatically illustrates the appearance of corruption that can result from unrestrained independent electoral expenditures on behalf of corporate interests. In *Caperton*, the Court concluded that substantial independent expenditures advocating the election of a judicial candidate and the defeat of his opponent "had a significant and disproportionate influence on the electoral outcome" and created a "risk of actual bias" so "substantial" that due process required the successful candidate to recuse himself from a case involving the corporation whose executive engineered the expenditures. 129 S. Ct. at 2264-2265.

Surely, preventing such apparent bias is a compelling interest, but if *Austin* and *McConnell* were over-

ruled, state laws aimed at preventing corporate expenditures in connection with judicial elections would fall with them. *Cf. Republican Party of Minn.* v. *White*, 536 U.S. 765 (2002) (First Amendment applies fully to judicial elections). Moreover, there is no reason to believe that the types of expenditures that create an appearance of bias in a judge are less likely to create such an appearance with respect to legislative or executive officials. Indeed, if anything, the public would be less inclined to attribute corruption to judges than to other elected officials. *See id.* at 796 (Kennedy, J., concurring). And the due-process recusal remedy, though itself problematic in some respects, *see Caperton*, 129 S. Ct. at 2269-2272 (Roberts, C.J., dissenting), is not even available for legislators, who, by stepping aside, would leave constituents unrepresented. Therefore, preventing the appearance of corruption by forestalling potentially corrupting expenditures is the only practical remedy for such officials (and is also the simplest solution for judicial elections).

Not surprisingly, the *McConnell* record provided strong corroboration that corporate and union expenditures on ads that were the functional equivalent of express advocacy created the appearance of corruption. Based on that record, Judge Kollar-Kotelly found that such expenditures "permit corporations and labor unions to inject immense aggregations of wealth into the process" and "radically distort[] the electoral landscape." 251 F. Supp. 2d 176, 555 (D.D.C. 2003). She further found that candidates are "acutely aware of" and "appreciate" such expenditures, *id.*, and "feel indebted to those who spend money to help get them elected," *id.* at 556 (citing declaration of former Sen. Bumpers). She concluded that "the record demonstrates that candidates and parties appreciate and en-

courage corporations and labor unions to deploy their large aggregations of wealth into the political process," and that "the record presents an appearance of corruption stemming from the dependence of officeholders and parties on advertisements run by these outside groups." *Id.* at 560.

2. It remains true, as it was when *Austin* was decided, that distinguishing corporate and union expenditures from those of individuals is justified by the much greater magnitude of the resources that business corporations and unions can bring to bear on elections: Using state-conferred legal advantages and privileges, these entities can accumulate "political 'war chests,'" *NRWC*, 459 U.S. at 207, so that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257; *see also FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985). The vast sums at corporations' disposal create a much more formidable risk of corruption than those generally available to individuals.

Business corporations, moreover, necessarily deploy wealth in the electoral process to serve relatively narrow economic interests. To be sure, individuals' participation in electoral politics may also be driven by particular interests. But a citizen's involvement in our system of representative democracy also reflects a broad range of considerations reflecting each citizen's status as a sovereign member of a republic, engaged in a process of selecting representatives entrusted to act on her behalf across the full range of public issues—a process in which artificial persons, unlike individuals, have no direct role. This important distinction is surely an appropriate consideration for a democratic society arranging its electoral politics.

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978), is not at all to the contrary. *McConnell* and *Austin* extensively discussed and rejected *Bellotti*'s application outside of ballot measures, and *MCFL* also recognized that requiring corporations to use PACs for candidate advocacy was "of course distinguishable" from the law in *Bellotti*. 479 U.S. at 259 n.12. *WRTL* also emphasized the distinction between candidate advocacy and the issue advocacy in *Bellotti*. 551 U.S. at 480. *Bellotti* itself said it "implie[d] no comparable right" to make expenditures in "the quite different context of participation in a political campaign for election to public office." 435 U.S. at 788 n.26. It is one thing for a corporation to spend treasury funds on a measure that will have the same effect as a law passed by a legislature that it may freely lobby, and quite another for it to unleash its wealth on elections in which sovereign citizens determine who will exercise their proxies on the full breadth of public issues. Moreover, there is no "risk of corruption ... in a popular vote on a public issue." *Id.* at 790. In contrast, as *Bellotti* recognized, § 441b was enacted to combat "the problem of corruption of elected representatives through the creation of political debts." *Id.* at 788 n.26.

3. In addition, *Austin*'s point that distinguishing corporate and individual spending vindicates an important interest in protecting shareholders not only remains valid today, but is, if anything, even more compelling. Since *Austin*, the trend toward wider stock ownership has accelerated, fueled by explosive growth in mutual funds and changes in the funding of retirement plans that require most workers to rely on their own investments to provide for their old age. Thus, whereas less than twenty-five years ago only about one

in five American households held stocks, today about half do.[5]

Owners of corporate stocks thus reflect the diverse political views of the American public at large. And because of the dispersion of ownership through mutual funds, individual investors have little or no ability even to monitor political spending by the corporations they own, let alone control or influence it. Neither, however, do they have the realistic option of *not* investing their retirement funds, or of ensuring that they invest only in companies whose political activities they endorse.

Allowing unrestrained political spending by corporations would empower corporate managers, authorized by state laws to control assets whose ownership resides elsewhere, to use other people's money to advance their own political agendas. Just as union members have a strong First Amendment interest in not being legally compelled to support political activities, *see Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977), so corporate shareholders have a free-speech interest in not having what is ultimately their money spent to elect candidates they do not support. And just as there is no right to receive government assistance to collect funds for political purposes, *see Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093 (2009), so, too, corporate managers have no First Amendment right to use government-endowed authority over property ultimately belonging to others to divert money to electoral politics.

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[5] *See* U.S. Congress Joint Economic Committee, *The Roots of Broadened Stock Ownership* 1 (2000), www.house.gov/jec/tax/stock/stock.pdf; Investment Company Institute, *U.S. Household Ownership of Mutual Funds in 2005*, at 2 (2005), http://www.ici.org/pdf/fm-v14n5.pdf.

The corporate PAC option, moreover, is ideally suited to balancing the First Amendment interests of corporate entities and their shareholders. It allows the corporation to direct political spending only to the extent shareholders have personally decided to contribute for that specific purpose. It thus ensures that the corporation may have a voice, but one that is not subsidized unwillingly by those who may disagree with its electoral message. And there is no basis in the record for concluding that PACs are inadequate or unduly burdensome for *business* corporations, whatever may be true of certain ideological nonprofit corporations. Indeed, PAC requirements pale in comparison with the detailed recordkeeping and accounting otherwise required of corporations and unions.

4. Finally, there is no reason to conclude that restrictions on corporate political expenditures chill legitimate, non-electoral corporate expression. At oral argument, members of the Court expressed concern over the possibility that limits on corporate express advocacy might lead to banning of books that incidentally express views on electoral outcomes. Such concerns cannot justify the drastic step of overruling *Austin* or *McConnell*.

The statute at issue—BCRA § 203—does not apply to books or to any mode of expression other than television and radio broadcasts. It would be unprecedented to strike down a law on its face because of concerns that some *other* statute, such as 2 U.S.C. § 441b, might be applied overbroadly.[6]

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[6] Neither party has argued that § 441b barred Citizens United from producing its film or showing it in non-broadcast settings, which Citizens United did without any enforcement threat.

Even were § 441b at issue, there would be no basis for overruling *Austin*'s holding that restrictions on corporate expenditures are facially constitutional. As far as we are aware, § 441b has *never* been applied to a book. The bare possibility that the statute might be applied to expression that was incidentally campaign-related or that, taken as a whole, was not reasonably understood as being "in connection with" an election (as § 441b requires) does not establish that the statute is overbroad, because such isolated, hypothetical impermissible applications are not "substantial ... 'relative to the scope of the law's plainly legitimate applications.'" *McConnell*, 540 U.S. at 207 (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 120 (2003)). Should § 441b or a similar state statute be applied outside the realm of true electioneering activity, an as-applied challenge would remain available, as *WRTL* demonstrates.

CONCLUSION

The Court should not overrule *Austin* or *McConnell*.

Respectfully submitted.

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JULY 2009

APPENDIX

STATE STATUTES PROHIBITING INDEPENDENT EXPENDITURES FROM GENERAL TREASURY

Alaska	Alaska Stat. § 15.13.400(8), (13) ("group" excludes corporations unless their "principal purpose" is to influence elections; "nongroup entity" excludes entities that "participate in business activities")
	Alaska Stat. § 15.13.065(a) (permitting contributions to groups only by other groups, nongroup entities, and individuals)
	Alaska Stat. § 15.13.067 (permitting expenditures only by groups, nongroup entities, individuals, and candidates)
Arizona	Ariz. Const. art. 14, § 18 ("It shall be unlawful for any corporation, organized or doing business in this State, to make any contribution of money or anything of value for the purpose of influencing any election or official action.")
	Ariz. Rev. Stat. Ann. § 16-919(A) (prohibiting corporations from making "any contribution of money or anything of value for the purpose of influencing an election")
	Ariz. Rev. Stat. Ann. § 16-920(A)(4) (permitting corporations to make expenditures only to establish, administer, and solicit voluntary contributions for a separate segregated fund)

Colorado	Colo. Const. art. 28, § 3, cl. 4 (prohibiting corporations from making expenditures "expressly advocating the election or defeat of a candidate"; permitting corporations to establish committees to accept contributions from employees, officeholders, shareholders, or members; corporations that are "formed for the purpose of promoting political ideas and cannot engage in business activities" are excepted from these restrictions)
Connecticut	Conn. Gen. Stat. § 9-613(a), (b) (prohibiting corporate expenditures "for the benefit of" any candidate or "to promote the success or defeat of any political party" except to administer and solicit contributions for a political committee established by the corporation)
Iowa	Iowa Code § 68A.503(1) (prohibiting corporations from making contributions to a committee or candidate or to expressly advocate for the election or defeat of a candidate)
	Iowa Code § 68A.503(3) (permitting corporations to establish political committees, but permitting use of corporate funds only for the administration of the committee)
Kentucky	Ky. Rev. Stat. Ann. § 121.035(2) ("No officer, agent, attorney, or employee of any corporation ... shall disburse, distribute, pay out, or in any way

handle any money, funds, or other thing of value that belongs to or has been or is being furnished by any such corporation ... to be used or employed in any way for the purpose of aiding, assisting, or advancing any candidate for public office in this state in any way whatever.")

Massachusetts — Mass. Gen. Laws ch. 55, § 8 (prohibiting corporations from making contributions or expenditures "for the purpose of aiding, promoting or preventing the nomination or election of any person to public office" and prohibiting any political committee from accepting contributions or donations from any corporation)

Michigan — Mich. Comp. Laws § 169.254 (prohibiting corporations and labor organizations from making contributions or expenditures)

Minnesota — Minn. Stat. § 211B.15, subdiv. 2 (prohibiting corporations from making contributions or expenditures "to promote or defeat the candidacy of an individual")

Montana	Mont. Code Ann. § 13-35-227(1), (3) (prohibiting corporations from making contributions or expenditures "in connection with a candidate or political committee that supports or opposes a candidate or a political party"; corporations may establish a segregated fund consisting of contributions from affiliated individuals)
North Carolina	N.C. Gen. Stat. § 163-278.19(a)(1), (f)(1) (prohibiting corporations and labor unions from making "any contribution" to candidate or political committee or from making "any expenditure to support or oppose the nomination or election of a clearly identified candidate"; non-business entities with the "express purpose" of "promoting social, educational, or political ideas" are excepted)
North Dakota	N.D. Cent. Code § 16.1-08.1-03.3(1)(d), (e) (prohibiting corporations from making contributions to any candidate, political party or committee, or for any "political purpose," or "[f]or the influencing of any measure before the legislative assembly")
Ohio	Ohio Rev. Code Ann. § 3599.03(A)(1) (prohibiting corporations from making contributions or expenditures to aid the election of any candidate or to contribute to any political action committee)

	Ohio Rev. Code Ann. § 3517.082(A) (authorizing corporations to use corporate funds only to create and administer political action committees or segregated funds)
Oklahoma	Okla. Const. art. 9, § 40 (prohibiting corporations from "influenc[ing] elections or official duty by contributions of money or anything of value")
	Okla. Stat. Ann. tit. 74, ch. 62, App. § 257:10-1-2(d) (prohibiting corporate contributions or expenditures for benefit of candidate or committee in connection with election; allows solicitation of funds to separate committee for political purposes)
Pennsylvania	25 Pa. Stat. Ann. § 3253 (prohibiting corporations from making any "contribution or expenditure in connection with the election of any candidate or for any political purpose whatever," unless corporation is formed primarily for political purpose or as political committee)
Rhode Island	R.I. Gen. Laws § 17-25-10.1(h)(1) (prohibiting "any corporation, whether profit or non-profit, domestic corporation or foreign corporation ... or other business entity" from making "any campaign contribution or expenditure ... to or for any candidate, political action committee, or political party committee")

South Dakota	S.D. Codified Laws § 12-27-18 (prohibiting "organization[s]" from making "a contribution to a candidate committee, political action committee, or political party or mak[ing] an independent expenditure expressly advocating the election or defeat of a candidate"; excepting "independent expenditures expressly advocating the election or defeat of a candidate by a qualified nonprofit corporation from its treasury funds"; providing that "[a]n organization may create a political action committee")
	S.D. Codified Laws § 12-27-1(16) (defining "[o]rganization" to include "any business corporation," "nonprofit corporation," or "labor union")
Tennessee	Tenn. Code Ann. § 2-19-132(a) (making it unlawful for executive or representative of corporation to use corporate money "for the purpose of aiding" a candidate for office or for "in any way contributing to the campaign fund of any political party, for any purpose whatever")
Texas	Tex. Elec. Code Ann. § 253.094(a) (generally prohibiting a corporation or labor organization from making "political contribution[s]" and "political expenditure[s]")
	Tex. Elec. Code Ann. § 251.001(7), (10) (defining "[p]olitical expenditure[s]" to include "campaign expenditure[s]",

	i.e., "expenditure[s] made by any person in connection with a campaign for an elective office or on a measure")
	Tex. Elec. Code Ann. § 253.100(a) (excepting from general prohibition corporate political expenditures made for "the establishment or administration of a general-purpose committee" or the "maintenance and operation" of such a committee)
	Tex. Elec. Code Ann. § 253.098(a) (excepting from general prohibition "campaign expenditures" made by corporations "from [their] own property for the purpose of communicating directly with [their] stockholders ... or with the families of [their] stockholders")
West Virginia	W. Va. Code § 3-8-8(a), (b)(1)(C) (forbidding corporate contributions "for the purpose of expressly advocating the election or defeat of a clearly identified candidate"; a corporation may solicit contributions to a separate segregated fund to be used for political purposes)
Wisconsin	Wis. Stat. Ann. § 11.38(1)(a) (forbidding corporate contributions and expenditures; allowing a corporation to solicit contributions to a "separate segregated fund"; corporation may not spend more than $500 annually for purpose of soliciting contributions to such a fund)

Wyoming	Wyo. Stat. Ann. § 22-25-102(a) (prohibiting corporations from contributing funds "or election assistance to aid, promote or prevent the nomination or election of any candidate or group of candidates or to aid or promote the interests, success or defeat of any political party")

STATE STATUTES LIMITING INDEPENDENT EXPENDITURES FROM GENERAL TREASURY

Alabama	Ala. Code § 10-2A-70 (generally prohibiting corporations from making expenditures "for the purpose of aiding any political party or any candidate for any public office")
	Ala. Code § 10-2A-70.1(a) (permitting corporate expenditures not exceeding $500 in "any one election in order to aid, promote or prevent the nomination or election of any person")
	Ala. Code § 10-2A-70.2 (permitting a corporation to contribute no more than $500 to a committee)
New York	N.Y. Elec. Law § 14-116 (prohibiting contributions or expenditures by corporations in excess of $5,000; corporations organized "for political purposes only" are excepted)

AMICUS CURIAE BRIEF

134 (51)

No. 08-205

JUL 31

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

—v.—

FEDERAL ELECTION COMMISSION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF *AMICUS CURIAE* OF SENATOR MITCH MCCONNELL IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. *McCONNELL* SHOULD BE OVERRRULED AND BCRA'S BAN ON ELECTIONEERING COMMUNICATIONS HELD UNCONSTITUTIONAL	10
II. *AUSTIN* SHOULD BE OVERRULED TO ENSURE THAT CORPORATIONS AND UNIONS MAY ENGAGE IN CORE POLITICAL SPEECH ABOUT CANDIDATES	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases

Ashcroft v. *Free Speech Coalition*, 535 U.S. 234 (2002) 10

Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990) 2, 6, 16-19

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 14

Buckley v. *Valeo*, 424 U.S. 1 (1976) 2-6, 9, 11, 17

Connally v. *General Construction Co.*, 269 U.S. 385 (1926) 11

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) 5, 9, 9n

FEC v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) 2, 8-10, 15, 15n

First National Bank v. *Bellotti*, 435 U.S. 765 (1978) 18

McConnell v. *FEC*, 540 U.S. 93 (2003) 1, 7, 9n, 10-12, 18

Mills v. *Alabama*, 384 U.S. 214 (1966) 3

Reno v. *ACLU*, 521 U.S. 844 (1997) 11

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 18

United States v. *Automobile Workers*, 352 U.S. 567 (1957) 3n

United States v. *CIO*, 335 U.S. 106 (1948) 3n-4n

Constitutional Provisions

U.S. Const. amend. I ..... *passim*

Statutes

2 U.S.C. § 434(f) 7, 15

2 U.S.C. § 441b 1, 7, 10

2 U.S.C. § 441b(a) 5-6

18 U.S.C. § 608(e)(1) (1975) 4-5

Other Authorities

Floyd Abrams, *Speaking Freely: Trials of the First Amendment* (2005) 7-8

FEC Advisory Op. 1994-30 (Oct. 28, 1994) 9

FEC Advisory Op. 2004-30 (Sept. 10, 2004) 17

Dog Eat Dog Films, MURs 5479 and 5539, First General Counsel's Report (May 25, 2005) 17

Statement of Sen. McCain, 147 Cong. Rec. S3116 (daily ed. Mar. 29, 2001) 12-13

INTEREST OF *AMICUS CURIAE*[1]

Senator Mitch McConnell is the Senior Senator from the Commonwealth of Kentucky and the Senate Republican Leader in the 111th Congress. Senator McConnell was the lead plaintiff in *McConnell* v. *FEC*, 540 U.S. 93 (2003), litigation challenging, *inter alia*, the constitutionality of Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). For many years, Senator McConnell has been a leader in the United States Senate in opposing Congressional efforts to restrict speech about elections in the name of campaign finance reform.

Senator McConnell submits this brief, *amicus curiae*, because of his belief that speech about candidates for federal office cannot be constrained by the Congress consistent with the First Amendment.

SUMMARY OF ARGUMENT

Few would dispute that *Hillary: The Movie* offers a critical, caustic, and often harsh view of then Senator and presidential candidate Hillary Clinton. But whatever one thinks of the film, from whichever side of the aisle, it is simply inconceivable that in a country founded on a profound commitment to freedom of speech, its dissemination may be punishable as a

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

crime. Lamentably, that is where Congress and this Court's decisions in *McConnell* and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), have brought us.

Senator McConnell does not offer a view in this brief as to whether, as a matter of law, *Hillary: The Movie* contains "express advocacy" as that term was defined by the Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which would make criminal its dissemination at any time in any forum. Nor does he opine as to whether the movie is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), which would make criminal its dissemination by broadcast television, cable or satellite during BCRA's extensive blackout periods. He does venture a guess that most citizens, unburdened with knowledge of the fine distinctions of current federal campaign finance law, would likely believe it was both. His conclusion is that if the screening of this movie can lead to the imposition of criminal sanctions on either — or any — theory, there is something seriously wrong, and constitutionally intolerable, not with the movie, but with the state of the law.

ARGUMENT

INTRODUCTION: THE ROAD TO CENSORSHIP

In this case, the federal government asserts the authority to criminalize a motion picture critical of a candidate for the presidency of the nation because it was paid for in part with corporate funds and shown too close to the election. It should really not be neces-

sary to cite a case for the proposition that Americans may not be fined or jailed for such speech. If it were, the unanimous ruling of this court in *Mills* v. *Alabama*, 384 U.S. 214 (1966), should suffice. There, an Alabama statute drafted to "protect" the public from the impact of last-minute campaign charges was applied to bar the publication on election day of an editorial urging adoption of a particular form of city government. Unsurprisingly, the statute was held unconstitutional on the ground that "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of government affairs." *Id.* at 218. *"[O]f course,"* this Court concluded, that includes "discussions of candidates [and] structures and forms of government." *Id.* (emphasis added).

What was self-evident in 1966 is no longer so today. Recent campaign finance legislation and litigation spawned by that legislation have too often turned First Amendment principles inside out.

Not until its ruling in *Buckley* was the constitutionality of limitations on independent expenditures addressed by this Court.[2] In *Buckley*, the Court

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[2] Prior to *Buckley*, the Court and various of its members had repeatedly voiced serious doubts about the constitutionality of sweeping limitations on independent expenditures by corporations and unions. In *United States* v. *CIO*, 335 U.S. 106 (1948), the Court narrowly construed the Taft-Hartley Act to avoid potential First Amendment concerns. 335 U.S. at 121 (Court has "gravest doubt . . . as to . . . constitutionality" of broader reading) (Reed, J.); *id.* at 155 (Rutledge, J., Black, J., Douglas, J., Murphy, J. concurring) ("A statute which, in the claimed interest of

Footnote continued on next page.

struck down the limits on independent expenditures set forth in the Federal Election Campaign Act ("FECA"). As originally enacted, FECA restricted expenditures by any person "relative to a clearly identified candidate" to $1,000. *See* FECA § 608(e)(1). Stressing the sanctity of the "[d]iscussion of public issues and debate on the qualifications of candidates," *Buckley*, 424 U.S. at 14, the Court emphasized that the First Amendment affords such speech the "broadest protection" from government regulation, because it is "at the core of our electoral process and [our] First Amendment freedoms." *Id.* at 39 (citation and internal quotation marks omitted).

Based on these principles, *Buckley* held that section 608(e)(1) could not withstand First Amendment scrutiny. Seeking to construe the provision in a manner that could save it from unconstitutional vagueness, the Court first narrowed the provision to "communications that in express terms advocate the election or defeat of a clearly identified candidate for fed-

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Footnote continued from previous page.

free and honest elections, curtails the very freedoms that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election . . . cannot be squared with the First Amendment."); *United States* v. *Automobile Workers*, 352 U.S. 567, 597 (1957) ("Some may think that one group or another should not express its views in an election because it is too powerful, because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group — labor or corporate.") (Douglas, J., Warren, C.J., Black, J., dissenting.)

eral office," *id.* at 44, which it further clarified to mean "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

Even under its narrowing construction, the Court ultimately struck down section 608(e)(1), holding that the provision could not survive strict scrutiny. *See id.* at 44. Rejecting the lower court's conclusion that restrictions on expenditures were necessary to prevent circumvention of restrictions on contributions, *see id.*, the Court explained that the governmental interest in preventing corruption and the appearance of corruption was not implicated by independent expenditures and that, even if it were, the limitation on independent expenditures was necessarily underinclusive, *see id.* at 45-46. "The exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness thus undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder [by running ads that do not 'in express terms advocate the election or defeat of a clearly identified candidate']." *Id.* at 45.

In the aftermath of *Buckley*, Congress amended FECA and the provision prohibiting contributions or expenditures by corporations and unions in connection with any federal election. *See* 2 U.S.C. § 441b(a). In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("*MCFL*"), the Court drew from *Buckley*'s narrowing construction of section 608(e)(1) the need to limit section 441b(a) expenditures to "express advocacy," *see MCFL*, 479 U.S. at 248-49. Nonethe-

less, the Court ruled that section 441b(a) could not constitutionally be applied to MCFL, a non-profit corporation with a policy of declining corporate contributions.

Four years later, the Court held, for the first time, that independent corporate expenditures could be restricted in the service of a goal other than the prevention of *quid pro quo* corruption. In *Austin*, the Court considered a Michigan law prohibiting corporations from using treasury funds for independent expenditures in support of or in opposition to candidates in elections for state office. Implicitly recognizing that such restrictions did not advance the government's interest in preventing corruption or the appearance of corruption as *Buckley* had found, *Austin* identified a new governmental interest in the course of upholding Michigan's ban: "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. Notwithstanding the Court's prior determinations that the alternative of establishing separate segregated funds or PACs imposed too great a burden on the right to engage in core political speech, *MCFL*, 479 U.S. at 253-255; *id.* at 266 (O'Connor, J., concurring), the Court embraced the PAC alternative in *Austin*, paving the way for BCRA.

In 2002, Congress passed BCRA. Signed into law by President Bush notwithstanding his publicly expressed doubts about its constitutionality, the statute bans all corporations and unions, or entities using funds donated by corporations or unions, from using treasury funds to make disbursements for "election-

eering communications." An electioneering communication is defined as "any broadcast, cable, or satellite communication" disseminated within 30 days of a primary or 60 days of a general election which "refers to a clearly identified candidate for Federal office." Anticipating that this definition might be held unconstitutional, Congress included a "fallback" definition which defines an electioneering communication as any broadcast, cable or satellite communication carried *at any time* which "promotes," "supports," attacks" or "opposes" a federal candidate and "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201(a) (adding new FECA § 304(f)).

BCRA's ban on electioneering communications was sustained in *McConnell* without resort to the fallback definition. Although the Court concluded that appellants' challenge to the statute failed "to the extent that the issue ads . . . are the functional equivalent of express advocacy," it offered no narrowing construction and simply affirmed (in the single paragraph that the Court devoted to the merits of the challenge to BCRA's § 203) that "the vast majority of ads clearly had [an electioneering] purpose." *McConnell*, 540 U.S. at 206.

It did not take long after the Court's decision in *McConnell* for BCRA to lead to a significant diminution of speech:

> To comply with the new law in the months before the 2004 election, the Chamber of Commerce of the United States . . . had to abandon its plans to broadcast advertisements supporting class action reform legislation which

> mentioned the names of senators and congressmen whose votes the Chamber coveted. At the same time, and for the same reason, the AFL-CIO was forced to forego its efforts to broadcast advertisements criticizing federal overtime regulations issued by the Department of Labor in which the union wished to identify names of members of Congress that it sought to pressure to vote their way. . . [T]he ACLU. . .ultimately broadcast advertisements denouncing the Patriot Act but refrained, as McCain-Feingold required, from criticizing (or even mentioning) President Bush as it did so.

Floyd Abrams, *Speaking Freely: Trials of the First Amendment*, 274-75 (2005).

Significant, if partial, relief from the draconian impact of BCRA's ban on electioneering communications ultimately came with this Court's decision in *WRTL II*. However one characterizes that ruling, there can be no doubt that "electioneering communications" were, in effect, redefined. Under *WRTL II*, a communication in the targeted media at the targeted times is prohibited only if it "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S.Ct. at 2655.

Corporations and unions now find themselves in the following position. As a result of FECA's ban on independent expenditures, no corporation or union may spend its treasury funds on any communication which contains express advocacy as defined in *Buck-*

ley.[3] This prohibition applies to any and all media whether it be a road sign, a placard, a newsletter, an internet posting, a movie, a television, cable or satellite offering or, indeed, a book. It applies 24 hours a day, seven days a week, 365 days a year. There are few exceptions, the most notable being for not-for-profit corporations that meet the criteria of this Court's decision in *MCFL*, media entities (as defined in FECA) and entities engaging in purely commercial transactions (*see* FEC Advisory Op. 1994-30 (Oct. 28, 1994)). In addition, as a result of BCRA's ban on electioneering communications, no corporation or union may spend its treasury funds on any communication which is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S.Ct. at 2667. This prohibition applies to any communication transmitted by broadcast television, cable or satellite during the "black out periods" defined in BCRA. Thus, if *Hillary: The Movie* contains "express advocacy" it is doomed wherever and however displayed. If it passes the express advocacy test of *Buckley* but fails the test of *WRTL II*, it subjects Citizens United to severe criminal penalties if distributed by broadcast television,

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[3] The emphasis in *McConnell* on corporate PACs serving as a sufficient substitute for a corporation's use of treasury funds is inconsistent with the Court's recognition in both *MCFL*, *see* p. 5, *supra*, and *WRTL II* of the "well-documented and onerous burdens" the use of PACs entails. *WRTL II*, 127 S. Ct. at 2671 n.9 (Roberts, C.J.). *See McConnell*, 540 U.S. at 330-333 (Kennedy, J., dissenting). *See generally* Brief of *Amicus Curiae* National Rifle Association at 18-22.

cable or satellite during any of BCRA's blackout periods.

I. *McCONNELL* SHOULD BE OVERRRULED AND BCRA'S BAN ON ELECTIONEERING COMMUNICATIONS HELD UNCONSTITUTIONAL

The Court's ruling in *WRTL II* makes it unnecessary to review in detail the constitutionally impermissible overbreadth of the primary definition set forth in BCRA. In addition to the analysis in that case by the Chief Justice and the concurring opinion of Justice Scalia, we note only that the consideration of BCRA's ban on electioneering communications in *McConnell* was driven by flawed factual and legal premises. Section 203 does not simply prohibit communications with "an electioneering purpose" or which are the "functional equivalent of express advocacy." On its face BCRA prohibits corporations and unions from using treasury funds to air *any* communication that even "refers" to a federal candidate during BCRA's blackout periods. In doing so, BCRA's goal of banning supposedly "bad" speech — *i.e.* speech with an "electoral purpose" — swept within it significant amounts of speech that had no such purpose. But this Court had previously made plain that the notion "that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down." *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 255 (2002); *accord WRTL II*, 127 S. Ct. at 2670 (Roberts, C.J.).

BCRA's fallback definition — banning any communication that "promotes," "supports," attacks" or "opposes" a federal candidate and "is suggestive of no

plausible meaning other than an exhortation to vote for or against a specific candidate" — cannot salvage the statute. As the record in the *McConnell* case vividly revealed, the definition is unconstitutionally vague.

A statute is unconstitutionally vague if people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926); *accord Reno* v. *ACLU*, 521 U.S. 844, 871-72 (1997). An "even greater degree of specificity is required" in the First Amendment context. *Buckley*, 424 U.S. at 77 (citation and internal quotation marks omitted). As the Court explained in *Buckley*:

> In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.
>
> *Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.*

Id. at 43 (emphasis added; citation and internal quotation marks omitted).

Discovery in *McConnell* confirmed that reasonable and intelligent people often disagree about whether particular political ads meet the criteria of the fallback definition. When shown particular ads during

their depositions in *McConnell*, the authors of the much disputed studies submitted to Congress and the Court, defendants' experts, and BCRA's sponsors routinely disagreed *with each other* as to whether a given ad was intended to promote, support, attack, or oppose a specific candidate or was "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." A criminal law that gives so little guidance as to its meaning cannot be sustained.

By way of example, an ad that ran within 60 days of the 1998 general election stated in part: "Year after year the federal government takes a bigger piece of the pie. In fact in 1998 we'll pay more in federal taxes than at any time in American history except for World War II. And now with the budget surplus, in thirty years all the Washington politicians can talk about is getting their hands on more of your dough." The ad then asked viewers to "[c]all Harry Reid and John Ensign" and urge them to cut taxes. "Otherwise," the ad concluded, "there will be nothing left but the crumbs." McConnell Br. App. 4a.[4] One author of the pro-BCRA studies opined that this ad was a "genuine" issue ad and not a candidate ad because its "focus is on taxes." J.A. 959. Senator McCain, in contrast, testified that the ad "attacks" both candidates. *Id.* at 937. And Congressman Shays, another legislative sponsor, offered a third view, testifying that the ad supported "one per-

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[4] References to "McConnell Br. App." are to the Appendix to the "Brief for Appellants/Cross-Appellees Senator Mitch McConnell, et al." in No. 02-1674. References to "J.A." are to the Joint Appendix in that case.

son's position, but not the other" and that it was therefore "designed to influence the election." *Id.* at 994.

Another ad, sponsored by the Alliance for Quality Nursing Home Care broadcast within 60 days of the 2000 general election, referred to then-presidential candidate Al Gore. *See* McConnell Br. App. 5a. In his deposition, Senator Feingold was unsure whether the ad was pro-Gore or anti-Gore. *See* J.A. 852. On the other hand, Senator McCain testified that the ad "implies that Al Gore was responsible for Medicare cuts, which is a pretty damning indictment." *Id.* at 941. But Representative Meehan concluded that the ad "probably" was intended to promote Gore's candidacy, *see id.* at 973, and Representative Shays agreed, *see id.* at 994.

A third example was this ad, aired with 60 days of the 2000 general election:

> GRADUATE: Dear high tech company, I'd like to send you my resume.
>
> ANNOUNCER: Dear Graduate, sorry, Congress is going to give your job to a foreign worker.
>
> GRADUATE: But I've just finished four hard years of technical studies.
>
> ANNOUNCER 1: Sorry, besides foreign workers will work for a lot less.
>
> ANNOUNCER 2: Is this any way to treat American workers? But based on her record, Congresswoman Northup is likely to vote in favor of the Foreign Worker Bill. Call Congresswoman Northup and

> tell her to save our best jobs for American workers. Ask her to vote no on the Foreign Worker Bill. This message paid for by the Coalition for the Future American Worker.

McConnell Br. App. 6a. Though the ad was treated by supporters of BCRA in a study much cited by members of Congress, as a "genuine" issue ad (that is, one that does not "generate support or opposition for a particular candidate"), *see* J.A. 895-98, Senator McCain called the ad "exactly what I have in mind as a sham issue ad," *id.* at 942.

With disagreement of such magnitude, it is plain that the fallback definition would inevitably lead speakers to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (citation and internal quotation marks omitted). Senator McCain said it best when he rose on the Senate floor to oppose the inclusion of materially identical statutory language:

> Boy, we better get out the dictionary because there is a great deal of ambiguity of words . . . It says in the amendment: . . . [ads] can have no reasonable meaning other than to advocate the defeat of one or more clearly identified candidates. Who decides that? . . . Now you are asking a judge to look at every commercial, or you are asking the broadcast station to look at every commercial[,] and make some decision as to whether it is an attack ad or not. . . I am not a lawyer, but I

> have been involved so long and so engaged in these issues that words do have meaning, and this amendment is very vague.

147 Cong. Rec. S3116 (daily. ed. Mar. 29, 2001). The fallback definition in section 201 is, as Senator McCain counseled, unacceptably and unconstitutionally vague.

The test adopted in *WRTL II*, which looks to whether a communication is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" is similar to BCRA's fallback definition and suffers from the same difficulties.[5] BCRA's sponsors and its expert defenders are no doubt reasonable people. If they cannot agree on whether an ad is "an exhortation to vote for or against a specific candidate," there is no reason to conclude that juries or judges would be any more able to agree on whether it is "an appeal to vote for or against a particular candidate."

McConnell should be overruled.

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[5] It is dissimilar in one significant way. BCRA's "fallback definition" has no temporal limitation. The test adopted by the Court in *WRTL II* is apparently limited to BCRA's blackout periods.

II. *AUSTIN* SHOULD BE OVERRULED TO ENSURE THAT CORPORATIONS AND UNIONS MAY ENGAGE IN CORE POLITICAL SPEECH ABOUT CANDIDATES

As a consequence of FECA's ban on independent expenditures, given force by this Court's decision in *Austin*, corporations and unions are currently subjected to criminal penalties for using their treasury funds to engage in "express advocacy" but are free to engage in "issue advocacy," subject, of course, to the limitations of BCRA's ban on electioneering communications. The criticism in some quarters of the Solicitor General's Office for forthrightly acknowledging in oral argument that the government's position would permit criminal punishments to be inflicted for the publication of books or the screening of movies funded by corporations or unions is thus entirely misplaced. Congress has already invoked that power in FECA if the work contains "express advocacy" and the FEC already enforces it. As a result, other movies have not escaped the FEC's scrutiny, in ways that cannot be reconciled with the First Amendment.

In the 2004 election cycle, Michael Moore's *Fahrenheit 9/11*, a documentary that criticized President Bush to the point of ridicule, came under the scrutiny of the FEC. The claim was that the movie, funded as it was by a corporation, was illegal express advocacy and that to show it at all would violate FECA. The movie barely escaped a finding of liability. The Commission ruled that because the film was a commercial venture, *i.e.*, because its producers charged viewers to see it, it fell within the Commission's exemption for "bona fide commercial activity," an exemption unavailable to Citizens United in the context of this

case. *Dog Eat Dog Films*, MURs 5474 and 5539, First General Counsel's Report at 8 (May 25, 2005). The second reason *Fahrenheit 9/11* wiggled away from the FEC's reach was the Commission's finding, after dissecting each minute of the entire film, that it did not quite contain any of the language specified in *Buckley*. *Id.* at 17-18.

Another film produced during the 2004 election cycle, also produced by Citizens United, met with similar FEC scrutiny. This film focused on the lives and careers of presidential candidate John Kerry and vice-presidential candidate John Edwards. Citizens United's plan was to make the film available to the public through movie theaters, DVD and videocassette sales and by purchasing air time to broadcast the film in certain television markets. It sought an advisory opinion from the FEC to ensure it would not be subjecting itself to potential criminal liability for doing so. The theater showings and DVD and videocassette sales passed muster with the FEC because Citizens United represented that the film "would not contain express advocacy." The television effort was doomed however because the film was to have aired during a BCRA blackout period. FEC Advisory Opinion 2004-30 (Sept. 10, 2004).

The world reflected in these opinions is one of government censors parsing through the content of core political speech in an effort to determine whether it may be published or whether the speaker would be guilty of a crime. And the case on which all this governmental authority rests is *Austin*.

At its core, *Austin* stands for the unsound proposition that the government has an interest in regulating speech by corporations simply because they are corpo-

rations. This is flatly contrary to this Court's prior ruling in *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978). *See McConnell*, 540 U.S. at 326 (Kennedy, J., dissenting). There is no valid justification for subjecting non-commercial speech by corporations to more stringent regulation, especially speech that is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill* v. *Alabama*, 310 U.S. 88, 103 (1940).

The Supplemental Brief for Appellant addresses in considerable detail why *Austin* was not analytically sound when issued and has not stood the test of time. So as not to burden the Court with duplicative argument, we join in those arguments and Appellant's request that *Austin* be overruled.

CONCLUSION

Sometimes a case helps us see just how far off constitutional course Congress and prior rulings of this Court have taken the nation. This is one of those cases. That the dissemination of *Hillary: The Movie* may be prohibited by BCRA (under the authority of *McConnell*) or prohibited by FECA (under the authority of *Austin*) is reason enough to overrule those decisions.

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AMICUS CURIAE BRIEF

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CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTIONS COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE MICHIGAN CHAMBER OF COMMERCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL OF *AUSTIN v. MICHIGAN CHAMBER OF COMMERCE* ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF THE *AMICUS* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

A. *Austin* Is Inconsistent with Established Supreme Court Precedent and Created Bad Law Severely Undermining the First Amendment 3

B. The Outright Prohibition on Independent Expenditures by Corporations Upheld in *Austin* Violates the First Amendment 6

1. There Is No Compelling State Interest Justifying the Discrimination Against Corporations and Suppression of Their Political Speech 6

a. The potential for corporations to amass great wealth is illogical and does not justify a restriction on core speech 7

b. Political equality is not required by the First Amendment and cannot be required by the government 9

2. Restricting All Independent Expenditures by For-Profit and Nonprofit Corporate General Treasuries Is Not Narrowly Tailored 11

TABLE OF CONTENTS – Continued

Page

a. To survive strict scrutiny, the government must prove the restriction is narrowly tailored to further a compelling governmental interest 11

b. There is no evidence that corporate independent expenditures cause corruption 12

c. Prohibiting all for-profit and nonprofit corporate independent expenditures is not sufficiently narrowly tailored to pass constitutional muster 15

i. Independent expenditures by corporations should be permitted just like independent expenditures by individuals and political committees 15

ii. *Austin* censors speech by any corporation operated for-profit or whose members are operated for-profit 16

d. Michigan could easily prevent corruption or "distortion" without censoring corporate political speech... 19

i. Government should regulate, rather than block, corporate speech 19

TABLE OF CONTENTS – Continued

Page

ii. The ban on independent expenditures is not properly tailored toward targeted entities 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Colorado Republican Fed. Campaign Comm. v. F.E.C., 518 U.S. 604 (1996) 17

Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) 13

Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) 18

Craig v. Boren, 429 U.S. 190 (1976) 13

Edenfield v. Fane, 507 U.S. 761 (1993) 14

F.E.C. v. Mass. Citizens for Life, 479 U.S. 238 (1986) 12

F.E.C. v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 12, 15, 16

F.E.C. v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) 6, 16

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 5, 9, 10

McConnell v. F.E.C., 540 U.S. 93 (2003) 12

Meyer v. Grant, 486 U.S. 414 (1988) 17, 18

Schneider v. State of New Jersey, 308 U.S. 147 (1939) 19

TABLE OF AUTHORITIES – Continued

Page

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 22

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622 (1994) 12, 14

STATUTES

Federal Election Campaign Act (FECA), 2 U.S.C. § 431 *et seq.* 15, 17

MCL § 169.247 20

MCL § 169.251 20

MCL § 169.254 ..... 1, 2, 10, 20

OTHER AUTHORITIES

U.S. Const. amend. I ..... *passim*

INTEREST OF THE *AMICUS*[1]

The Court scheduled this matter for reargument and asked, in part, whether the Court should overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Michigan Chamber of Commerce, *amicus* herein, ("Michigan Chamber") was the Plaintiff/Appellee in *Austin, supra*. The Michigan Chamber has been subject to the First Amendment speech restrictions of Section 54 of Michigan's Campaign Finance Act (MCL § 169.254) (the "Act") for the nineteen years since the Court's March 27, 1990 decision upholding the complete ban on corporate independent expenditures in support of or in opposition to political candidates.

SUMMARY OF THE ARGUMENT

In Michigan, subsequent to this Court's decision in *Austin*, it continues to be a felony for nonmedia corporations to engage in fundamental First Amendment political speech. Under the Act, a corporation "shall not make a contribution or expenditure" in support of or in opposition to political candidates. MCL § 169.254(1). The State of Michigan applies

[1] The parties' written consents to the filing of this brief have been submitted to the Court. *Amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Section 54(1) of the Act in a manner not only to prohibit corporate contributions and expenditures, but also *independent expenditures* in support of or in opposition to political candidates (hereafter "independent expenditures"). In *Austin*, the Michigan Chamber challenged the constitutionality of this provision, asserting that it was entitled by the First Amendment to make independent expenditures indicating its support for candidates.

Specifically, the Michigan Chamber sought to make a public statement through a one-quarter page advertisement in the Grand Rapids Press to support Richard Bandstra, a candidate for the Michigan House of Representatives.[2] The Michigan Chamber's statement in support of Bandstra would have been an independent expenditure because it was not at the direction or control of, or in coordination with, the candidate committee. Because of the felony provisions of Section 54(5) of the Act, the Michigan Chamber did not publish its statement and initiated the litigation that resulted in the *Austin* decision.

In a dramatic departure from all prior cases addressing the interplay between the government's interest in regulating corruption and the appearance of corruption in the electoral process with corporations' core First Amendment right to express themselves politically, including through independent

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[2] *See* appendix to opinion of Kennedy, J., dissenting in *Austin*.

expenditures that do not raise the same concerns as do contributions, the *Austin* Court created a new state interest designed to level the playing field between corporations and all others in the political process.

The *Austin* decision is based on a flawed analysis and creates bad law, discriminating against one speaker and suppressing the speech of corporations in a manner that unquestionably infringes upon fundamental First Amendment rights. *Austin* was wrongfully decided almost 20 years ago. That error should now be rectified by this Court.

ARGUMENT

A. *Austin* Is Inconsistent with Established Supreme Court Precedent and Created Bad Law, Severely Undermining the First Amendment.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court recognized that political speech was "core" First Amendment activity, entitled to the greatest deference and "exacting scrutiny," which requires a regulation to be struck down unless it is narrowly tailored to serve a compelling governmental interest. *Buckley*, 424 U.S. at 44-45. The Court specifically determined that campaign finance regulation constitutes a direct restriction on political speech protected by the First Amendment because limitations on political contributions and expenditures "necessarily reduce the

quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached. This is because virtually every means of communicating in today's mass society requires the expenditure of money." 424 U.S. at 19.

The *Buckley* Court concluded that the "governmental interest in preventing corruption and the appearance of corruption" was not sufficient to warrant the limitation on independent expenditures. Moreover, the Court determined, abuses that might be generated by a large independent expenditure did not pose the same threat of corruption as did large contributions because the "absence of prearrangement or coordination by the expenditure with the candidate or his agent alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidates." 424 U.S. at 47. The *Buckley* Court flatly rejected the concept that government may impose regulations to promote fairness and equality among political participants stating that "[t]he First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Id.* at 49; *see also id.* at 48-49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voices of others is wholly foreign to the First Amendment").

Following *Buckley,* this Court, in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), struck down a state statute prohibiting corporations from spending money in connection with a referendum, holding that the scope of First Amendment protection turns on the nature of the speech, not the identity of the speaker. The *Bellotti* Court recognized that political speech is no less valuable "because the speech comes from a corporation rather than an individual." 435 U.S. at 777. Indeed, the *Bellotti* Court specifically concluded that the fear that "corporations are wealthy and powerful and their views may drown out other points of view" cannot justify suppression of corporations' political speech. *Id.* at 789.

In a dramatic shift from the principles set forth in *Buckley* and *Bellotti*, the *Austin* Court upheld a state statute prohibiting all corporations, for-profit and nonprofit, from making any independent expenditures to articulate a corporation's opinion in support or opposition to a candidate. To reach this holding, the Court had to create a new compelling interest to justify this severe restriction on corporations' First Amendment rights, concluding that the State had a compelling interest in forestalling the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *Austin,* 494 U.S. at 660.

B. The Outright Prohibition on Independent Expenditures by Corporations Upheld in *Austin* Violates the First Amendment.

Governmental restrictions on content-based speech, including the core political speech at issue here, unquestionably trigger the First Amendment and are subject to a strict scrutiny analysis, thereby requiring the government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." *F.E.C. v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007) ("*WRTL II*"). Given that the prohibition on independent expenditures by corporations suppresses not only who speaks (corporations), but also about what they may speak (candidates), core political speech is clearly at stake.

1. There Is No Compelling State Interest Justifying the Discrimination Against Corporations and Suppression of Their Political Speech.

There is no legitimate basis for suppressing the expression of core political speech based on (1) a corporation's alleged and potential ability to amass great wealth, and (2) the desire to create equality among speakers or to protect members or shareholders of a corporation from political expression that may differ from their own.

a. The potential for corporations to amass great wealth is illogical and does not justify a restriction on core speech.

The conclusion that a corporation's mere potential ability to amass great wealth as a consequence of its corporate form justifies a severe restriction on core political speech is deeply flawed in logic and law. As a threshold matter, there is no requirement that a corporation actually be wealthy, nor is there any requirement that, if a corporation is wealthy, such wealth was accumulated as a consequence of state-conferred benefits, which is the purported justification for this prohibition on a corporation's exercise of its political speech. In fact, the Court failed to distinguish between for-profit and nonprofit corporations, even though nonprofits are required to use their funds to further their underlying charitable, political or social purpose, not to "amass" great wealth. Moreover, to treat similarly for these purposes all corporations regardless of wealth (for example, a publicly held mega corporation in the same manner as a small, closely held corporation or nonprofit ideological corporation) is overly broad and undermines the stated basis for permitting the direct infringement on corporations' First Amendment rights. Most corporations do not amass great wealth, even among for-profits. Nonprofits, by definition, do not and cannot acquire significant treasuries. To penalize the majority based on the potential of a

minority is not a constitutional justification for a direct infringement on core First Amendment rights.

In addition, numerous entities other than corporations, including, for example, limited liability companies and partnerships, are afforded benefits, treatment or other positive consequences for forming in the state (including limited liability, perpetual existence, tax benefits, etc.). Yet the prohibition on independent expenditures applies only to corporations. A corporation should not have to choose between receiving a state-conferred benefit or the ability to exercise its First Amendment rights, particularly where a limited liability company, for example, does not have to make that choice. Nor should the government be able to dole out advantages conditioned upon abandoning the right to express oneself politically.

Further, the potential accumulation of large amounts of money does not necessarily lead to corruption in the political process. Independent expenditures, by definition, cannot be controlled or directed by a candidate, thereby negating any possibility of *quid pro quo* corruption. If an independent expenditure is independent, it cannot possibly corrupt the process. A candidate, in fact, may not even want the support provided by the corporation and deem it harmful to his or her campaign.

b. Political equality is not required by the First Amendment and cannot be required by the government.

Although the *Austin* Court appeared to recognize that it could not require political equality given *Buckley* and *Bellotti's* conclusion that to do so would violate the First Amendment, it attempted to achieve that very result by prohibiting corporations from speaking as a consequence of their potential wealth. The Court justified its conclusion by stating it was not seeking equality but, instead, protecting the members and shareholders, because a corporation might spend money on political matters that they as individuals may not support.

This conclusion is incorrect. A corporation is a voluntary association and its members and shareholders retain their free will and can terminate that relationship at any time. In contrast with, for example, integrated mandatory state bars or union shops, corporation participation is not mandatory. Appellee's attempt to analogize unions with corporations in this context is flawed. *See* Appellee Supp. Brf. at 13. States require thousands of employees to belong to unions and pay dues for that membership. In contrast, the Michigan Chamber, along with all other corporations, is a voluntary organization, for which there exists no state compulsion to join. If a member does not agree with the Michigan Chamber's advocacy, it can simply choose not to renew its membership.

In addition, this reasoning cannot be reconciled with the fact that corporations can spend without restriction on ballot questions, often concerning controversial political issues, regardless of whether supported by its members, shareholders, etc., which the *Bellotti* Court deemed entirely within their First Amendment rights. In fact, corporations can contribute unlimited amounts on ballot questions, as can all other entities or individuals. Likewise, in Michigan, every person or entity other than a corporation[3] can make unlimited independent expenditures. It is irrational to conclude that it is unconstitutional to restrict a corporation from spending unlimited amounts of money on ballot questions regardless of member or shareholder support, but that those same members and shareholders must be protected from a corporation's decision whether to make independent expenditures.

The risk of member or shareholder opposition to independent candidate-related expenditures by a nonprofit is inconsequential. A nonprofit corporation is limited by its articles and bylaws to spending money to support its members' goals and stated purposes for joining the corporation in the first place. Realistically, most members of ideological nonprofit corporations expect the corporation to advocate in

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[3] The prohibition on corporations has since been extended to labor organizations and domestic dependent sovereigns under Michigan law. MCL § 169.254.

support of the ideology underlying the nonprofits' interests.

For-profit corporations are likewise limited by the fact that they must make decisions based on what is best for the corporation financially, which benefits the shareholder financially, and is the sole purpose of a for-profit corporation. A shareholder invests in a corporation to make money, not to share its personal political views. A particular member or shareholder's political views are irrelevant to that purpose and he or she can always make contributions and expenditures to support their personal views with their own funds.

2. Restricting All Independent Expenditures by For-Profit and Nonprofit Corporate General Treasuries Is Not Narrowly Tailored.

a. To survive strict scrutiny, the government must prove the restriction is narrowly tailored to further a compelling governmental interest.

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. To constitutionally restrict corporate political speech, the government must not only demonstrate a compelling state interest, discussed *supra*, but it must also show that the regulation is narrowly tailored to meet that interest.

McConnell v. F.E.C., 540 U.S. 93 (2003). To demonstrate that a particular law is narrowly tailored, the government must offer actual evidence of a real problem that the law is designed to remedy. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 680 (1994). The subject law must curtail speech only to the degree necessary to remedy that problem and "must avoid infringing on speech that does not pose the danger that has prompted regulation." *F.E.C. v. Mass. Citizens for Life*, 479 U.S. 238, 265 (1986). Akin to bringing a bazooka to a fist fight, the Michigan Legislature's prohibition of all independent expenditures from corporate treasuries is an example of the government choosing "too blunt an instrument for such a delicate task." *Id.*

b. There is no evidence that corporate independent expenditures cause corruption.

A regulation must be "narrowly tailored to the evil that may legitimately be regulated." *F.E.C. v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) (*"NCPAC"*). The *Austin* Court determined that the corporation's "unique state-conferred structure," which has the potential for facilitating the amassing of large amounts of wealth, could lead to an inequality of political influence, thereby corrupting the electoral process as a whole. There was, however, no evidence that this potential harm had actually occurred or that it was even likely to occur, particularly given that most Michigan

corporations are either nonprofit or closely held. The government cannot undertake prophylactic measures absent evidence that corporate expenditures will actually corrupt the process. *Austin* and its progeny embraced an unproven myth that if corporations are allowed to make independent expenditures, corruption of the process will necessarily occur. Repeating that myth for twenty years does not make it true, and any evidence that corporate independent expenditures have or will cause corruption, or even the appearance of corruption, still fails to exist. As noted in Appellee's Supplemental Brief at n.3, less than half the states prohibit the use of treasury funds for electioneering, meaning that in more than half, such expenditures are permitted. There has never been any evidence presented that these more than twenty states have a corrupt or distorted political process as a consequence thereof.

The government must draw classifications based upon reality, not stereotypes. *Craig v. Boren*, 429 U.S. 190, 202 (1976). The "potential danger" of corruption, the amassing of great wealth or the expenditure of funds contrary to the interests of its members or shareholders are insufficient to justify a restriction absent evidence of actual problems. *See, e.g., Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 127 (1973) (stating that the "sacrifice [of] First Amendment protections for so speculative a gain is not warranted[.]"). The mere possibility that an organization may "potentially" engage in misconduct is not a sufficient reason to ban large

quantities of political expression. Hypothetical harms do not justify infringement on First Amendment freedoms. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993).

The Michigan Legislature has never provided a record supporting the existence of actual or perceived corruption resulting from corporate independent expenditures and certainly did not demonstrate that any special corruption would result from corporate independent expenditures. Such a showing is necessary to survive constitutional scrutiny. *See Turner Broad. Sys., Inc.*, 512 U.S. at 664 ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'") (internal citation omitted).

In *Austin*, the record reflected no evidence of corruption caused by corporate expenditures. In fact, the record indicates that the State of Michigan's key witness, Edward M. Epstein, political scientist and author of the book "The Corporation in American Politics," acknowledged that there had been no evidence in Michigan that corporate expenditures had a corruptive influence in elections. *Austin*, Joint Appendix at 86a. The Michigan Legislature, therefore, appears to have based its conclusion regarding corruption merely upon a hunch. To restrict speech based upon hunches, hypotheticals, and hyperbole tears the very fabric of First Amendment protections.

c. Prohibiting all for-profit and non-profit corporate independent expenditures is not sufficiently narrowly tailored to pass constitutional muster.

i. Independent expenditures by corporations should be permitted just like independent expenditures by individuals and political committees.

In *Buckley*, this Court struck down the Federal Election Campaign Act's (FECA) limitation on individuals' independent expenditures because this Court found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or give the appearance of corruption. Subsequently, in *NCPAC*, this Court struck down the FECA's limitation on independent expenditures by political committees. *NCPAC*, 470 U.S. at 496. In *NCPAC*, this Court examined whether corruption can taint the political process, stating that "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id.* at 497. This Court went on to differentiate independent expenditures from corruptive political contributions, summarizing *Buckley's* conclusion that "there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate. . . ." *Id.*

Austin assumes that expenditures by corporations might someday be demonstrated to beget *quid*

pro quo corruption. As Justice Scalia acknowledged in *WRTL II*, however, "[t]hat someday has never come. No one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as coordinated expenditures." *WRTL II*, 127 S. Ct. at 2678, n.4 (Scalia, J., concurring in part) (emphasis in original). Just as *NCPAC* determined that limiting independent expenditures by PACs was fatally overbroad in response to the perceived evil of corruption or the appearance thereof, this Court should now overrule the prohibition against corporate independent expenditures. Corporations independently communicating ideas with the public should be encouraged as a fundamental facet of democratic free speech, not condemned as hypothetical corruption. *Austin* should be reversed, allowing corporations the same constitutional protection recognized for individuals and political committees in *Buckley* and *NCPAC*. By failing to craft a solution that is designed to fix a narrow potential problem, the Michigan Legislature's blanket prohibition against all corporate independent expenditures is unconstitutional.

ii. *Austin* censors speech by any corporation operated for-profit or whose members are operated for-profit.

For-profit corporations were given the least amount of First Amendment protection in *Austin*, while nonprofit ideological corporations having no

for-profit corporations as members or shareholders were given the most protection in *WRTL*. The Michigan Chamber is the middle-ground, as a nonprofit ideological corporation with corporate members but, because of *Austin,* has not been afforded the same rights as recognized in *WRTL*. In *Colorado Republican Fed. Campaign Comm. v. F.E.C.*, this Court rejected the FECA's political party independent expenditure limit, stating that "[w]e do not see how a Constitution that grants to individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties." 518 U.S. 604, 618 (1996). *Austin*, however, concluded that corporations were not entitled to the same First Amendment protection as others who have the same ability to amass wealth to use for political speech.

Although the *Austin* Court stated that corporate speech is not stifled because corporations can establish separate segregated funds ("SSFs") whose independent expenditures are not limited, SSFs do not provide the same rights as direct corporate speech because SSFs are separate entities whose speech does not necessarily reflect that of the corporation. Indeed, that inherent separateness effectively serves as a muzzle to limit or quash such speech. This Court has held that restricting the "most effective, fundamental and perhaps economical avenue of political discourse" while leaving open "more burdensome" avenues of communication fails to nullify its burden on First Amendment expression. *Meyer v. Grant*, 486 U.S.

414, 424 (1988). The First Amendment protects not only the right of corporations to advocate a cause but also "to select what they believe to be the most effective means for so doing." *Id.*

Because corporations have a constitutional right to engage directly in political speech, forcing them to speak only through an SSF is inadequate. *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 541 n.10 (1980) (this Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression."). The First Amendment protects not only the right to speak, but also the right to choose the most effective means of doing so. *Meyer*, 486 U.S. at 424 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech . . . outside the bounds of First Amendment protection.").

Because SSFs cost money, many small or midsize corporations (the majority of corporations in Michigan) cannot afford the cost to create and administer an SSF and are, therefore, blocked entirely from political speech.[4] Even for those corporations that can afford this added expense, it creates an administrative burden to speech, restricts the use of those funds, and often diminishes the message, because it cannot come directly from the corporation. As this

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[4] *See* Testimony of Woodward Sidney Smith in *Austin* Joint Appendix at 91a-94a.

Court has explained, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939). In addition, the SSF requirement also diminishes the right of members who wish to support the corporation's advocacy efforts but are prohibited from doing so because they are not among the very small list of persons who may contribute to an SSF.

d. Michigan could easily prevent corruption or "distortion" without censoring corporate political speech.

A less blunt instrument could be used to craft alternative solutions allowing corporations to exercise their First Amendment rights, while still accomplishing the purported goal of preventing theoretical corruption or distortion.

i. Government should regulate, rather than block, corporate speech.

Permitting independent expenditures with reporting requirements prevents corruption using transparency, rather than a gag. Regulation and disclosure of corporate speech provides a more narrowly tailored response to alleged corruption. Reporting mechanisms already are in place in Michigan if corporations are allowed to make independent

expenditures. Section 47 of the Act requires a disclaimer identifying the sponsor of any communication, and Section 51 of the Act mandates disclosure of many other aspects of independent expenditures. MCL § 169.247 and MCL § 169.251. Such a solution permits corporate speech, but identifies and discloses those corporate expenditures.

Permitting independent expenditures with reporting requirements is precisely the type of scalpel required to satisfy the narrowly tailored standard of strict scrutiny, unlike the hatchet employed by the Michigan Legislature. Where such a simple solution exists that both achieves the government's purported purpose of preventing the appearance of corruption, while still allowing constitutionally guaranteed free speech, that solution should be implemented. Absent such a solution, the law fails the strict scrutiny test and must be struck down.

ii. The ban on independent expenditures is not properly tailored toward targeted entities.

If the purpose of restricting corporate speech is to prevent behemoth conglomerates from disproportionately influencing the political process (from "too much speech" as Justice Kennedy stated during oral arguments in *Austin*) then, rather than a complete prohibition on independent expenditures from all corporations, a narrowly tailored approach would be

to prohibit independent expenditures only from those for-profit entities with significant financial resources.

The Michigan Chamber contends that no outright ban on corporate independent expenditures passes constitutional muster. Rather than blocking all corporate expenditures, however, a possible narrowly tailored approach would be to prohibit expenditures only by "large" for-profit entities, by publicly traded companies, by those whose treasury balance exceeds a certain monetary threshold, or those not established for an ideological or political purpose. Instead, the Michigan Legislature prohibited all corporations, regardless of purpose, size, wealth, or even nonprofit status, from direct political speech. Michigan's law should only limit independent expenditures by those with the capability to perpetrate the alleged harm.

Because nearly all businesses in Michigan are small, privately held companies, their ability to exercise "too much speech" is minimal.[5] The risk of corruption by those corporate expenditures is, like the individual independent expenditures analyzed in *Buckley*, insufficient to justify limits, let alone a ban, on such spending. Although it may be easier for the government to limit all speech by corporate entities based upon an amorphous theory of the potential for

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[5] In 2008, 63% of Michigan Chamber members employed fewer than 49 employees and 90% employed fewer than 249 employees.

corruption of the process, rather than limiting only that speech that may actually result in corruption, administrative convenience cannot justify an infringement upon fundamental First Amendment speech. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986).

CONCLUSION

Corporations possess the same First Amendment protections as individuals and all other associations of persons. Yet, as a result of *Austin*, only corporations are prohibited from making independent expenditures in support of a candidate. An independent expenditure is, by definition, made without direction or control by a candidate and, therefore, cannot lead to corruption. As such, no compelling state interest justifies a direct infringement on one speaker's rights based on hypothetical and imagined harms. In reality, most corporations do not amass great wealth or make decisions contrary to the interests and views of their shareholders and members.

For the foregoing reasons, the Michigan Chamber submits that *Austin* was decided wrongly, based on flawed logic and analysis, and should be overruled.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
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CITIZENS UNITED,

Appellant,

vs.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE STATES OF MONTANA, ARIZONA, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, VERMONT, WEST VIRGINIA, AS *AMICI CURIAE* ADDRESSING JUNE 29, 2009 ORDER FOR SUPPLEMENTAL BRIEFING AND SUPPORTING NEITHER PARTY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE COURT NEED NOT ADDRESS *AUSTIN* 3

II. *AUSTIN* CORRECTLY SETTLED THE BOUNDS OF STATE CORPORATE ELECTIONEERING LAWS 5

A. *Austin* Confirmed the Settled Expectations of Governments, Corporations, and Campaigns 7

B. Regulation of Corporate Electioneering Remains a Compelling State Interest 14

C. Segregated Funds Are Narrowly Tailored to Serve State Interests 19

CONCLUSION 21

APPENDIX

State Laws Prohibiting Corporate Electioneering 1a

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) 10, 19

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009) 15, 16

Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008) 5

FEC v. Beaumont, 539 U.S. 146 (2003) 12, 14, 18

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FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985) 11

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TABLE OF AUTHORITIES – Continued

Page

McConnell v. Combination Mining & Milling, 76 P. 194 (Mont. 1904) 7

McConnell v. FEC, 540 U.S. 93 (2003).....13, 14, 18

Montana Right to Life v. Eddleman, 343 F.3d 1085 (9th Cir. 2003) 16

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People ex rel. Perkins v. Moss, 187 N.Y. 410 (1907).....8

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Pipefitters Local Union No. 562 v. United States, 407 U.S. 385 (1971).....10, 19

Randall v. Sorrell, 548 U.S. 230 (2006).....4, 6

State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999).....13

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TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Ky. Const. § 150 (1891) 8

STATUTES

Acts of Tennessee, ch. 18 (April 29, 1897) 9

General Laws of Nebraska, ch. 19 (April 3, 1897) 8

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Page

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TABLE OF AUTHORITIES – Continued

Page

Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L. J. 871 (2004).....17, 18

INTEREST OF THE *AMICI CURIAE*

Amici States have a fundamental interest in ensuring their authority to police the powers and duties of corporations and to oversee and conduct state elections. For more than a century, states have regulated corporate campaign electioneering, encouraging corporations' employees and shareholders to participate in election campaigns through segregated funds that protect the integrity of the political process by providing a well-established means of accountable corporate campaign speech. Today, twenty-four states limit or prohibit corporate electioneering paid with general treasury funds. Although not all *Amici* States regulate corporate spending on candidate elections, they all recognize the importance of preserving the discretion of state policy-makers to enact campaign finance regulations that may include regulation of corporate electioneering. *Amici* States, therefore, ask this Court to resolve this case without overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

SUMMARY OF ARGUMENT

I. This case does not concern the traditional regulation of corporate campaign spending by state laws. Instead, it presents the application of a recent federal statute to a novel form of political campaigning through the medium of video-on-demand and the message of a ninety-minute film. These and

other political campaign innovations present an occasion to draw on state law experiments—not end them. The Court cannot reach the validity of these laws under *Austin* without departing from its conventional approach to constitutional avoidance and as-applied review of campaign finance statutes, and ignoring its cautions against facial challenges in election law generally.

II. *Austin* follows a century of campaign finance law at the state and federal level honed by six decades of this Court's holdings. Those decisions, and the state and federal laws that gave rise to and rely on them, delineate a workable segregated-fund requirement for corporate electioneering that is embedded in campaign laws and practice at the federal and state level. While imposing minimal burdens on corporations, the segregated fund protects the integrity of the political process from the corrupting influence of corporate executives funding political campaigns that have no proven support from the shareholders or customers whose money pays for the advocacy. The flourishing of corporate speech through PACs, and continued harms of direct corporate electioneering, has vindicated rather than undermined *Austin*'s approval of segregated funds.

ARGUMENT

I. THE COURT NEED NOT ADDRESS *AUSTIN*.

1. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2513 (2009) (quoting *Escambia County, Fla. v. McMillan*, 466 U.S. 48, 51 (1984)). As both Citizens United and the BCRA sponsors suggest, this case presents at least one such ground in the construction of the statutory term "electioneering communication." *See* Appellant's Br. at 26 n. 2; Br. of *Amici Curiae* Sen. McCain *et al.* at 18-19 (same). Both the thin record in this case and Citizens United's abandonment of its facial constitutional challenge below further counsel avoidance. This Court refrains "from avoidable constitutional pronouncements" unless "absolutely necessary to a decision." *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 590-91 (1957) ("UAW") (internal quotation marks omitted).

2. If it is necessary to reach a constitutional decision, the factual record does not provide a basis for reevaluating *Austin*. Once Citizens United abandoned its facial challenge on summary judgment, there was no reason for the parties to present or the lower court to consider "the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *UAW*, 352 U.S. at 591.

a. This case does not address the medium or message of mainstream campaign materials that are the central subject of *Austin* and state- and federal-corporate-electioneering laws. In *Austin*, "[a]lthough the Chamber had established and funded a separate political fund, it sought to use its general treasury funds to place in a local newspaper an advertisement supporting a specific candidate." 494 U.S. at 656. In contrast, Citizens United raises novel issues concerning the application of BCRA to a ninety-minute movie distributed to people who chose to view it through a video-on-demand subscription service on cable. The record below does not evince any burdens or benefits of requiring the use of segregated funds to pay for the corporate express advocacy at issue in *Austin*. Such evidence would be critical to an assessment of whether, as Citizens United alleged, § 203 "has not proven workable in application." (J.A. 24a.) "Such an incomplete presentation is reason enough to refuse [Appellants'] invitation to re-examine" *Austin*. *Randall v. Sorrell*, 548 U.S. 230, 263 (2006) (Alito, J., concurring).

b. The sparse record below is particularly ill-suited to a facial challenge that would call into question the century of state and federal laws and decisions that led to *Austin*. Overruling *Austin* in this case necessarily would "rest on speculation" as to the broader benefits and burdens of corporate-electioneering laws, ask for "a rule of constitutional law broader than is required by the precise facts" of Citizens United's anomalous communication, and

"prevent[ ] laws embodying the will of the people from being implemented in a manner consistent with the Constitution" at the state and federal level. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008). Even as to advocacy groups funded by corporate donations, the lack of detail about Citizens United's funding makes it impossible "to quantify either the magnitude of the burden on this narrow class of [corporations] or the portion of the burden imposed on them that is fully justified." *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1622 (2008).

Thus, this Court should not transform this case from an as-applied challenge concerning the regulation of a single video-on-demand campaign movie to a facial challenge that would affect the variety of long-standing state campaign finance regulations throughout the country regardless of their particular purposes and effects. *See* William P. Marshall, *The Last Best Chance for Campaign Finance Reform*, 94 Nw. U.L. Rev. 335, 383 (2000) ("Each state has its own political traditions, structures, and exigencies, and these differences can have profound effects on campaign finance concerns.").

II. *AUSTIN* CORRECTLY SETTLED THE BOUNDS OF STATE CORPORATE ELECTIONEERING LAWS.

The rule of *Austin* reflects over a century of law and practice dating to states' first efforts at campaign

finance reform, and remains vital to the campaign laws of nearly half of the states and the federal government. This case presents no "special justification" to depart from the principles of stare decisis. *Randall v. Sorrell*, 548 U.S. at 243-44 (plurality opinion). To the contrary, *Austin* is part of a decades-long line of state and federal cases developing the segregated-fund requirement "through iteration and reiteration," thus "avoid[ing] the instability and unfairness that accompany disruption of settled legal expectations" in Congress and the state legislatures that have relied on these cases. *Randall*, 548 U.S. at 244. And that line continues unbroken: cases since *Austin* have reinforced rather than undermined *Austin's* basic legal principles. *See* Part II.A, below. Moreover, there has been no demonstration that political campaigns have changed so radically as to undermine *Austin*'s critical factual assumptions. *See* Parts II.B & II.C, below. If the Court overrules *Austin*, "[n]ot just one case, but a half-century of election law would be tossed aside in favor of a new regime of corporate and union political participation of uncertain shape and effect." Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the Segregated Funds Cases*, 3 Election L.J. 361, 368 (2004).

A. *Austin* Confirmed the Settled Expectations of Governments, Corporations, and Campaigns.

1. The states were the first to react to the surge of corporate money into political campaigns in the late Nineteenth Century. In Montana, "[p]olitical commentators reserved the phrase, 'the company,' for the special economic and political synergy of the Anaconda Company and the Montana Power Company, and to 'the company' they ascribed astounding political control." James J. Lopach, *Montana's Role in the Free Speech vs. Equal Speech Debate*, 60 Mont. L. Rev. 475, 485-86 (1999) (footnotes omitted). In 1898 mining company shareholders brought a derivative suit alleging misappropriation of corporate funds for political expenditures to promote "the silver cause" and lobby for the formation of a new county. *McConnell v. Combination Mining & Milling*, 76 P. 194, 198 (Mont. 1904), *modified on other grounds,* 79 P. 248 (Mont. 1905). The Montana Supreme Court held that the expenditures, made "for strictly political purposes," were *ultra vires*, noting that "[t]he stockholders of the company . . . were not unanimous in their political beliefs." *Id.* at 199.

In 1904, a New York state legislative committee found that insurance company campaign contributions were "wholly unjustifiable" uses of the policyholders' funds. *UAW*, 352 U.S. at 573. If the contributions were "made for the purpose of supporting political views," then "executive officers have sought to impose their political views upon a

constituency of divergent convictions." *Id.* If they were made "with the desire to obtain protection for the corporation" from policyholders in the legislature, the officers "have been guilty of a serious offense against public morals." *Id.* The New York state courts echoed these concerns in a resulting prosecution of an insurance executive for grand larceny, but ultimately held that the contributions, although *ultra vires*, were not crimes. *People ex rel. Perkins v. Moss*, 187 N.Y. 410 (1907).

Piecemeal derivative actions were a crude tool to protect the integrity of campaigns and corporate treasuries, however, given the costs of derivative actions and the decline of *ultra-vires* liability as courts deferred to management under the business judgment rule. *See, e.g., Marsili v. Pacific Gas & Elec. Co.*, 124 Cal. Rptr. 313, 323 (App. Ct. 1975). Moreover, one state's corporate law cannot take into account the effects of corporate electioneering that arise in the other jurisdictions where a corporation operates.

So states imposed statutory limits on corporate electioneering. As early as 1891, Kentucky prohibited corporate campaign spending in its Constitution. *See* Ky. Const. § 150 (1891). By 1897, Florida, Missouri, Nebraska, and Tennessee had enacted similar statutes. *See* Robert E. Mutch, *Before and After* Bellotti: *The Corporate Political Contribution Cases*, 5 Election L.J. 293, n.1 (2006) (citing Laws of Florida, ch. 4538 (June 2, 1897); Missouri Laws, p. 108 (March 20, 1897); General Laws of Nebraska, ch. 19 (April 3,

1897); Acts of Tennessee, ch. 18 (April 29, 1897)). The federal government followed the states' lead with the Tillman Act of 1907. Tillman Act, ch. 420, 34 Stat. 864-65 (1907). By the early 1930s, thirty-four states had enacted "corrupt practices laws" that prohibited direct corporate campaign spending. *See* Louise Overacker, *Money in Elections, Politics and People: The Ordeal of Self-Government in America,* 294-95 (1932).

2. Courts have repeatedly upheld these state and federal corporate-electioneering restrictions from their inception. *See* Mutch, 5 Election L.J. at 296-98. For example, the Michigan Supreme Court held that a corporation's charter did not allow it to "us[e] its funds for the purpose of influencing public sentiment in connection with any election" in violation of a state corrupt practices act, but if "the stockholders . . . desired, as individuals, to contribute to the campaign fund, it was their privilege so to do." *People v. Gansley*, 158 N.W. 195, 201 (Mich. 1916). State courts also narrowed corrupt practices acts to focus on "money from corporate treasuries," exempting non-profit voluntary associations long before *MCFL*. *State v. Joe Must Go Club of Wisconsin Inc.*, 70 N.W.2d 681, 682 (Wisc. 1955).

Later, this Court conformed the Tillman Act to constitutional bounds in the *Segregated Fund Cases*. First, it held that the Act did not cover political advocacy to members and stockholders within an organization concerning its interests. *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 120-22 (1948).

Second, it rejected constitutional challenges to the Act where the record did not answer whether a union's broadcast was paid with mandatory dues, reached the general public, or constituted "active electioneering," *UAW*, 32 U.S. at 592. Third, it recognized the segregated fund by holding that the Act allowed campaign contributions paid out of a voluntary political fund instead of union dues and assessments. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1971). The Federal Election Campaign Act codified the segregated-fund requirement. 2 U.S.C. § 441b ("FECA"). The requirement was not questioned in *Buckley v. Valeo*, 424 U.S. 1 (1976), where the Court observed that segregated funds "do not foreclose the making of substantial contributions to candidates by some major special-interest groups" including corporations and labor unions. *Id.* at 29 n.31.

State corporate campaign law came before the Court in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which harmonized a state restriction with the free-speech principles recognized in the *Segregated Fund Cases*. Massachusetts had enacted "a complete prohibition of corporate expenditures" without a segregated-fund option. *Id.* at 775. Although the Court struck down the categorical ban as "an impermissible legislative prohibition of speech," *id.* at 784, it remained open to recognizing "the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." *Id.* at 787

n.26. Soon after, recognizing the "dangers . . . to the electoral process" posed by "the particular legal and economic attributes of corporations and labor organizations," the Court unanimously endorsed the segregated fund in upholding the FECA limitation of corporate PAC solicitations to members and shareholders. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-10 (1982); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985) (noting "the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office").

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), the Court firmly rooted corporate-electioneering laws in "the conviction that it is important to protect the integrity of the marketplace of political ideas." *Id.* at 257; *see also id.* at 266 (Rehnquist, C.J., dissenting) (careful regulation of corporate campaign spending "is constitutionally sound and entitled to substantial deference"). Reinforcing four decades of segregated-fund cases, the Court in *MCFL* held that corporate-electioneering regulation could extend only as far as the logic of the segregated-fund principle itself. *Id.* at 263. A nonprofit ideological corporation like *MCFL*, supported solely by individual contributions from donors sympathetic with its political ideas, more closely resembled the segregated fund solution than the corporate-electioneering problem. *Id.* at 259. Because MCFL refused corporate contributions, it and similar organizations could not "serve[ ] as conduits" for

direct campaign spending by corporations that posed the threats addressed by segregated funds. *Id.* at 264.

3. *Austin* is more an application of these cases than a culmination of them. The segregated fund for corporate electioneering is "a narrowly tailored solution" to the problem of a "significant possibility that corporate political expenditures will undermine the integrity of the political process." *Austin,* 494 U.S. at 668.

The line drawn by state legislatures and Congress, clarified in cases from *UAW* to *MCFL*, and confirmed in *Austin*, has proven workable for the vast majority of corporations over more than a century. Since *Austin*, this Court has maintained the steady course set by decades of precedent, noting that this "historical prologue would discourage any broadside attack on corporate campaign finance regulation." *FEC v. Beaumont*, 539 U.S. 146, 156 (2003). Thus, in upholding the federal-corporate-electioneering law as applied to a nonprofit advocacy corporation partly funded by business contributions, the Court repeated its endorsement of the segregated fund as "allow[ing] corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Id.* at 163 (citations omitted).

In the most recent step of the Court's as-applied approach to corporate electioneering, it held that the interest "justifying regulation of corporate campaign

speech" has no application to issue advocacy. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) ("*WRTL*") (plurality opinion). This fits squarely within the framework articulated in *MCFL*'s holding "that an expenditure must constitute 'express advocacy'" to be subject to a segregated fund requirement. *MCLF*, 479 U.S. at 249. It therefore remains true that "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell v. FEC*, 540 U.S. 93, 203 (2003).

States and campaigns have long relied on the constitutionality of corporate-campaign-finance regulation confirmed in *Austin*, as demonstrated by nearly half the states' adoption of corporate-electioneering restrictions, and the widespread emergence of corporate PACs. *See* Appendix hereto; Part II.C, below. Since *Austin*, states have relied on it and other "substantial evidence" confirming *Austin*'s corruption concerns to revise and review state corporate-electioneering laws within the segregated-fund framework. *See, e.g.*, *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 609 (Alaska 1999). The Court should not unsettle the foundations of a century of state laws.

B. Regulation of Corporate Electioneering Remains a Compelling State Interest.

1. "[N]ot only has the original ban on direct corporate contributions endured, but so have the original rationales for the law." *Beaumont*, 539 U.S. at 154. It "has never been doubted" that the people through their legislatures may prevent "the problem of corruption of elected representatives through the creation of political debts." *Bellotti*, 435 U.S. at 788 n.26. As this Court has understood, corruption occurs "not only as *quid pro quo* agreements, but also as undue influence on an officerholder's judgment, and the appearance of such influence." *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (the corruption concern "extend[s] to the broader threat from politicians too compliant with the wishes of large contributors").

More than individuals' campaign spending, corporations' spending disproportionately favors incumbent officeholders, who unlike challengers can easily return the favor, or simply entrench the status quo. *See* Val Burris, *The Two Faces of Capitalism: Corporations and Individual Capitalists as Political Actors*, 66 Am. Soc. Rev. 361 (2001). Thus, the Court has "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.'" *McConnell*, 540 U.S. at

205 (quoting *Austin*, 494 U.S. at 660); *see also MCFL*, 479 U.S. at 257-59 (explaining "concern over the corrosive influence of concentrated corporate wealth").

a. The corruption threat posed by corporate electioneering does not arise from any partisan viewpoint, or inequality of wealth or economic scale alone. Nor is it new. Indeed, the Framers aptly described the paramount threat of corruption not as theft or bribery, but as "the use of government power and assets to benefit localities or other special interests ('factions')." Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 Kan. L. Rev. 1, 48 (2003). Corporate electioneering corrupts the relationship between public officials and the public interest by encouraging political dependence on narrowly concentrated private interests embodied in the corporate form, backed only by "the economically motivated decisions of investors and customers," *MCFL*, 479 U.S. at 258, at the expense of the broader and more dispersed interests represented by the people themselves. *See generally* Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341, 393 n.245, 406 (2009). Corporate-electioneering laws therefore aim "not merely to prevent the subversion of the integrity of the electoral process," but "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *UAW*, 352 U.S. at 575.

In *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), this Court reiterated the potential threat

of "significant and disproportionate influence" posed by campaign spending. *Id.* at 2264-65. In such instances, it is not enough to rely on a public servant's good faith to not be corrupted by $1000 in campaign contributions, $2.5 million in spending for a political organization supporting the candidate, and $500,000 in independent expenditures. *Id.* at 2257. In the majority of states with judicial elections at some level, corporate-electioneering laws help ensure that such situations remain "extraordinary" acts of a single individual, *see id.* at 2265, rather than business as usual. Beyond judicial campaigns, most state campaigns are waged with thousands rather than millions of dollars, and could be easily overwhelmed, as they were a century ago, by national corporations' campaign spending. *See id.* at 2264; *see also Montana Right to Life v. Eddleman*, 343 F.3d 1085, 1089 (9th Cir. 2003) (a state legislative campaign in Montana costs between $3,000 and $9,000).

b. Recent scholarship also has recognized corruption in the other direction, in the form of "systemic shakedowns of corporations" by "politician-maximizers" exercising increased regulatory powers. Robert Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1127 (2002). This kind of corruption, demonstrated by today's "pay-to-play" scandals, had its roots in the migration of political fundraising from pre-civil-service kickbacks from public employees based on salary (called assessments) to pre-Tillman-Act shakedowns of major

corporations based on capitalization (also called assessments). *See* Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 Albany Gov't L. Rev. 1, 8-12 (2008); Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 Geo. L. J. 871, 84 (2004). Thus, corporate-electioneering laws may help "protect society from the purchase of special-interest regulation by corporations and their shareholders." Sitkoff, 69 U. Chi. L. Rev. at 1118; *see also id.* at 1152-53 (noting corporations' support of new spending bans).

2. Second, the Court has unanimously held that "individuals who have paid money into a corporation or union for purposes other than the support of candidates" should not have "that money used to support political candidates to whom they may be opposed." *Nat'l Right to Work Comm.*, 459 U.S. at 208. Beyond coercion, the original corrupt practices acts recognized that "[p]olitical spending was different from other types of corporate spending because the former could be used to disempower the owners of [an] enterprise relative to management," itself a kind of corruption of corporate governance. Winkler, 92 Geo. L. J. at 896.

Efforts short of a segregated-fund requirement have proven ineffective. Before the Tillman Act and similar state laws, "publicity laws" intended to unveil corporate campaign spending "either became dead letters or were found to be futile." *UAW*, 352 U.S. at 571. Derivative actions premised on *ultra-vires* liability failed due to their cost and jurisdictional

limitations. *See* Part II.A.1, above. Both attempts foundered on the ease with which corporations can conceal campaign spending through accounting and other means, and the difficulty shareholders face in policing it. *See* Winkler, 92 Geo. L. J. at 884-85; *cf. Jones v. Harris Assocs. L.P.*, 537 F.3d 728, 730 (7th Cir. 2008) (Posner, J., dissenting from denial of rehearing *en banc*), *cert. granted*, 129 S. Ct. 1579 ("Competition in product and capital markets can't be counted on to solve the problem [of protecting mutual fund shareholders]"). Without the segregated fund, political-dissident shareholders, members, and employees could lose retirement savings, member benefits, or a job, simply to enjoy the same protection of their speech rights enjoyed by employees in a collective bargaining unit with respect to a union's political activities. *See Austin*, 494 U.S. at 665-66; *MCFL*, 479 U.S. at 260-61.

3. Finally, "certain restrictions on corporate electoral involvement permissibly hedge against" circumvention of other valid campaign spending regulations. *McConnell*, 540 U.S. at 205. Corporate officers "diverting money" for campaign expenditures through the corporate treasury could transform the corporation itself into an informal PAC while avoiding PAC regulations. *Beaumont*, 539 U.S. at 155 (citation and quotation marks omitted). Complex corporate structures would either enable evasion of disclosure requirements, coordinated expenditure restrictions, and other unchallenged campaign laws, or demand an added level of regulatory complexity to rival

securities and corporate tax law. The regulation of non-*MCFL* corporations as political actors per se, rather than through segregated funds, heightens rather than resolves Appellant's concern about the complexity of campaign finance laws. Oral Arg. Tr. at 3.

C. Segregated Funds Are Narrowly Tailored to Serve State Interests.

Over a century after the Tillman Act and similar state laws, nearly four decades after *Pipefitters* and FECA, and two decades after *Austin*, it is no longer possible to claim that corporate-electioneering laws amount to a prohibition on corporate speech. Importantly, most corporate political speech occurs through *speech* "such as lobbying, testimony, and other direct contacts" rather than "naked corporate money expenditures" to or for candidates. Jill E. Fisch, *How Do Corporations Play Politics: The FedEx Story*, 58 Vand. L. Rev. 1495, 1566 (2005).

Still, the Court's prediction in *Buckley* about "the potential for proliferation" of corporate and union PACs has proven true. *Buckley*, 424 U.S. at 29 n.31. Corporate speech has increased markedly under the segregated-fund requirement. Before *Pipefitters* and FECA, business interest groups spent $1.4 million on federal elections in 1968; a decade later business PACs spent $37 million. Edwin M. Epstein, *The PAC Phenomenon: An Overview*, 22:2 Ariz. L. Rev. 355, 357 (1980). In *Austin* itself, the Michigan Chamber of

Commerce amassed $140,000 of voluntary contributions in a segregated campaign fund. 494 U.S. at 663. Today, at the federal level alone, there are 1,598 corporate PACs, the largest single category of PACs and more than one-third of all PACs. *See* FEC, Number of Federal PACs Increases (Mar. 9, 2009), *available at* http://www.fec.gov/press/press2009/20090309PACcount.shtml. Aside from this increase in corporate speech, the only proven result of the segregated fund is that shareholders, law enforcers, and the public know that the speech belongs to the speakers and has not been purchased with other people's money.

Meanwhile, corporate-electioneering laws reflect the lesson of *MCFL* that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status," while other corporations may "serv[e] as conduits for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 263-64. Citizens United may intend to test the line drawn in *MCFL* by accepting as little as $2000 from business corporations in a presidential campaign. (J.A. at 252a.) But this minimal solicitation suggests less a constitutionally cognizable burden than an attempt "to shape litigation, so far as it is within their control, in order to secure [a] comprehensive ruling[ ]." *UAW*, 352 U.S. at 592.

The steady development of the *Segregated Fund Cases* has ensured not only that corporate-electioneering laws are "firmly embedded," *McConnell*, 540 U.S. at 203, but also that they are "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views." *Austin*, 494 U.S. at 660. This case presents no reason to call those laws into question.

CONCLUSION

For these reasons, the *amici* States respectfully request that this Court resolve this case without overruling *Austin*.

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APPENDIX TO STATE AMICUS BRIEF

STATE LAWS PROHIBITING CORPORATE ELECTIONEERING

ALASKA: Alaska Stat. § 15.13.074(f)

ARIZONA: Ariz. Const. art. XIV, § 18; Ariz. Rev. Stat. §§ 16-919(A), -920

COLORADO: Colo. Const. XXVIII, § 3(4)(a)

CONNECTICUT: Conn. Gen. Stat. § 9-613(a)

IOWA: Iowa Code § 68A.503

KENTUCKY: Ky. Rev. Stat. § 121.150(20)

MASSACHUSETTS: Mass. Gen. L. ch. 55, § 8

MICHIGAN: Mich. C. L. S. § 169.254(1)

MINNESOTA: Minn. Stat. § 211B.15

MONTANA: Mont. Code Ann. § 13-35-227

NORTH CAROLINA: N.C. Gen. Stat. §§ 163-278.15, -278.19

NORTH DAKOTA: N.D. Cent. Code § 16.1-08.1-03.3

OHIO: Ohio Rev. Code Ann. § 3599.03(A)(1)

OKLAHOMA: Okla. Stat. tit. 21, § 187.2 ch. 62, Appx., 257: 10-1-2(d)

PENNSYLVANIA: 25 Pa. Stat. § 3253(a)

RHODE ISLAND: R.I. Gen. Laws § 17-25-10.1(h), (j)

SOUTH DAKOTA: S.D. Codified Laws § 12-27-18

TENNESSEE: Tenn. Code Ann. § 2-19-132

TEXAS: Tex. Elec. Code § 253.094

WEST VIRGINIA: W. Va. Code § 3-8-8

WISCONSIN: Wis. Stat. § 11.38

WYOMING: Wyo. Stat. § 22-25-102(a)

STATE LAWS LIMITING CORPORATE ELECTIONEERING

ALABAMA: Ala. Code §§ 10-2A-70, 10-2A-70.2

NEW YORK: N.Y. Elec. Law § 14-116.

AMICUS CURIAE BRIEF

134

56

No. 08-205

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In The

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. The Government's Distinction of Nonprofit Advocacy Corporations Rings Hollow	3
II. The Court Should Overrule *Austin* and *McConnell* at Least as to Nonprofit Advocacy Corporations' Independent Expenditures Funded by Individuals	7
III. The Court Should Overturn *Austin* in Whole and *McConnell* in Part	11
A. The Government Has Abandoned *Austin*'s Anti-Distortion Rationale	12
B. Gratitude for Political Support Does Not Equate to Corruption	14
C. No Other Rationale Justifies BCRA § 203	17
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan State Chamber of Commerce,
494 U.S. 652 (1990) ..... *passim*

Buckley v. Valeo,
424 U.S. 1 (1976) 15, 17, 18

Davis v. FEC,
128 S.Ct. 2759 (2008) 12, 18

FEC v. Beaumont,
539 U.S. 146 (2003) 6

FEC v. Colorado Republican Fed. Campaign Comm.,
533 U.S. 431 (2001) 16

FEC v. Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986) 3-4, 10, 17, 19

FEC v. National Conservative Political Action Comm.,
470 U.S. 480 (1985) 12, 17, 19

FEC v. National Rifle Ass'n,
254 F.3d 173 (D.C. Cir. 2001) 4

FEC v. Survival Educ. Fund, Inc.,
65 F.3d 285 (2d Cir. 1995) 4

FEC v. Wisconsin Right to Life, Inc.,
127 S.Ct. 2652 (2007) 2, 8, 11, 16-18

First Nat'l Bank v. Bellotti,
435 U.S. 765 (1978) 18, 19

TABLE OF AUTHORITIES – Continued

Page

Leegin Creative Leather Prods. v. PSKS, Inc., 127 S.Ct. 2705 (2007) 11

McConnell v. FEC, 251 F.Supp.2d 176 (D.D.C. 2003) 16

McConnell v. FEC, 540 U.S. 93 (2003) ..... *passim*

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000) 7

Renne v. Geary, 501 U.S. 312 (1991) 14

STATUTES

2 U.S.C.

§ 441b(c)(2) 6

§ 441b(c)(3)(B) 6

§ 441b(c)(6) 6

§ 501(c)(4) 3, 6

REGULATORY AUTHORITIES

11 C.F.R. § 114.10(c) 4

63 Fed. Reg. 29,359-29,360 (1998) 4

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

2 Alexis de Tocqueville, DEMOCRACY IN AMERICA (P. Bradley ed. 1948) 8

THE FEDERALIST No. 35 (Hamilton) 15

THE FEDERALIST No. 51 (Madison) 15

INTEREST OF *AMICUS CURIAE*[1]

As detailed in its prior *amicus* brief, the National Rifle Association ("NRA") is a nonprofit, voluntary membership corporation qualified as tax-exempt under 26 U.S.C. § 501(c)(4). Its nearly four million members are individual Americans bound by a common desire to preserve the Second Amendment right to keep and bear arms. The NRA funds its political speech almost exclusively with dues and contributions from individual members. The organization does not accept business corporations as members, and the contributions it receives from such corporations are negligible. *See* Br. of *Amicus Curiae* NRA in Support of Appellant ("NRA *Amicus* Br.") 1-2.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Government has had an epiphany in response to the Court's request for supplemental briefing: despite arguing to the contrary in case after case before this Court, the Government has now decided that nonprofit advocacy corporations whose "operations are financed 'overwhelmingly' by individual donations" – like Citizens United and the NRA – are, after all, "distinctly atypical" corporations when

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[1] The parties have consented to the filing of this brief. This brief was not authored in whole or in part by any counsel for a party to this case. No person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation and submission of this brief.

it comes to regulating their political speech. Supplemental Br. for the Appellee ("FEC Suppl. Br.") at 2-3 & n.1. One might have hoped that the Government would confess error and join Citizens United and its brethren in their struggle to recover their political voices, lost since passage of BCRA. But, no – that would mark a substantial inroad into Title II in favor of core political speech, and so the Government instead only pays lip service to speech by nonprofits for the sake of keeping them mute.

Thus, the Government seems to argue that Citizens United, as a nonprofit advocacy corporation, is "distinctly atypical" enough to make this case a bad vehicle for overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), but not enough to actually qualify it for (ever-illusory) First Amendment protection. The upshot, according to the Government, is that this Court should hold against Citizens United on the basis of *Austin* without finding occasion actually to analyze *Austin*. Such reasoning would seem risible were the continued specter of criminal prosecution not lurking behind it.

"Enough is enough." *FEC v. Wisconsin Right to Life, Inc. ("WRTL II")*, 127 S.Ct. 2652, 2672 (2007) (Roberts, C.J.). There is only one sure way finally to put an end to this and vindicate the First Amendment. It is to trace the Government's tangled line of argument back to its source. In the pages that follow, *Amicus* NRA respectfully explains why this Court should overrule *Austin* and *McConnell v. FEC*, 540 U.S. 93 (2003), at least to the extent they stand for

the arresting proposition that government may bar nonprofit advocacy corporations from using individual donations to fund political speech. Correspondingly, the Court should restore the provision of Title II (the Snowe-Jeffords provision) that expressly exempted 501(c)(4) corporations funded by individuals from Section 203's speech ban, by striking down the superseding provision (the Wellstone amendment) that placed 501(c)(4) corporations under the same cone of silence as for-profit business corporations. Alternatively, this Court should overrule *Austin* in whole and *McConnell* in part, holding that all corporations (for-profit and nonprofit alike) are no less entitled under the First Amendment than are other speakers to air their independent political speech to the public, including around election time.

ARGUMENT

I. The Government's Distinction of Nonprofit Advocacy Corporations Rings Hollow

In discounting the burdens of Title II (while simultaneously defending them as sacrosanct), the Government has always trumpeted the exception for certain nonprofits established in *FEC v. Massachusetts Citizens for Life, Inc. ("MCFL")*, 479 U.S. 238, 264 (1986). That exception has proved illusory in practice, particularly because the Government has been so begrudging in administering and so zealous in policing it. *See* NRA *Amicus* Br. 22-24. Indeed, the Government has gone to court repeatedly arguing

that corporations such as Citizens United and the NRA cannot claim the benefit of *MCFL*. *See FEC v. National Rifle Ass'n*, 254 F.3d 173, 190-91 (D.C. Cir. 2001); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 292-93 (2d Cir. 1995); 63 Fed. Reg. 29,359-29,360 (1998) (collecting decisions). Against this backdrop, footnote 1 of the Government's supplemental brief comes with poor grace. According to it, Citizens United "would appear to" come within certain lower-court decisions (ruling *against* the Government) construing the *MFCL* exception because Citizens United's "overall operations are financed 'overwhelmingly' by individual donations." FEC Suppl. Br. 3 n.1. In saying this, of course, the Government by no means acknowledges that "these decisions" are *correct*; to the contrary, it continues to maintain they are wrong. Nor does the Government agree that Citizens United *in fact* comes within them; it points only to an "appear[ance]" behind which the Government would surely poke over years of protracted litigation.

Indeed, the FEC's regulations implementing *MCFL* categorically deny the exemption if the corporation receives even a penny from business entities, as Citizens United and the NRA do. *MCFL*, 479 U.S. at 264 (corporation must have "policy not to accept contributions from" business corporations); 11 C.F.R. § 114.10(c) (corporation must "not directly or indirectly accept donations of anything of value from business corporations"); NRA *Amicus* Br. 4, 24-25. Even setting that aside, Citizens United and the NRA

would also be disqualified from the *MCFL* exception simply because they maintain programs and benefits extending beyond their political mission, strictly defined. *Id.* Thus, the Government's seeming concession marks nothing more than a last-minute maneuver by which to shield *Austin* from this Court's scrutiny, offering the false promise of extending *MCFL* to additional nonprofit corporations today only so that the Government may withhold that exception and restrict their speech (along with all other corporations' speech) tomorrow.

As the Government would now have it, "a nonprofit corporation whose stated purpose is expressly ideological" and whose electoral speech is funded "'overwhelmingly' from individual donations" is "a distinctly atypical corporation" because its general treasuries are not "unrelated to the dissemination of political ideas." FEC Suppl. Br. 2-3. Such solicitude by the Government for the special case of nonprofits is sure to have been lost on attentive readers of all of its prior submissions to this Court. In *those* filings, the Government uniformly maintained that – outside the preexisting regulatory strictures of *MCFL* – nonprofits were no different from all other corporations. *See* Br. for the Appellee 29-32; Br. for the FEC 75, 78, 113, *McConnell v. FEC*, No. 02-1674 (S.Ct. Aug. 2003). The Government did so, in fact, in direct opposition to arguments by the NRA and others that nonprofit advocacy corporations funded predominantly by individuals posed no meaningful risk of *Austin*-style distortion. NRA *Amicus* Br. 16; Br. for

Appellants the NRA, *et al.* 20-23, 28-33, *NRA v. FEC*, No. 02-1675 (S.Ct. July 8, 2003); *FEC v. Beaumont*, 539 U.S. 146, 159 (2003) ("advocacy corporations are generally different from traditional business corporations in the improbability that contributions they might make would end up supporting causes that some of their members would not approve").

Lest there be any doubt, the Government *defended* a provision of Title II that *specifically targeted* nonprofit corporations such as Citizens United and the NRA for restriction, notwithstanding their funding from individual supporters. As the NRA explained in its prior *amicus* brief, Congress initially accounted for the distinctive status of corporations like Citizens United and the NRA. Specifically, Congress enacted the Snowe-Jeffords provision to exempt from BCRA § 203 independent expenditures by a nonprofit 501(c)(4) corporation, provided that "the communication is paid for exclusively by funds provided directly by individuals," 2 U.S.C. § 441b(c)(2); and, if the corporation receives funds from "business activities" or other corporations, provided that the funds used for the communication are kept in "a segregated account to which only individuals can contribute," § 441b(c)(3)(B).

But Congress then decided to cast a wider net. It later enacted the Wellstone amendment, § 441b(c)(6), which nullified Snowe-Jeffords, for fear that

"negative attack ads" from these nonprofits would continue to threaten incumbents.[2] The Wellstone amendment has stood out like an unconstitutional sore thumb ever since – it serves an illegitimate, content-based purpose and *Austin*'s anti-distortion aim could be achieved through the less-restrictive alternative of Snowe-Jeffords. *See* NRA *Amicus* Br. 5-6, 9-16; *McConnell*, 540 U.S. at 248-50, 260, 262-64 (Scalia, J., dissenting) (Section 203 "cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government.").

II. The Court Should Overrule *Austin* and *McConnell* at Least as to Nonprofit Advocacy Corporations' Independent Expenditures Funded by Individuals

In *Austin*, the Court thought the restriction on independent corporate expenditures was necessary to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660. In *McConnell*, the Court relied upon *Austin*'s anti-distortion rationale, without critical analysis, to

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[2] As an additional measure of protection, Congress further leveraged the "media-related advantages of incumbency" by exempting media corporations from BCRA § 203's restrictions. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 404 (2000) (Breyer, J., concurring).

uphold BCRA § 203 on its face. 540 U.S. at 205. Far from preventing a nonprofit advocacy group's political voice from being unfairly *inflated* by funds derived from the economic marketplace, however, Section 203 has artificially *deflated* the strength of such a group's voice in the political marketplace vastly below its "contributors' support for the corporations' political views" and has, perversely, "concentrat[ed] more political power in the hands of the country's wealthiest individuals." *Austin*, 494 U.S. at 660-61; *WRTL II*, 127 S.Ct. at 2686-87 (Scalia, J., concurring); *see* NRA *Amicus* Br. 2-3, 11-16; *McConnell*, 540 U.S. at 255-58 (Scalia, J.).

The NRA respectfully reiterates that it and Citizens United, along with other nonprofit advocacy organizations funded by individuals, have always been constitutionally distinct from business corporations. Indeed, "associations" are essential for vigorous public debate in a democracy because they "circulate" "opinions or sentiments" to "the multitude" and possess a voice loud enough to be heard and thus to check governmental impingement upon rights. 2 Alexis de Tocqueville, DEMOCRACY IN AMERICA 109 (P. Bradley ed. 1948). If anything, therefore, speech by corporations – particularly nonprofit corporations funded by like-minded individuals of modest means – deserves a special place under the First Amendment. Consequently, independent expenditures by such groups should be categorically exempt from limitation.

There simply is no answer to this reality. The Government nonetheless purports to offer one, positing that it may limit independent expenditures by nonprofit advocacy corporations because the nonprofits might otherwise "serve as conduits for spending by for-profit corporations." FEC Suppl. Br. 6-7. Of course, Snowe-Jeffords solves that problem completely by limiting a nonprofit advocacy corporation's funding of electioneering communications to the amount of donations it receives *from individuals*. The prospect of nonprofit corporations becoming mere conduits for *Austin*-type distortion would thus be nil.

Certainly, fidelity to *Austin* by no means mandates the miserly delineation of a nonprofit exemption that the FEC has taken from *MCFL*. In *Austin*, the Court was concerned that there was "little or no correlation" between the corporation's wealth and its contributors' "support for the corporation's political ideas" because 75 percent of the corporate speaker's contributors were business corporations. 494 U.S. at 660. *Austin* did not address whether nonprofit advocacy corporations with a smaller positive percentage of for-profit contributors would be beyond the Government's reach. Clearly, however, if a nonprofit's political expenditure is funded solely by contributions from individuals who are "informed that their money may be used for [a particular electioneering] purpose," the funds provide not only a "rough barometer" but a near perfect correlation of the public's support for the corporation's political view. *MCFL*, 479 U.S. at 258, 261. Likewise, where

the funds come overwhelmingly from informed individuals, there is a strong "correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660.[3] Such is the case here, where less than one percent of the funds for *Hillary* came from for-profit corporations and Citizens United "is funded predominantly by donations from individuals who support [its] ideological message." Br. of Appellant at 5, 7; JA 244a, 251a-52a.[4]

In sum, an independent electoral expenditure like *Hillary* – paid for by a nonprofit corporation overwhelmingly with contributions from informed individual supporters – is categorically exempt from Section 203, because the expenditure "accurately reflects members' support for the organization's political views." *Austin*, 494 U.S. at 666. This Court should overrule both *Austin* and *McConnell* insofar as necessary to vindicate the ability of Citizens United,

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[3] The percentage of business contributions rather than the absolute amount is the appropriate measure of the correlation. *See* NRA *Amicus* Br. 24.

[4] Thus, it should not matter that Citizens United used a *de minimis* amount of business funds to finance *Hillary* or co-mingled its funds rather than strictly comply with Snowe-Jeffords, which was not the operative standard at the time. As long as a nonprofit corporation's contributions by informed individuals are equal to all or all but a *de minimis* amount of its independent electoral expenditures, there is no constitutionally significant risk of *Austin*-style distortion.

the NRA, and other nonprofit advocacy groups to use donations from like-minded individuals to fund electoral speech.

III. The Court Should Overturn *Austin* in Whole and *McConnell* in Part

More generally, the Court would be amply justified in overturning *Austin* in whole and that portion of *McConnell* upholding Section 203 on its face. The doctrine of *stare decisis* does not stand in the way. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 127 S.Ct. 2705, 2734 (2007) (Breyer, J., dissenting) ("Justice Scalia, writing [in *WRTL II*, 127 S.Ct. at 2685-86], well summarizes [the] law" of *stare decisis*). As Justice Scalia observed recently, "[t]his Court has not hesitated to overrule decisions offensive to the First Amendment ... and to do so promptly where fundamental error was apparent." *WRTL II*, 127 S.Ct. at 2684-85. *Austin* and *McConnell* employed flawed reasoning to sanction an unworkable regime – one that shunts most corporate electoral speech into a world of post-litigation irrelevance and skews the political marketplace in favor of wealthy individuals and media conglomerates. The two decisions are recent aberrations in an otherwise robust First Amendment tradition of assiduously protecting political speech and leaving it to flow free. Groping for precedent, the Government notes that "since 1947 [Congress] has barred the use of corporate treasury funds for independent expenditures in federal election campaigns," FEC Suppl. Br. 7, 16, but the

Court "expressly declined to pronounce upon the constitutionality of such restrictions" until *Austin*. *WRTL II*, 127 S.Ct. at 2685-86 (Scalia, J.). And reversal of *Austin* and *McConnell* would not disrupt any contractual or property interests formed in reliance upon those decisions.

A. The Government Has Abandoned *Austin*'s Anti-Distortion Rationale

The Government, in grasping for strands of doctrine and reasoning that might ground *Austin*'s holding, does not even mention the anti-distortion rationale that expressly undergirds it. This is not surprising, for that anti-distortion rationale has never found meaningful existence or explication outside *Austin* itself, apart from *McConnell*'s unexamined reliance thereon.

Austin's anti-distortion rationale does not square with the Court's considered judgments in prior and subsequent cases. Just over a year ago, the Court stated that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Davis v. FEC*, 128 S.Ct. 2759, 2773 (2008). "The hallmark of corruption is the financial '*quid pro quo*': dollars for political favors." *FEC v. National Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 497 (1985). *Austin*-style distortion has no connection to actual or apparent corruption of public officials, as even *Austin* recognized.

494 U.S. at 659-60 (calling distortion "a different type of corruption" from "financial *quid pro quo*"). Indeed, the Government now appears to concede as much. FEC Suppl. Br. 11 ("The Court did not decide in *Austin* or *McConnell* whether the compelling interest in preventing actual or apparent corruption provides a constitutionally sufficient justification for prohibiting the use of corporate treasury funds for independent electioneering.").

Rather, "[t]he only effect ... that the 'immense aggregations' of wealth will have (in the context of independent expenditures) on an election is that they might be used to fund communications to convince voters to select certain candidates over others" – that is, "to convince voters of the correctness of their ideas." *McConnell*, 540 U.S. at 274 (Thomas, J., dissenting). Legislation that suppresses the ability to compete effectively in the marketplace of political ideas "is antithetical to everything for which the First Amendment stands." *Id.*; *id.* at 324 (Kennedy, J., dissenting). Moreover, such distortion is "*especially*" "unlikely [under Title II because] disclosure requirements *tell* the people where the speech is coming from." *Id.* at 258-59 (Scalia, J., dissenting).

Finally, if mitigating *Austin*-style distortion were a compelling governmental interest, Section 203 would be impermissibly underinclusive because expenditures by wealthy political activists are no less likely to distort than ones by corporations.

In sum, the Government is correct to abandon *Austin*'s anti-distortion rationale.[5] We respectfully urge this Court to follow suit.

B. Gratitude for Political Support Does Not Equate to Corruption

With the anti-distortion rationale moribund, the Government scurries to justify Title II as the antidote for actual or apparent corruption. The Government posits that "federal office-holders and candidates [might be] aware of and [feel] indebted to corporations and unions that financed electioneering advertisements on their behalf or against their opponents." FEC Suppl. Br. 8. This argument is as misplaced as it is familiar. The gratitude a candidate feels to his supporters "is not a *corruption* of the democratic political process; it *is* the democratic political process." *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J. dissenting). The fear that a candidate may feel grateful for political support – whether a vote, an endorsement, an independent issue ad, or an independent ad extolling the candidate's virtues or decrying the opponent's vices – is, in a real sense, a fear of democracy itself. Those who

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[5] The Government's revisionist attempt to justify Title II as protection for corporate shareholders, FEC Br. at 12, which is generally flawed for reasons discussed below, specifically makes no sense as applied to nonprofit advocacy organizations such as Citizens United and the NRA, whose speech naturally attracts only those individuals who support it.

provide such support naturally expect that, if the campaign succeeds, the official will cast votes in a way that reflects the shared views that inspired the support in the first place.

This is a founding principle of our Republic. As Publius explained, not only is it "natural" that a candidate for office "should be willing to allow [his 'fellow-citizens'] their proper degree of influence upon his conduct," but also such "dependence on the people" is a central virtue of democracy, for it is "the primary control on the government." THE FEDERALIST No. 35, at 221 (Hamilton); *id.* No. 51, at 349 (Madison). Or, as Justice Kennedy more recently put it: "It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness." *McConnell*, 540 U.S. at 297; *see also id.* at 259 (Scalia, J.). "Evil corporate (and private affluent) influences are well enough checked (so long as adequate campaign-expenditure disclosure rules exist) by the politician's fear of being portrayed as 'in the pocket' of so-called moneyed interests." *Id.*

The Government tries to blur the line between ordinary political gratitude and *quid pro quo* transactions, but the Court has drawn the line straight, bright, and firm. In *Buckley v. Valeo*, the Court concluded that "independent expenditure ceiling[s] ... fail[ ] to serve *any* substantial governmental interest

in stemming the reality *or appearance* of corruption in the electoral process." 424 U.S. 1, 47-48 (1976) (emphases added); *see also, e.g., FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-41 (2001). Citing Judge Kollar-Kotelly's opinion from the three-judge district court in *McConnell*, the Government here asserts that the "record in *McConnell* ... indicated that ... federal office-holders ... felt indebted to corporations ... that financed [favorable] electioneering advertisements." FEC Suppl. Br. 8. Tellingly, no other judge on the *McConnell* panel joined Judge Kollar-Kotelly's skimpy collection of evidence and no Justice later ratified it. More importantly, as Judge Kollar-Kotelly admitted, "the record [did] not have any direct examples of votes being exchanged for" independent electioneering communications, in marked contrast to the robust evidentiary record supporting Title I. *Compare McConnell v. FEC*, 251 F.Supp.2d 176, 555-60, 623-24 (D.D.C. 2003) (Kollar-Kotelly, J.), *with McConnell*, 540 U.S. at 129-30, 143-52, 155-56. Today, "[n]o one seriously believes that *independent* expenditures could possibly give rise to *quid-pro-quo* corruption without being subject to regulation as *coordinated* expenditures." *WRTL II*, 127 S.Ct. at 2678 n.4 (Scalia, J.).

Moreover, the gratitude "rationale has no limiting principle," and would leave independent political expenditures of every stripe exposed to regulatory suppression. *McConnell*, 540 U.S. at 329 (Kennedy, J.). Under the Government's theory, "Congress would have the authority to outlaw even

pure issue ads," independent expenditures by individuals, and independent expenditures by PACs "because they, too, could endear their sponsors to candidates who adopt the favored positions." *Id.* But the Court has rightly rejected each of those restrictions. *See WRTL II*, 127 S.Ct. at 2672; *Buckley*, 424 U.S. at 51; *NCPAC*, 470 U.S. at 498; *McConnell*, 540 U.S. at 275 n.8 (Thomas, J.).[6] In short, the Government's false equation of gratitude to corruption rings no truer now than it did before.

C. No Other Rationale Justifies BCRA § 203

None of the Government's other asserted rationales for limiting independent expenditures by corporations should carry the day.

First, *Austin*'s anti-distortion theory ultimately seems to reflect a desire to "level the playing field" between wealthy and non-wealthy political speakers. That is most certainly not a legitimate government

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[6] According to the Government, "[t]he nature of business corporations makes corporate political activity inherently more likely than individual advocacy to cause *quid pro quo* corruption or the appearance" thereof. FEC Suppl. Br. 9. There is no reason to suppose, however, that wealthy, powerful, or influential individuals cannot provide assistance comparable to that of business corporations when it comes to helping candidates win office. And there certainly is no reason to suppose that "corporate political activity" by a *PAC*, which all agree cannot be stifled, does not pose precisely the same risk of corruption or the appearance thereof.

objective. *Davis*, 128 S.Ct. at 2773-74; *MCFL*, 479 U.S. at 257; *Buckley*, 424 U.S. at 48-49; *WRTL II*, 127 S.Ct. at 2677 (Scalia, J.).

Second, *Austin* and the Government evince a distrust of corporate speech and participation in the political process. *See* FEC Suppl. Br. 9-10. But the Court has repeatedly recognized that express advocacy is "at the heart of the First Amendment's protection" and is "indispensable to decisionmaking in a democracy"; this is "no less true because the speech comes from a corporation rather than an individual." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978); *Buckley*, 424 U.S. at 45, 50, 187 (striking down restriction on independent expenditures by "persons," which included "corporation[s]"); *see also WRTL II*, 127 S.Ct. at 2677-78 (Scalia, J.). Indeed, in *Bellotti* the Court squarely rejected the idea that corporate participation "would exert an undue influence on the outcome of a referendum vote" by "drown[ing] out other points of view" and "destroy[ing] the confidence of the people in the democratic process." 435 U.S. at 789.

Third, *Austin* expressed concern, which the Government echoes, for shareholders, whose "purchase of [for-profit] corporate stock does not imply any intent to subsidize electoral advocacy." FEC Suppl. Br. 12-13; *Austin*, 494 U.S. at 663. But shareholders necessarily delegate some authority to the corporation to act in a way that maximizes the shareholders' return. Presumably, if a business corporation engages in political speech, it does so to

serve its business interests and thus benefit its shareholders. If shareholders nonetheless disagree with the way in which the corporation exercises its authority, they are protected by the "procedures of corporate democracy," as well as the "free[dom] to withdraw [the] investment at any time and for any reason." *Bellotti*, 435 U.S. at 794-95 & n.34; *see McConnell*, 540 U.S. at 324-25 (Kennedy, J.); *id.* at 275 (Thomas, J.). Likewise, a contribution to a non-profit advocacy corporation, such as Citizens United or the NRA, "necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor," and a member "dissatisfied with how funds are used can simply stop contributing." *MCFL*, 479 U.S. at 261. Of course, "contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." *NCPAC*, 470 U.S. at 494-95.

Finally, when enacting BCRA § 203, Congress fretted "that there is too much money spent on elections." *McConnell*, 540 U.S. at 261 (Scalia, J.). But Congress was not concerned that this money was being spent running disciplined ads supporting

re-election of incumbents. Rather, as explained above, Congress enacted Title II for the utterly impermissible purpose of suppressing speech that threatened incumbents – that is, Congress itself. *Id.* at 261-64. Nonprofits were a particular target but not the only one; Title II "prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort." *Id.* at 248-50; *see* NRA *Amicus* Br. 9-10.

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Section 203 is, therefore, invalid in its origins, design and operation. And it is due to be struck down along with the anomalous and misconceived precedents that paved its way.

CONCLUSION

For the reasons stated here, in the NRA's prior *amicus* brief, and in Citizens United's briefs, the judgment of the district court should be reversed, and Title II's prohibition on corporate funding of electioneering communications either should be held categorically unconstitutional as applied to nonprofit corporations that fund their electioneering communication with contributions from individuals informed of the corporation's political purpose, or else should be held unconstitutional on its face.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICI CURIAE OF NORMAN ORNSTEIN, THOMAS MANN, ANTHONY CORRADO, AND DANIEL ORTIZ IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE COURT SHOULD NOT REOPEN THE ISSUE ADVOCACY LOOPHOLE THAT BCRA SECTION 203 CLOSED.	4
CONCLUSION	16

TABLE OF AUTHORITIES

	Page
CASES:	
Arizona v. *Rumsey*, 467 U.S. 203 (1984)	16
Austin v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990)	*passim*
Buckley v. *Valeo*, 424 U.S. 1 (1976)	*passim*
FEC v. *Beaumont*, 539 U.S. 146 (2003)	*passim*
FEC v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001)	1
FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)	6, 7, 9
FEC v. *National Right to Work Comm.*, 459 U.S. 197 (1982)	5, 6
FEC v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007)	2, 4, 16
McConnell v. *FEC*, 540 U.S. 93 (2003)	*passim*
McConnell v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003)	*passim*
Nixon v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).	2
United States v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567 (1957)	5
Vieth v. *Jubelirer*, 541 U.S. 267 (2004)	2
Wisconsin Right to Life, Inc. v. *FEC*, 546 U.S. 410 (2006)	2

TABLE OF AUTHORITIES—Continued

	Page
STATUTORY AND REGULATORY PROVISIONS:	
Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 91-92	*passim*
Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074	6
Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*	2
2 U.S.C. § 431(9)(A)(i)	6
2 U.S.C. § 441b	6, 7, 9
2 U.S.C. § 441b(a)	6
2 U.S.C. § 441b(b)(2)	3, 14
RULES:	
S. Ct. R. 37.3(a)	2
S. Ct. R. 37.6	1
OTHER AUTHORITIES:	
144 Cong. Rec.:	
p. H6802 (daily ed. July 30, 1998)	10
pp. S1048-49 (daily ed. Feb. 26, 1998)	13
147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001)	8
148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002).	13
Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns, S. Rep. No. 105-167 (1998)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
Report of Thomas E. Mann, *at* http://www.campaignlegalcenter.org/McConnell-31.html	8, 9, 10
S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. (1947)	5

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are three political scientists who have dedicated much of their careers to studying, analyzing and writing extensively on Congress, federal elections, campaign finance, and American politics, and a law professor expert in election law.[1]

Anthony J. Corrado, Jr. is a Professor of Government at Colby College and Chair of the Board of Trustees of the Campaign Finance Institute. He served as an expert witness in *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001), and this Court cited and quoted his expert statement in its opinion in that case.

Thomas E. Mann is a Senior Fellow in Governance Studies at the Brookings Institution. He served as an expert witness in *McConnell* v. *FEC*, 251 F. Supp. 2d 176 (D.D.C.), *aff'd in part & rev'd in part*, 540 U.S. 93 (2003), and this Court cited and quoted his expert report in its opinion in that case. *See* 540 U.S. at 124 nn.8, 9, 11 & 12; *id.* at 148 & 155.

Norman J. Ornstein is a Resident Scholar at the American Enterprise Institute for Public Policy Research. He is the founder and director of the Campaign Finance Working Group, a group of scholars and practitioners that helped craft the McCain-Feingold legislation.

Stemming from their expertise and interest in federal elections and campaign finance reform, Professor Corrado, Dr. Ornstein, and Dr. Mann have filed

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae* and their counsel made a monetary contribution to the preparation or submission of the brief.

amici briefs in previous cases before this Court involving election-law issues.[2]

Daniel R. Ortiz is John Allan Love Professor of Law at the University of Virginia. He teaches and writes in the area of election law and served as coordinator of the Task Force on Legal and Constitutional Issues for the National Commission on Federal Election Reform chaired by Presidents Carter and Ford.

The *amici* have a great interest in seeing to the success of the reforms that they helped bring to fruition and that have strengthened our federal campaign finance system, and offer their views to aid the Court in this case. Their brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

This case involves another as-applied challenge to Section 203 of the Bipartisan Campaign Finance Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 91-92. *See FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (*WRTL II*). BCRA overhauled our federal election laws by amending, *inter alia*, the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. § 431 *et seq.* *See McConnell*, 540 U.S. at 114. Section 203 of BCRA amended FECA by prohibiting corporations and unions from financing, with their general treasury funds, "electioneering communication[s]"—*i.e.*, communications referring to a federal

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[2] *See FEC* v. *Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (Corrado, Mann & Ornstein); *Wisconsin Right to Life, Inc.* v. *FEC*, 546 U.S. 410 (2006) (per curiam) (Corrado, Mann & Ornstein); *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (Mann & Ornstein); *McConnell* v. *FEC*, *supra* (Ornstein); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, *supra* (Mann); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (Mann).

office candidate and broadcast within 30 days of a primary or 60 days of a general election in the candidate's jurisdiction. *See* 2 U.S.C. § 441b(b)(2).

Citizens United argues that Section 203 could not, consistent with the First Amendment, bar it from using general treasury funds to make its documentary about then-Senator Hillary Clinton—*Hillary: The Movie*—available to cable subscribers "on demand" as she vied for the Democratic Party's 2008 presidential nomination. The Court has asked for supplemental briefing on the question whether it should overrule *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990)—which upheld a state statute requiring corporations and unions to use segregated funds for campaign advocacy—or *McConnell*—which, in the context of a facial challenge, held that Section 203 survived strict scrutiny. *See* 540 U.S. at 207-208.

The answer to the Court's question is no. Preventing corporations and unions from using their general treasury funds to influence federal elections is not a novel congressional objective; it is one that Congress has pursued for more than a century with this Court's approval. BCRA is only Congress's most recent effort "to purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." *Id.* at 115 (quotation marks & citation omitted).

Section 203 advances that goal by extending a longstanding prohibition against the use of corporate and union treasury funds for ads that expressly advocate the election or defeat of a federal candidate to cover a newly-defined form of communication—*i.e.*, electioneering communications. Based on overwhelming evidence, Congress concluded that this extension was necessary to prevent corporations and unions from circumventing the pre-existing FECA prohibition by funding with treasury revenues ads

that, while falling short of prohibited "express advocacy," were no less calculated to influence federal elections and likely had that effect. Section 203 thus closed a loophole in FECA that corporations and unions exploited during past elections.

The Court should not reopen that loophole by overruling either *Austin* or *McConnell*. This Court has consistently affirmed the constitutionality of restrictions on corporate express advocacy and its equivalent in recognition of the effect of unchecked corporate spending on federal elections. There is simply no reason to think that rationale, which underpins *Austin* and *McConnell*, is no longer relevant—only a few years after *McConnell* upheld Section 203 and on the very heels of the reaffirmation of that judgment a Term ago in *WRTL II*.

ARGUMENT

I. THE COURT SHOULD NOT REOPEN THE ISSUE ADVOCACY LOOPHOLE THAT BCRA SECTION 203 CLOSED.

"Since 1907, there has been continual congressional attention to corporate political activity, sometimes resulting in refinement of the law, sometimes in overhaul." *FEC* v. *Beaumont*, 539 U.S. 146, 153 (2003). Section 203 and the definition of "electioneering communication" fall into the former category. That provision extends the prohibition on the spending of corporate and union general treasury funds in connection with federal elections to encompass a newly-defined form of communication. But since the Court's seminal ruling in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), "Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law." *McConnell*, 540 U.S. at 203. Section 203 is no more than a

refinement needed to " 'plug [an] existing loophole' " in that longstanding prohibition. *United States* v. *International Union United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 582, 585 (1957) (*UAW*) (quoting S. Rep. No. 1, pt. 2, 80th Cong., 1st Sess. 38-39 (1947)).

1. The Court does not confront Citizen United's challenge to Section 203 in a vacuum, but instead should bear in mind that statute's "historical prologue." *Beaumont*, 539 U.S. at 156; *see UAW*, 352 U.S. at 570 ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). That prologue is critical: The prohibition on corporate and union general treasury expenditures in connection with federal elections has long been a cornerstone of federal election law. *See Beaumont*, 539 U.S. at 152-154. As this Court has recognized, that restriction reflects an abiding concern with the ability of corporations and unions to leverage their state-sanctioned privileges and to aggregate large amounts of capital into unfair political advantages. *See Austin*, 494 U.S. at 658-659; *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 207-208 (1982) (*NRWC*).

Congress made its initial foray into the arena of campaign finance regulation more than a century ago—in 1907. The Tillman Act responded to the controversy over corporate contributions in the 1904 elections and President Roosevelt's call for a ban on corporate political contributions by banning "any corporation whatever from making a money contribution in connection with federal elections." *Beaumont*, 539 U.S. at 153 (quotation marks & citation omitted). In 1925, Congress extended the Tillman Act's prohibition on corporate contributions to encompass "anything of value" and by criminalizing the giving and receiving of corporate contributions. *See*

NRWC, 459 U.S. at 209 (citing Corrupt Practices Act, 1925, §§ 301, 313, 43 Stat. 1070, 1074). With the Taft-Hartley Act of 1947, Congress later extended the scope of this prohibition to include labor unions and "expenditures." *See McConnell*, 540 U.S. at 117.

In its "steady improvement of the national election laws," *id.*, Congress enacted FECA in 1971, which "ratified the earlier prohibition on the use of corporate and union general treasury funds for political contributions and expenditures." *Id.* at 118. Specifically, FECA Section 441b, which constituted "merely a refinement of th[e] gradual development of the federal election statute," *NRWC*, 459 U.S. at 209, made it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any" federal election. 2 U.S.C. § 441b(a); *see FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986) (*MCFL*). The term "expenditure" included "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). While barring expenditures of general treasury funds, however, FECA "expressly permitted corporations and unions to establish and administer separate segregated funds (commonly known as political action committees, or PACs) for election-related contributions and expenditures." *McConnell*, 540 U.S. at 118.

2. FECA Section 441b's prohibition against corporate expenditures of "anything of value" in connection with federal elections was later modified by this Court in a way that ultimately prompted Congress to enact BCRA Section 203. In *MCFL*, this Court accepted the argument that FECA Section 441b "necessarily incorporates the requirement that a communication 'expressly advocate' the election of candidates," 479 U.S. at 248, and held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *Id.*

at 249. This requirement stemmed from the Court's prior decision in *Buckley*, which—in order to avoid vagueness and overbreadth concerns inhering in a different FECA provision—held that "expenditure encompassed 'only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.'" *Id.* at 248-249 (quoting *Buckley*, 424 U.S. at 80). *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." *MCFL*, 479 U.S. at 249. *Buckley* identified eight "more pointed exhortations," 424 U.S. at 44 n.52, which later became "known as the 'magic words' requirement." *McConnell*, 540 U.S. at 191.

"As a result of *MCFL*, corporations and labor unions were permitted to use their general treasury funds on independent expenditures in connection with a federal election, provided that those independent expenditures did not contain words of 'express advocacy.'" *McConnell*, 251 F. Supp. 2d at 525-526 (Kollar-Kotelly) (footnote omitted). That meant that "corporations and labor unions could use their general treasury funds to pay for an advertisement *which influenced a federal election*, provided that the corporation or labor union did not use any of *Buckley*'s 'magic words' in the advertisement." *Id.* at 526 (emphasis added).

3. The prohibition contained in FECA Section 441b (qualified by the magic words requirement) proved no exception to the lesson of experience that "candidates, donors, and parties test the limits of the current law." *Beaumont*, 539 U.S. at 155 (quotation marks & citation omitted). After *MCFL*, corporations tested FECA Section 441b's prohibition by making expenditures on ads that eschewed *Buckley*'s "magic words" but were no less effective at influencing federal elections than communications containing

"pointed exhortations" of support for or opposition to candidates for federal office. *See McConnell*, 251 F. Supp. 2d at 526 (Kollar-Kotelly). As Dr. Mann explained in his report in the *McConnell* litigation, research concerning this period reveals "extensive and elaborate efforts by parties, candidates, unions, corporations and groups to exploit this new issue advocacy loophole to avoid the strictures of federal election law." Report of Thomas E. Mann 20-21 [Mann Report].

4. The 1990s witnessed an explosion of issue advocacy in which corporations and unions "spent hundreds of millions of dollars of their general funds to pay for these ads." *McConnell*, 540 U.S. at 127. The Annenberg Center for Public Policy concluded that "the numbers of ads, groups, and dollars spent on issue advocacy * * * climbed" markedly from the 1996 to the 2000 election cycle. *McConnell*, 251 F. Supp. 2d at 879 (Leon). It found that the 1995-96 election cycle saw about "$135 million to $150 million * * * spent on multiple broadcasts of about 100 ads." *Id.*

The numbers only grew during the next election cycle: "77 organizations aired 423 advertisements at a cost of between $250 million and $340 million." *Id.* And during the "1999-2000 election cycle, the Annenberg Center found that 130 groups spent over an estimated $500 million on 1,100 distinct advertisements." *Id.* The Annenberg Center's tracking of the rise of organizations' reliance on issue advocacy did not escape Congress's attention. *See* 147 Cong. Rec. S2455-56 (daily ed. Mar. 19, 2001).

5. The meteoric rise in issue ads was not a coincidence but a strategy adopted by organizations intent on influencing federal elections. As Dr. Mann has explained, "[p]arties and outside groups used issue advocacy as a cover to finance campaigns for and against federal candidates in targeted races." Mann

Report 24. Two judges on the three-judge District Court convened to review the pre-enforcement challenge to BCRA similarly found that organizations used issue ads to influence federal elections. Judge Kollar-Kotelly found "uncontroverted" evidence "that by the early 1990s and especially by 1996, interest groups had developed a strategy to effectively communicate an electioneering message for or against a particular candidate without using the magic words." *McConnell*, 251 F. Supp. 2d at 528 (quotation marks, alteration & citation omitted). Judge Leon likewise concluded that the "factual record unequivocally establishes that [issue ads] have not only been crafted for the specific purpose of directly affecting federal elections, but have been very successful in doing just that." *Id.* at 800.

6. *Buckley*'s line between express advocacy and issue advocacy—later imported into FECA Section 441b in *MCFL*—was not only easily and frequently circumvented but largely illusory from the start. *See* 424 U.S. at 42. This Court in *McConnell* confirmed that the express advocacy test is "functionally meaningless." 540 U.S. at 193, 217. In other words, "[w]hile the distinction between 'issue' and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects." *Id.* at 126.

Experience powerfully demonstrated that the express advocacy test and the focus on "magic words" failed accurately to identify communications designed to influence federal elections. As Dr. Mann has explained, "research by political scientists confirmed the suspicion" that there is "little difference in purpose and content between express advocacy and candidate-specific issue advocacy communications financed by parties and groups." Mann Report 24. The result: "Voters were unable to differentiate candidate-specific issue ads * * * sponsored by par-

ties and outside groups from campaign ads run by candidates." *Id.*

That the dichotomy between express advocacy and issue advocacy is a false one was further born out by the *McConnell* litigation. All three of the judges of the District Court agreed that few ads run by candidates, parties or interest groups rely on words of express advocacy. *See* 251 F. Supp. 2d at 303 (Henderson); *id.* at 529 (Kollar-Kotelly); *id.* at 874 (Leon). The record before them confirmed that media professionals actually disfavored such heavy-handed tactics. *Id.* at 529-530 (Kollar-Kotelly); *see also id.* at 305 (Henderson); *id.* at 874-875 (Leon). Rather, the "most effective" course, as "[a]ll advertising professionals understand," is to "lead[ ] the viewer to his or her own conclusion without forcing it down their throat." *Id.* at 529-530 (Kollar-Kotelly); *id.* at 875 (Leon).

Members of Congress themselves—some of them "seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years"[3]—confirmed that the "magic words" of express advocacy "do not distinguish pure issue advertisements from candidate-centered issue advertisements." *Id.* at 532 (Kollar-Kotelly). The Congressional Record is replete with such views. *See, e.g.*, 144 Cong. Rec. H6802 (daily ed. July 30, 1998) (statement of Rep. Shays) ("They are not sham in the sense that they do not have a right to speak, but they are not issue ads, they are campaign ads, and we call them such.").

7. The widespread practice of using soft money to fund issue ads designed to influence federal elections was further documented in the six-volume report—spanning nearly 10,000 pages—that the Senate

[3] *Buckley*, 424 U.S. at 261 (White, J., concurring in part & dissenting in part).

Governmental Affairs Committee (Committee), led by Chairman Fred Thompson and Ranking Member John Glenn, produced following its investigation into campaign finance law abuses during the 1996 presidential campaigns. *See Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, S. Rep. No. 105-167 (1998) (Thompson Report). This Court has characterized the Committee's findings as "disturbing." *McConnell*, 540 U.S. at 122.

The Committee concluded that issue ads constituted "the second most significant loophole" in the pre-existing campaign finance regime. Thompson Report at 5968 (minority views). It "found such ads highly problematic for two reasons." *McConnell*, 540 U.S. at 131. *First*, because issue ads "accomplished the same purpose as express advocacy (which could lawfully be funded only with hard money), the ads enabled unions, corporations, and wealthy contributors to circumvent protections that FECA was intended to provide." *Id.* *Second*, while the ads were "ostensibly independent of the candidates," they were "often actually coordinated with, and controlled by, the campaigns." *Id.* "The ads thus provided a means for evading FECA's candidate contribution limits." *Id.* The Committee's findings bear out these conclusions.

The Thompson Report found that both national parties used soft money to fund issue ads intended to influence the 1996 presidential election. The Democratic National Committee (DNC) spent $44 million on issue ads during the 1996 presidential election, while the Republican National Committee (RNC) spent $24 million. *See* Thompson Report at 4482; *id.* at 8294 (minority views).

Just as the national parties exploited the issue-advocacy loophole, the Thompson Report also concluded that corporations and unions did too. Such

organizations spent "roughly one-seventh of the 400 million dollars expended on political advertising during the 1996 elections by parties, candidates and others." *Id.* at 3993. These ads were likewise intended to influence federal elections and were often coordinated with the presidential candidates' campaigns or their respective national parties. *Id.* The Thompson Report found, for example, that "[e]vidence * * * indicates [that AFL-CIO] programs were conceived, designed and implemented to defeat Republican Members of Congress during the 1996 elections." *Id.*; *see also id.* at 128.

Groups backing Republican candidates similarly used issue ads to influence federal elections. For instance, The Coalition: Americans Working for Real Change, a group formed to counter issue ads aired by the AFL-CIO, produced ads nearly identical to those run by the National Republican Congressional Committee (NRCC), a division of the RNC, aired them at the same time as the NRCC's ads and "in districts where the Republican incumbent's seat was vulnerable." *Id.* at 8944 (minority views). Another group, Triad Management Services, also "channeled millions of dollars from its backers to two tax-exempt groups it had established for the sole purpose of running attack ads against Democratic candidates under the guise of 'issue advocacy.' " *Id.* at 4569 (minority views).

The Thompson Report concluded that repairs to the campaign finance laws must involve restrictions on issue advocacy. "The majority expressed the view that a ban on the raising of soft money by national party committees would effectively address the use of union and corporate general treasury funds in the federal political process only if it required that candidate-specific ads be funded with hard money." *McConnell*, 540 U.S. at 132; *see* Thompson Report at 4492; *id.* at 9394 (minority views).

8. "*Buckley*'s express advocacy line [did] not aid[ ] the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 193-194. The legislative process culminating in the passage of BCRA spanned more than six years and generated multiple reform bills introduced in Congress. *See McConnell*, 251 F. Supp. 2d at 434 & n.1. This process was influenced by the failings of the pre-BCRA campaign-finance regime brought to light by the Thompson Report as well as the reforms that the report proposed.[4] Senator Feingold, for example, opined that, "in the wake of the Thompson investigation, we reluctantly concluded that we need to first focus our efforts on closing the biggest loopholes in the system: the soft money and the phony issue ads." 148 Cong. Rec. S2104 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold); *see also* 144 Cong. Rec. S1048-49 (daily ed. Feb. 26, 1998) (statement of Sen. Glenn).

9. Section 203 directly combats the well-documented problem of issue ads that avoided express advocacy but nevertheless have the purpose and likely effect of influencing federal elections. That section extended FECA's pre-existing prohibition on the use of corporate and union general treasury funds to finance communications influencing federal elections—which *MCFL* had limited to communications expressly advocating election or defeat of a particular candidate—to cover any "electioneering communication." 2 U.S.C. § 441b(b)(2). As a result, "corporations and unions may not use their

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[4] The House and Senate bills that became BCRA were not accompanied by explanatory committee reports. Members of Congress frequently relied on the Thompson Report's findings in floor debates on BCRA, however. *See, e.g.*, 147 Cong. Rec. S3138 (daily ed. Mar. 29, 2001) (statement of Sen. Levin) ("The 1997 Senate investigation collected ample evidence of campaign abuses.").

general treasury funds to finance electioneering communications, but they remain free to organize and administer segregated funds, or PACs, for that purpose." *McConnell*, 540 U.S. at 204.

Congress's new term—"electioneering communication"—is carefully calculated to identify (and block) corporate and union general treasury expenditures on advertisements intended to influence federal elections that escaped detection under *Buckley*'s express advocacy radar. Each criterion of Congress's new term is bottomed on empirical evidence. *First*, the definition of electioneering communication aims only at the media "found by Congress to be problematic"—*viz.*, broadcast, cable, and satellite communications. *McConnell*, 251 F. Supp. 2d at 569 (Kollar-Kotelly). "The records developed in [the BCRA pre-enforcement] litigation and by the Senate Committee adequately explain the reasons for this legislative choice." *McConnell*, 540 U.S. at 207. As Judge Kollar-Kotelly explained, that record "demonstrate[d] that more than any other medium, broadcast advertisements were the vehicle through which corporations and labor unions spent their general treasury funds to influence federal elections." *McConnell*, 251 F. Supp. 2d at 573. The Thompson Report further supported Congress's finding that "corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections." *McConnell*, 540 U.S. at 207. *See* Thompson Report at 4465, 4474-81; *id.* at 7521-25 (minority views).

Second, the definition of electioneering communication encompasses only messages that refer to clearly identified candidates for federal elected office. During the pre-enforcement challenge, "[f]ederal officeholders and candidates * * * testif[ied] that, based on their experience, the intent behind issue

advertisements that mention the name of a federal candidate, are aired right before the election, and broadcast to the candidate's electorate, is to influence the election." *McConnell*, 251 F. Supp. 2d at 534 (Kollar-Kotelly). These politicians' intuitions were confirmed by political consultants' "uncontroverted testimony that when designing pure issue advertisements, it was never necessary to reference specific candidates for federal office in order to create effective ads." *Id.* at 628 (quotation marks & ellipsis omitted).

Third, the 30- and 60-day pre-election blackout periods applicable to electioneering communications also strongly correlate to the periods during which ads aimed at influencing federal elections are most likely to air—the time period immediately preceding an election. And, in *McConnell*, this Court similarly concluded that, although "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [30 and 60 day] preelection time spans but had no electioneering purpose is a matter of dispute * * * the *vast majority* of such ads clearly had such a purpose." 540 U.S. at 206 (emphasis added) (citations omitted).

Fourth, the definition of electioneering communication is keyed to messages that are targeted to the electorate relevant to the candidate to which the message refers. This component of the definition accounts for the fact that messages that "target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude." *McConnell*, 251 F. Supp. 2d at 633 (Kollar-Kotelly). Officeholders and candidates confirmed that issue ads delivered to a candidate's electorate were intended to influence the election. *Id.* at 534.

10. Acknowledging that "Congress' careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference," *McConnell*, 540 U.S. at 117 (quotation marks & citations omitted), this Court in *McConnell* upheld Congress's corrective measure embodied in BCRA Section 203, and BCRA's primary definition of "electioneering communication" on which it relies, against a facial constitutional attack. *See id.* at 189-194, 203-209. And only last Term, the Chief Justice, author of the controlling opinion in *WRTL II*, reiterated that "[t]his Court has already ruled that BCRA survives strict scrutiny to the extent it regulates express advocacy or its functional equivalent." 127 S. Ct. at 2664.

There is no "special justification" for revisiting that holding (or *Austin*'s on which it relied in part) now. *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984) (in constitutional cases, "any departure from the doctrine of stare decisis demands special justification"). Overruling *McConnell* would free corporations and unions to engage in the very advocacy that Congress, political scientists, and this Court have concluded is harmful to the electoral process. In view of the long history of efforts to prevent corporations and unions from deploying war chests to unfairly influence federal elections that ultimately led to Congress's passage of BCRA Section 203, there can be no question that they would take full advantage of their newfound liberty to do just that.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

134

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In the
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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QUESTION PRESENTED

For the proper disposition of this case, should the Court overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and the part of *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. RESTRICTIONS ON CORE POLITICAL SPEECH MAY BE JUSTIFIED ONLY BY ACTUAL EVIDENCE OF QUID PRO QUO CORRUPTION 4

II. CORPORATE SPEECH ADDS VALUE TO A DEMOCRATIC SOCIETY 11

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 16

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523 U.S. 666 (1998) 1

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494 U.S. 652 (1990) 3, 6-9, 12-14

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Citizens Against Rent Control v. Berkeley,
454 U.S. 290 (1981) 11

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 15

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539 U.S. 146 (2003) 1

Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) 2, 13

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551 U.S. 449, 127 S. Ct. 2652 (2007) 2, 7

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435 U.S. 765 (1978) 1, 9, 12, 15

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Page

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Page

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Page

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TABLE OF AUTHORITIES—Continued

Page

Lowenstein, Daniel H., *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505 (1982) 10

Lowenstein, Daniel Hays, *A Patternless Mosaic: Campaign Finance and the First Amendment after* Austin, 21 Cap. U. L. Rev. 381 (1992) 3

Lowenstein, Daniel Hays, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784 (1985) 6

Millon, David, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219 (1988) 14

Novak, Michael, *Toward a Theology of the Corporation* (1981) 14-15

Redish, Martin H. & Wasserman, Howard M., *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235 (1998) 10, 15

Redish, Martin H., *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. Pa. J. Const. L. 783 (2001) 7

Sandefur, Timothy, *What Part of "No Law" Don't You Understand?: Getting Government Out of the Politics Business*, 12 Nexus 135 (2007) 6, 13

Schultz, David, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85 (1999) 5

TABLE OF AUTHORITIES—Continued

Page

Shockley, John S., *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. Miami L. Rev. 377 (1985) 10

Sitkoff, Robert H., *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103 (2002) 16-17

Smith, Bradley A., *The John Roberts Salvage Company: After* McConnell, *A New Court Looks to Repair the Constitution*, 68 Ohio St. L.J. 891 (2007) 5, 8, 12, 14

Wald, Patricia M., *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753 (1988) ... 17-18

Winkler, Adam, *Beyond* Bellotti, 32 Loy. L.A. L. Rev. 133 (1998) 16

Winkler, Adam, *Election Law as Its Own Field of Study: The Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243 (1999) 10

Wright, R. George, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 Tenn. L. Rev. 335 (2001) 13

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded over 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise.[1]

PLF has litigated on behalf of First Amendment speech rights in the contexts of campaign speech, corporate speech, and expressive associations. *See, e.g.*, *Fed. Election Comm'n v. Beaumont*, 539 U.S. 146 (2003); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (mem.); *Bd. of Regents, Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990); and *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

PLF believes that the First Amendment prohibits government regulation of speech—be it political or commercial, by individuals, associations, or corporations—unless the regulation satisfies strict scrutiny. Critical to the strict scrutiny analysis is identification of the compelling state interest, which PLF believes should be limited to actual evidence of individual corruption. Moreover, PLF believes that corporate speech adds value to our democratic society and should not be treated as a malignancy that the body politic rejects.

SUMMARY OF ARGUMENT

The intersection of this Court's jurisprudence regarding the regulation of political speech during election campaigns and its jurisprudence reflecting wariness of corporate participants in the market of ideas has created an untenable situation in which First Amendment rights are based on fine distinctions applied on an almost ad hoc basis.

There are distinctions between contributions and expenditures (*Buckley v. Valeo*, 424 U.S. 1 (1976)); between contributions to candidates and to ballot propositions (*Bellotti*); between direct and indirect corporate campaign contributions (*Beaumont*); between issue advocacy advertisements and express advocacy/functional equivalent advertisements (*Fed. Election Comm'n v. Wis. Right to Life, Inc. (WRTL)*, 551 U.S. 449, 127 S. Ct. 2652 (2007); *McConnell*); between individuals and corporations (*Fed. Election Comm'n v. Nat'l Right to Work Comm. (NRWC)*, 459 U.S. 197 (1982)); between business interests and "advocacy groups" (*Fed. Election Comm'n v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986)); and between small advocacy groups and large ones

(*Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)). In the thirty-three years since *Buckley*, the distinctions have grown more numerous and more fine. The parsing and hairsplitting have rendered this area of the law a patchwork of contradictory opinions impacting political speech rights at the core of the First Amendment. Relatively early on, Justice White noted that *Buckley*'s distinction between contributions and independent expenditures had caused the Federal Election Campaign Act's regulations to become a "nonsensical, loophole-ridden patchwork." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 518 (1985). This situation has only grown worse. *See, e.g.*, Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment after* Austin, 21 Cap. U. L. Rev. 381 (1992); Richard L. Hasen, Buckley *Is Dead, Long Live* Buckley: *The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. Pa. L. Rev. 31 (2004), *cited in* Lillian R. BeVier, *First Amendment Basics Redux:* Buckley v. Valeo *to* FEC v. Wisconsin Right to Life, 2007 Cato Sup. Ct. Rev. 77, 78 n.9 (*Redux*).

Thus, whether or not this Court *must* overrule *Austin* and *McConnell* to protect Appellant's speech, this Court *should* overrule these decisions to (1) restore "actual quid pro quo" corruption as the sole justification for restricting political speech rights, and (2) acknowledge the value of corporate participation in public debates, including debates during the course of elections. In so doing, this Court can revivify "the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the 'fairness' of political debate." *Austin*, 494 U.S. at 679-80 (Scalia, J., dissenting).

ARGUMENT

I

RESTRICTIONS ON CORE POLITICAL SPEECH MAY BE JUSTIFIED ONLY BY ACTUAL EVIDENCE OF QUID PRO QUO CORRUPTION

This Court has held that "contribution . . . limitations operate in an area of the most fundamental First Amendment activities," and such limitations "impinge on protected associational freedoms." *Buckley*, 424 U.S. at 14, 22. Therefore, burdens on contributions may be sustained only if the State demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. at 387-88 (affirming standard of review articulated in *Buckley* in assessing the validity of a Missouri state law imposing a limit on political contributions). *Buckley* held that "the prevention of corruption and the appearance of corruption" is a "constitutionally sufficient justification" for a limit on contributions. *Buckley*, 424 U.S. at 25-27; *see also NCPAC*, 470 U.S. at 496-97.

This Court usually defers to Congress' judgment that corporate political speech is of a type more prone to actual corruption and the appearance of corruption, thus justifying greater regulation than it would countenance for individuals. *See, e.g.*, *NRWC*, 459 U.S. at 210; *NCPAC*, 470 U.S. at 497. But this distinction between natural and corporate persons, and their respective tendencies toward corruption, does not justify this Court's continued acceptance of a campaign

finance regulatory regime that, after more than three decades of attempts, has utterly failed to achieve its stated ends. *See* Bradley A. Smith, *The John Roberts Salvage Company: After* McConnell, *A New Court Looks to Repair the Constitution*, 68 Ohio St. L.J. 891, 900 (2007). The core political speech protections of the First Amendment should be open to all equally—to the millionaire as well as to the grassroots entity that selects the corporate form to facilitate the dissemination of its message.

In the aftermath of Watergate, the Court was understandably concerned about corruption, election law abuses, and the public's subsequent loss of faith in government. *Buckley*, 424 U.S. at 27 n.28. *Buckley* presumed that political contributions can cause corruption or a public perception of corruption, even though no evidence to that effect had been adduced. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1, 18 & n.84 (2001) (*Incorporating Corporate Governance*). *Cf.* Allison R. Hayward, *Revisiting the Fable of Reform*, 45 Harv. J. on Legis. 421, 424 (2008) (observing that much of the account of state and federal regulation of corporate political speech over the last century that the Court has used to uphold corporate speech limitations "is more fable than history"). This presumption allowed the Court to elude questions as to the amount and kind of evidence required to support an allegation of corruption or the appearance of corruption. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 85, 98-99 (1999).

The notion of "corruption" as a justification for corporate political speech restrictions was considerably broadened in *Austin*, 494 U.S. 652. There, "corruption" ceded place to the even more loosely defined phrase, "corrosive and distorting effects." *Id.* at 660. This latter definition expanded the compelling state interest well beyond the *quid pro quo* interest identified only 16 years before in *Buckley*. Under *Austin*'s definition of corruption, it is nearly impossible to discern whether regulation is a permissible attempt to purge corruption from politics, or whether the regulation is an impermissible attempt to equalize influence. *See* Daniel Hays Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 851 (1985) (describing corruption as "an 'essentially contested concept,' that is, a concept containing a descriptive core on which users of the concept can agree roughly, but so unbounded and so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible").

Once corruption is perceived beyond the relationship between the contributor and the candidate, the entire electoral process is threatened; corporate speech limitations intensify this threat through their distortion of actual expressive activity. *See* Timothy Sandefur, *What Part of "No Law" Don't You Understand?: Getting Government Out of the Politics Business*, 12 Nexus 135, 145 (2007). "Within this enlarged framework, legislative intent may more easily expand from the eradication of a particular evil, to the eradication of a larger class of evils, and even to the effectuation of some model of a greater good." Miriam Cytryn, Comment, *Defining the Specter of Corruption:* Austin v. Michigan State Chamber of

Commerce, 57 Brook. L. Rev. 903, 937 (1991) (*Defining the Specter*).

Under the *Austin* standard, questions of evidence largely disappeared. After all, if public opinion polls suggest a significant agreement with the premise that "special interest groups" or "corporate" money has a corrosive impact on the political process, then the government can freely regulate speech rights. This does a disservice to the Constitution. *See* Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. Pa. J. Const. L. 783, 815 (2001) ("[I]n no other case of speech regulation has the Court been willing to accept evidence of public perception of a compelling interest, rather than existence of the interest itself, to justify restrictions on expression."); *see also* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 589, 617-29 (1991) (arguing that *Austin* is an unjustified departure from precedent because it redefines corruption as unfairness instead of the appearance or actuality of bribery and this redefinition seems to justify legislative efforts to equalize speech by restricting the voices of certain speakers). This Court has already noted the constitutional peril latent in the *Austin* corruption rationale, which taken to its natural conclusion "would call into question [the Court's] holding in *Bellotti* that the corporate identity of a speaker does not strip corporations of all First Amendment rights." *WRTL*, 127 S. Ct. at 2656.

Professor Ronald Levin identifies at least three problems with the Court's reliance on public perceptions of corruption rather than evidence of actual corruption: First, it "invites regulation on too indiscriminate a basis." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 177 (2001) (*Fighting the Appearance*); *see also* Smith, *supra*, at 920. In rough-and-tumble politics, accusations of wrongdoing are flung at any candidate. All fund-raising efforts result in accusations that the candidates are beholden to special interests. Levin, *Fighting the Appearance*, *supra*, at 177 ("The knowledge that a particular type of fund-raising has been drawn into question in an editorial or an advocacy group's press releases is not a reliable guide to deciding whether it should be suppressed."). This shift in focus allows legislators a stronger hand in election regulation, as they need only point to a disproportionate impact and identify the source to justify content based regulation. Cytryn, *Defining the Specter*, *supra*, at 949-50.

Second, reliance on public perceptions means that advocates of "reform" can make wide-ranging accusations of corruption, and then rely on the fact that some people believe the charges as a reason to justify regulation. Levin, *Fighting the Appearance*, *supra*, at 178. *Cf. Austin*, 494 U.S. at 684 (Scalia, J., dissenting) (noting that, pursuant to the appearance of corruption standard, "anything . . . deem[ed] politically undesirable can be turned into political corruption—by simply describing its effects as politically 'corrosive'").

Third, if perceptions of corruption suffice to impose greater regulation, the "reformers" will then simply have more occasions for accusations of

noncompliance. The readiness of the campaign finance watchdogs to cry "corruption!" means that candidates and their campaign staff members who make judgment calls on debatable issues will be under a microscopic scrutiny; this is an untenable situation in real life. *Id.*[2] This Court should require evidence of actual *quid pro quo* corruption to justify infringement on core political First Amendment rights, rather than permit reliance on "gossip and newspaper citations." Robert F. Bauer, *Going Nowhere, Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives*, 51 Cath. U. L. Rev. 741, 758 (2002).

Importantly, there is no evidence that corporations—as an identifiable group—are corrupt or introduce corruption into the political process, at least to any greater degree than individuals.[3] *See, e.g.*,

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[2] In 2005 (the most recent year for which data are available), California's Fair Political Practices Commission (FPPC) reported that it opened over 870 enforcement cases. FPPC, *Year in Review: 2005* at 13, *available at* http://www.fppc.ca.gov/Library/2005annual.pdf (last visited July 24, 2009).

[3] The Court should be careful to distinguish corruption from legitimately effective and persuasive speech.

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Bellotti, 435 U.S. at 790 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)). Even so, corporate contributions cannot guarantee legislation favorable to business interests. The social welfare programs of the New Deal and Great Society, and the current expanding federal regulation of the tobacco and drug industries, were enacted over the objections of

(continued...)

BeVier, *Redux*, *supra*, at 112 n.162 (citing sources). Hence, *Austin*'s and *McConnell*'s abandonment of the core political speech protections of the First Amendment, *see* BeVier, *Redux*, *supra*, at 83; Erik S. Jaffe, McConnell v. FEC*: Rationing Speech to Prevent "Undue" Influence*, 2004 Cato Sup. Ct. Rev. 245, 279, was entirely unjustified. For, despite research intended to demonstrate that corporations exert considerable influence in ballot campaigns, *see, e.g.*, Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505, 542-47 (1982); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. Miami L. Rev. 377, 391-406 (1985), the many and varied intangibles influencing any election make it extremely difficult to identify a specific causal relationship between contributions and electoral or legislative events. "How can one prove that voters were overwhelmed by spending, rather than convinced by substantive arguments, other initiative backers, or the inept advertisements for the other side?" Adam Winkler, *Election Law as Its Own Field of Study: The Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1249 (1999); *see also* Jaffe, *supra*, at 289 ("Money only buys speech, which will be effective or not depending on whether voters are persuaded by the message."). The Court should move away from the amorphous standard of "potential corruption" alleged without

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[3] (...continued)
corporate America. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 247 (1998) (*General Motors*).

evidence and demand an evidentiary showing of actual corruption before permitting the government to silence political speech.

II

CORPORATE SPEECH ADDS VALUE TO A DEMOCRATIC SOCIETY

> The First Amendment is first and foremost a denial of government power. It is not a catalogue of favored and disfavored forms of speech. It is by no means a vehicle for rendering a prejudice against profit-motivated speech the supreme law of the land. It leaves to each of us the choice of what and how to communicate and whether to communicate at all. There exists no lawful "preferred" mix of ideas, no required speech or disallowed speech. No free speech and press model is mandated by the First Amendment. Rather, each model is descriptive of that government-free environment mandated by the First Amendment.

Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (Sept. 23, 1991), *available at* http://www.cato.org/pubs/pas/pa-161.html (last visited July 24, 2009). Expressive associations have a long-standing, constitutionally protected role as part of the political process. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). Corporations are one form of expressive association. *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (plurality opinion)

("Corporations . . . contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster." (quoting *Bellotti*, 435 U.S. at 783)). *Austin* acknowledges this proposition for media corporations, 494 U.S. at 667, but makes an inappropriate content-based distinction to give other types of corporations lesser protection. *See id.* Corporations are not an alien force requiring a barrier to protect the political process from its influence. The open political process of a democratic society is the clash of all sorts of different viewpoints, many driven by economic interests and many driven by noneconomic interests. To allow entrenched politicians to pick and choose which among the disparate interests will be hobbled is antidemocratic. *Cf.* Jaffe, *supra*, at 285 (noting the incumbent favoritism of campaign finance laws); Smith, *supra*, at 906-07 (same). The fact that private associations have been a dynamic and sometimes positive influence on politics over our nation's history does not mean that modern economic organizations are not. *See Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) ("Freedom of speech is not good government because it is in the First Amendment; it is in the First Amendment because it is good government.").

Free speech adds three types of value to society: First, free speech bolsters the pursuit of truth. Second, free speech provides a check on other sources of power, thus supporting a stable, progressive, uncorrupt, and responsive democratic government. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."). Third, free speech serves values of self-realization, personal and cultural development, autonomy, and autonomous

decision-making. R. George Wright, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 Tenn. L. Rev. 335, 337-38 (2001). Accordingly, the First Amendment guarantees that citizens may speak, publish, and join together in groups to engage in political activity to try to achieve the substantive ends they deem desirable. Lillian R. BeVier, *Campaign Finance "Reform" Proposals: A First Amendment Analysis*, Cato Policy Analysis No. 282 (Sept. 4, 1997), *available at* http://www.cato.org/pubs/pas/pa-282.html (last visited July 24, 2009) (citing *NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Alabama*, 357 U.S. 449 (1958)). They may attempt to persuade others and to acquire political influence, and the government may not interfere with, punish, repress, or otherwise impede their efforts. *Id.* (citing *Hague v. CIO*, 307 U.S. 496 (1939)). These protections exist not so much because corporate speech as corporate speech is the good. Rather, allowing corporations to speak facilitates the airing of more speech, which *is* a good. *See* BeVier, *Redux*, *supra*, at 108-09.

In *Austin* and *MCFL*, the Court suggested that election-related spending by business corporations is somehow less deserving of protection than speech by individuals or political organizations, *Austin*, 494 U.S. at 659-60; *MCFL*, 479 U.S. at 257, but this criticism is based upon the constitutionally suspect "complaint that [corporations] are wealthy and that it is somehow wrong to use wealth to support political speech." Jaffe, *supra*, at 287; Sandefur, *supra*, at 150-51. Moreover, the proposition is inconsistent with *Buckley* in two ways: First, by justifying regulation with the lack of public support for corporate views, the Court contradicted the central and long-standing *Buckley* rule against the equalization of relative voices, *Austin*,

494 U.S. at 659, even while purporting to leave it in place. *Id.* at 659-60. *See also* Jaffe, *supra*, at 287-88; Smith, *supra*, at 919. Second, *Austin* relied on the grant theory (that a corporation is nothing more than an artifice granted certain benefits by the state) in basing its ruling on the special privileges of corporations. 494 U.S. at 659. This reasoning is not only conclusory, *see* Sandefur, *supra*, at 150, it also raises a troubling implication that incorporation is predicated on unconstitutional conditions. Joo, *Incorporating Corporate Governance*, *supra*, at 80; *see also Pickering v. Bd. of Educ.*, 391 U.S. 563, 574-75 (1968) (public school teacher's employment cannot be conditioned on refraining to engage in otherwise constitutional speech).

Corporations add to societal values in numerous ways. *Cf.* Michael Novak, *Toward a Theology of the Corporation* 1 (1981) ("Neither participatory democracy nor capitalism could exist without the corporation."). For example, corporations have become significant engines of charitable giving. *See* Committee Encouraging Corporate Philanthropy, *Giving in Numbers* 4 (2008), *available at* http://www.corporatephilanthropy.org/pdfs/benchmarking_reports/GivinginNumbers2008.pdf (last visited July 24, 2009) (155 surveyed companies donated over $11.6 billion in cash and products).

Moreover, corporations play an important role in diffusing and checking societal and governmental accumulations of power. David Millon, *The Sherman Act and the Balance of Power*, 61 S. Cal. L. Rev. 1219, 1243 (1988) ("Commercial opportunity meant more than just personal independence. Equally important, it guaranteed a balance of economic power in society.").

Viewed in this light, governmental suppression of corporate speech takes on

> potentially ominous implications for avoiding political power's centralization. One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority.

Redish & Wasserman, *General Motors*, *supra*, at 264.

A message's overall nature may change when the messenger changes; similarly, the degree of effectiveness and credibility may change depending on the source. *See Bellotti*, 435 U.S. at 791-92 (stating that the people in a democracy "may consider . . . the source and credibility of the advocate"); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57, 65 ("Many listeners find that the identity of the source affects the worth or at least their evaluation of the speech."). The same statement from different speakers may constitute a different message. As the Court has noted, an "espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or an ambulatory sandwich board." *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994); Redish & Wasserman, *General Motors*, *supra*, at 257. Corporate speech thus provides both a message and a messenger of value to the bustling market of ideas.

Perhaps most importantly, corporations help the individuals who form them to achieve their fullest human potential. *Cf.* Novak, *supra*, at 37-43

(observing that corporate activity bears the hallmarks of human creativity, liberty, socialization, and insight, among others). Specifically in the context of First Amendment values, corporations provide "individuals the ability to organize in a form that would allow them to engage efficiently in collective action." Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1110-11 (2002); *see also* Jaffe, *supra*, at 289-90 (observing that restrictions on the funding of speech are tantamount to restrictions on speech itself).

These "corporate" goods—especially the good of corporate speech—are in no way undercut by the happenstance that corporations operate with and spend "someone else's money." The corporate form does not enable corporations to accumulate money from their customers. Adam Winkler, *Beyond* Bellotti, 32 Loy. L.A. L. Rev. 133, 158 (1998) ("[T]he business association's form is irrelevant to its ability to attract customers and sell services or products."). As for shareholders and their role in directing corporate speech, this Court has, to be sure, expressed concern that shareholders' disincentives to disassociate from a for-profit corporation are so overwhelming as to implicate the shareholders' First Amendment rights not to associate with expressive activity. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234 (1977). But, as Professor Sitkoff explains, the Court's analysis of economic disincentives to disassociate does not comport with reality.

> The minority shareholder who invests in stock for income, which is the precondition to having an economic disincentive to dissociating, is by hypothesis indifferent

> between companies with comparable rates of return. He therefore has no reason not to sell his stock in the politically active company and then invest the proceeds in another company that is not politically active. In contrast, the minority shareholder or member of the incorporated nonprofit political association often faces an incentive not to dissociate because of the shortage of alternatives. There is a thick market for corporate securities; the menu of prospective political associations is less robust.

Sitkoff, *supra*, at 1120 (footnotes omitted). *See also Int'l Ass'n of Machinists & Aerospace Workers v. Fed. Election Comm'n*, 678 F.2d 1092, 1118 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982) (shareholder is not legally or practically obliged "to continue his investment, is not compelled to speak, in violation of his First Amendment right to remain silent" by a statute permitting corporate political action committees). Therefore, the Court's concerns about "disincentives to disassociate" do not provide a sufficiently compelling reason to deny corporate speech full protection to engage in electoral debates. This Court should not hesitate to affirm the enduring importance of corporate speech in our society.

CONCLUSION

Upon reviewing the Court's decisions since *Buckley*, Judge Patricia M. Wald presciently questioned whether the rulings "have any real roots in the values enshrined in the first amendment? Do these fine distinctions contribute more to freedom of association or to mass cynicism about how the electoral system works?" Patricia M. Wald, *Two Unsolved*

Constitutional Problems, 49 U. Pitt. L. Rev. 753, 758 (1988).

The Court's attempt to craft laws restricting political speech in the name of campaign finance reform has seen our precious free speech rights moving further from the strong trunk at the center of the First Amendment to a precarious balance on the outermost branches and leaves. Today, the law of campaign finance exists mostly as a series of distinctions in which the First Amendment protection of free speech grows ever more attenuated. By overruling *Austin* and *McConnell*, this Court may both greatly simplify this area of the law, and reinvigorate the core political speech protections of our democracy.

DATED: July, 2009.

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AMICUS CURIAE BRIEF

No. 08-205

In The Supreme Court of the United States

CITIZENS UNITED, INC.,

Appellant,

v.

FEDERAL ELECTIONS COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

AMICUS CURIAE BRIEF OF PROGRAM ON CORPORATIONS, LAW & DEMOCRACY; WOMEN'S INTERNATIONAL LEAGUE FOR PEACE & DEMOCRACY; DEMOCRACY UNLIMITED OF HUMBOLDT COUNTY; SHAYS2: THE WESTERN MASSACHUSETTS COMMITTEE ON CORPORATIONS & DEMOCRACY; AND THE CLEMENTS FOUNDATION IN SUPPORT OF APPELLEE FEDERAL ELECTIONS COMMISSION ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *AUSTIN* AND *McCONNELL* REST ON TWO CENTURIES OF CONSTITUTIONAL LAW 3

A. Corporations Are Subject to Control of the People 3

B. This Court Recognizes That Corporations Are Creations of Statute and Are Subject to Legislative Restrictions 9

C. First Amendment Speech Cases Involving Corporations Do Not Prohibit the Regulation of Corporate Political Activity 15

II. OVERRULING *AUSTIN* WOULD IMPLICATE SIGNIFICANT FOURTEENTH AMENDMENT ISSUES 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Anderson v. City of Boston, 376 Mass. 178, 380 N.E.2d 628 (1978) 18

Asbury Hosp. v. Cass County, 326 U.S. 207 (1945) 12, 13

Bank of Augusta v. Earle, 38 U.S. 519 (1839) 11, 12

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 57 (1809) 10

Bigelow v. Virginia, 421 U.S. 809 (1975) 16

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Carden v. Arkoma Associates, 494 U.S. 185 (1990) 10, 11

Charlotte C & A Railway Co. v. Gibbes, 142 U.S. 386 (1892) 21

Central Hudson Gas & Electric Corporation v. Public Service Commission of New York, 447 U.S. 557 (1980) 16

Commercial & Railroad Bank of Vicksburg v. Slocomb, 39 U.S. (14 Pet.) 60 (1840) 10

Connecticut Life Insurance Company v. Johnson, 303 U.S. 77 (1938) 19, 21

TABLE OF AUTHORITIES – Continued

Page

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Creek v. Village of Westhaven, 80 F.3d 186 (7th Cir. 1996) 18

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 5

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Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173 (1999) 16

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TABLE OF AUTHORITIES – Continued

Page

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Lochner v. New York, 198 U.S. 45 (1905) 13

Lorillard v. Reilly, 533 U.S. 525 (2001) 16

Louisville Railroad Co. v. Letson, 43 U.S. (2 How.) 497 (1844) 10, 11

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Paul v. Virginia, 75 U.S. 168 (1868) 11, 13

TABLE OF AUTHORITIES – Continued

Page

Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888) 12, 20

Robert E. Rubin, Secretary of the Treasury v. Coors Brewing Company, 514 U.S. 476 (1995) 16

Santa Clara County v. Southern Pacific Railroad Company, 118 U.S. 394 (1886) 20

Slaughter-House Cases, 83 U.S. 36 (1872) 19

Sullivan v. Fulton Steamboat Co., 19 U.S. (6 Wheat.) 450 (1821) 10

Thompson v. Western States Medical Center, 535 U.S. 357 (2002) 16

Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819) 5, 9, 15

United States v. Morton Salt Co., 338 U.S. 632 (1950) 14

United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) 12

United States v. White, 322 U.S. 694 (1944) 15

Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) 16

Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949) 19

44 LiquorMart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 16

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

U.S. CONST. art III, § 2 10

U.S. CONST. art IV, § 2 12

U.S. CONST. amend. I 3, 15, 17, 18

U.S. CONST. amend. IV 14

U.S. CONST. amend. XIV 3, 19, 20, 21

STATUTES

2 U.S.C. § 441b 2

5 U.S.C. §§ 1501-1508 18

5 U.S.C. §§ 7321-7326 18

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TABLE OF AUTHORITIES – Continued

Page

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Page

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Page

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INTEREST OF *AMICI CURIAE*

With the parties' consent, *Amici Curiae* file this brief in support of Appellee Federal Elections Commission.[1]

Program on Corporations, Law and Democracy ("POCLAD") has instigated democratic actions concerning issues of corporations and democracy since 1994. POCLAD offers seminars and publishing demonstrating how "corporate rights" doctrines undermine democracy.

Women's International League for Peace and Freedom ("WILPF") works to achieve disarmament, rights for women, racial and economic justice, and an end to violence. WILPF maintains a *Corporations v. Democracy* Issue Committee and a "Challenge Corporate Power, Assert the People's Rights" campaign.

Democracy Unlimited of Humboldt County challenges undue corporate influence on democratic self-government. In June 2006, Humboldt County, California banned financial contributions in local elections from non-local corporations.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *Amici*, their members, or their counsel contributed monetarily to preparation and submission of this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a), and granted consent. Pursuant to Rule 37.3, letters of consent to the filing of this brief have been filed with the Clerk of Court.

Shays 2: The Western Massachusetts Committee on Corporations & Democracy, through education and peaceful action, challenges legal doctrines under which corporations are believed to undermine self-government.

The Clements Foundation supports non-profit organizations involved in education, environmental responsibility, and the promotion of self-government and freedom.

SUMMARY OF ARGUMENT

The Court should not overrule *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) ("*Austin*") or the part of *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003), addressing the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b ("*McConnell*"). *Austin* and *McConnell* rest on two hundred years of Constitutional jurisprudence.

While campaign finance laws refer to types of speech – "electioneering," "issue advocacy," "express advocacy" – the question raised by reconsideration of *Austin* and *McConnell* is not whether States and Congress may regulate a *type of speech* but whether they may regulate *a type of statutory organization* that people may, or may not, use to enhance their speech. Put differently, if the people's elected representatives create legal structures for economic, charitable or other purposes, are they barred from

preventing misuse of those structures for non-permitted purposes, such as political activity?

Corporations exist as a consequence of government policy, and governments may balance privileges and restrictions that accompany the corporate form. Representative governments best determine whether people may use corporations to influence elections. *Austin* and *McConnell* follow this Court's jurisprudence to that effect, both before and after *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

Moreover, *Austin* implicates Fourteenth Amendment considerations not otherwise present here. Whether a corporation is a "person" under the Amendment is doubtful. The Court should give this issue full consideration when appropriate parties are before the Court.

ARGUMENT

I. *AUSTIN* AND *McCONNELL* REST ON TWO CENTURIES OF CONSTITUTIONAL LAW

A. Corporations Are Subject to Control of the People

People vote. People represent other people by government service. People contest elections. Corporations do none of those things.

For two hundred years, the First Amendment did not preclude restrictions on corporate expenditures

to influence elections.[2] In 1978, the *Bellotti* Court invalidated a state law limiting corporate political activity, stating: "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech." 435 U.S. at 777. The "speakers," however, *are* corporations. More precisely, some people wish to speak in a corporate capacity while avoiding regulation of that capacity.

A corporation is a structure for doing business, available only by statute. Harry G. Henn & John R. Alexander, *Law of Corporations* (3rd ed.) (West Hornbook Series 1981) at 14-35. The structure has advantages (shareholder limited liability, for instance) and disadvantages (taxation of corporate profits and shareholder dividends, for instance) as compared to other structures. Non-profit corporations have other statutory advantages (such as the ability to raise tax deductible money) and disadvantages (such as restrictions on political activity).

Lawmakers deem a corporation to be a "person" for purposes of transacting business, suing and being sued, and other acts. That policy choice rests on perceived advantages of convenience and economic gains. The Constitution, however, does not enshrine particular policy choices.

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[2] U.S. CONST. amend. I provides: "Congress shall make no law ... abridging the freedom of speech, or of the press...."

The corporate legal form is not fundamentally different today than when Chief Justice Marshall for the Court explained that a corporation, as a "mere creature of law ... possesses only those properties which the charter confers upon it...." *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819). Corporations remain creatures of statute. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89-91 (1987) ("state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law").

No evidence suggests that the framers of the Constitution or the American people intended to include corporations in the Bill of Rights. Indeed, the evidence is to the contrary. "Those who feel that the essence of the corporation rests in the contract among its members rather than in the government decree ... fail to distinguish, as the eighteenth century did, between the corporation and the voluntary association." Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy, Massachusetts, 1774-1861* at 92 and n.18. *Cf. McConnell*, 540 U.S. at 256 (Scalia, J., dissenting).

During the colonial period, only "a handful of native business corporations carried on business," and only twenty business corporations were formed by 1787, when the American people convened the Constitutional Convention. Henn & Alexander, *supra*, at 24 and n.2, *citing* E. Dodd, *American Business Corporations Until 1860* (1954); 2 J. Davis, *Essays in*

the Earlier History of American Corporations (1917); Baldwin, *American Business Corporations Before 1789*, 1 Annual Rep't of American Historical Ass'n, 253-274 (1902). *See also* Handlin, *supra*, at 99, 162. Legislatures soon created more corporations but chartered these only for specific *public* purposes, often with limited time periods. Handlin, *supra*, at 106-133; *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548-560 (1933) (Brandeis, J., dissenting). Restrictions on corporate purposes were the norm. *Id.*; *Head and Amory v. Providence Insurance Co.*, 6 U.S. (2 Cranch) 127, 166-167 (1804) ("corporation can only act in the manner prescribed by law").

It is difficult to imagine that the Framers believed the Constitution to bar legislation to prevent corporate expenditures to influence politics. James Wilson – signer of the Declaration of Independence, member of the Continental Congress, a drafter of the Constitution, and among the nation's first six Justices – expressed a prevailing view:

> A corporation is described to be a person in a political capacity created by the law ... It must be admitted, however, that, in too many instances, those bodies politick have, in their progress, counteracted the design of their original formation ... This is not mentioned with a view to insinuate, that such establishments ought to be prevented or destroyed: I mean only to intimate, that they should be erected with caution, and inspected with care.

Collected Works of James Wilson, Vol. 2. Ch. X, *Of Corporations* (ed. Kermit L. Hall and Mark David Hall) (http://oll.libertyfund.org/title/2074/166648/2957866, accessed 2009-07-22).

James Madison viewed corporations as "a necessary evil" subject to "proper limitations and guards." *Writings of James Madison*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1900), Vol. 9, To J.K. Paulding (http://oll.libertyfund.org/title/1940/119324, accessed 2009-07-22). Thomas Jefferson hoped to "crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country." University of Virginia, Thomas Jefferson Digital Archive, To George Logan (http://etext.virginia.edu/jefferson/quotations/jeff5.htm, accessed 2009-07-22).

"[T]hroughout the greater part of our history," the American people, state and federal governments, and this Court knew that corporations remained subject to democratic control. 288 U.S. at 548 (Brandeis, J., dissenting). President Jackson warned of partisan activity by the second Bank of the United States corporation: "[T]he question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions." 1833 Annual Message to Congress, University of Virginia,

Miller Center of Public Affairs (http://millercenter.org/scripps/archive/speeches/detail/3640) ("Miller Center," all accessed 2009-07-15). President Van Buren spoke "of the dangers to which the free and unbiased exercise of political opinion ... would be exposed by any further increase of the already overgrown influence of corporate authorities." 1837 Annual Message to Congress, Miller Center (http://millercenter.org/scripps/archive/speeches/detail/3589).

These warnings continued as corporations became dominant in our economy. "Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters," wrote President Cleveland. 1888 Annual Message to Congress, Miller Center (http://millercenter.org/scripps/archive/speeches/detail/3578). Theodore Roosevelt sought to end "a riot of individualistic materialism" and remediate the "total absence of governmental control [that] led to a portentous growth in the financial and industrial world both of natural individuals and of artificial individuals – that is, corporations." Theodore Roosevelt, *An Autobiography* (Scribner & Sons, 1913) (1929 ed.), at 423. "Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly." 1906 Annual Message to Congress, Miller Center (http://millercenter.org/scripps/archive/speeches/detail/3778).

Austin and *McConnell* follow this understanding of the corporation and the practices of the American

people, and follow this Court's jurisprudence over two hundred years holding that corporations do not possess the same rights as people.

B. This Court Recognizes That Corporations Are Creations of Statute And Are Subject to Legislative Restrictions

Austin concluded, "the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures." 494 U.S. at 660. The Court upheld Michigan's corporate political influence law based on the "state-created advantages" of the legal form. 494 U.S. at 658-659. Similarly, *McConnell* upheld restrictions of corporate "electioneering communications" based on "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." 540 U.S. at 205 (quotations and citations omitted). The Court decided both cases correctly.

Since the beginning of the Republic, the Court has affirmed that elected governments of the states and nation may regulate, in an even-handed manner, "the corporate structure" because governments create that structure. *Dartmouth College* described the corporate entity as "an artificial being ... existing only in contemplation of law," and created only for such "objects as the government wishes to promote." 17 U.S. at 636-637.

The Court brought this understanding of the corporation to other Constitutional provisions, such as diversity jurisdiction under Article III and the judiciary statutes.[3] In the Founders' era and beyond, the Court considered state citizenship of shareholders, not the corporation, to determine whether people who formed corporations could enter the federal courts in the corporate name. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (corporation is a "mere legal entity ... not a citizen"); *Hope Insurance Co. v. Boardman*, 9 U.S. (5 Cranch) 57, 58 (1809); *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450 (1821); *Breithaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238 (1828); *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 39 U.S. (14 Pet.) 60 (1840).

Over time, the Court overruled these cases in part and developed a shortcut strictly limited to diversity jurisdiction. *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990) ("special treatment for corporations.").[4] *Louisville Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 557-558 (1844), decreed that a corporation "is to be deemed" a citizen of the state of its creation. Nine years later, the Court followed

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[3] Article III provides "The judicial Power shall extend ... to Controversies ... between Citizens of different States...." U.S. CONST. art. III, § 2.

[4] "Special treatment" refers to the fact that the Court and Congress do not extend the same treatment to non-corporate associations.

Letson but reiterated that "an artificial entity cannot be a citizen," and "State laws by combining large masses of men under a corporate name, cannot repeal the Constitution." *Marshall v. Baltimore and Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1853) (quotation and citation omitted).[5] The Court soon began simply to treat "a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created the corporate body...." *Ohio and Mississippi Railroad Co. v. Wheeler*, 66 U.S. 286, 296 (1861). The Court confined this doctrine to diversity jurisdiction, and it has never been defended with enthusiasm for its soundness.[6]

In *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), and *Paul v. Virginia*, 75 U.S. 168 (1868), the Court refused to extend "special treatment" for

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[5] *Marshall* reflects grave concern about corporations and rights. *See* 57 U.S. at 329 ("The right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers and the combined wealth wielded by corporations in almost every State."); 57 U.S. at 339 (Daniel, J., dissenting) ("citizens only ... men, material, moral, sentient beings, must be parties, in order to give jurisdiction"); 57 U.S. at 351, 352-353 (Campbell, J., dissenting) (courts should "repel[ ] these pretensions and expose[ ] [corporations'] perilous character ... "; corporations are "disdainful" of legislators, ready "to make of them a prey; and to accomplish this, to employ corrupting and polluting appliances.").

[6] *See Carden*, 494 U.S. 185. *See also* Frankfurter, *Distribution of Judicial Power between United States and State Courts* 13 CORN. L. Q. 499, 523 (1928).

corporations to the protection of citizen rights under the Privileges and Immunities Clause of Article IV. Repeatedly, the Court has held that corporations are not citizens under that clause, or under the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.*; *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181 (1888); *Asbury Hosp. v. Cass County*, 326 U.S. 207 (1945).[7]

As the Industrial Revolution gathered pace, the Court maintained with clarity that "[t]he only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state...." *Bank of Augusta*, 38 U.S. at 587. The Court did not examine the Constitution to determine rights "given to it in that character" because the Constitution does not create corporate rights. In upholding corporate contracts outside the place of incorporation, *Bank of Augusta* declined to rest on any Constitutional provision, instead applying the law that created the corporation, the law of the state where the corporation wished to enforce a contract, and "comity." 38 U.S. at 586-590.

This Court has long known of the dominant role of corporations, but generally has not given that development Constitutional significance. *Compare McConnell*, 540 U.S. at 257-258 (Scalia, J. dissenting)

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[7] Unrelated part of *Paul* overruled by *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

with Liggett, 288 U.S. at 548 (Brandeis, J., dissenting) ("The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen; and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life, and, hence, to be borne with resignation").

By 1868, corporations had "multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them." *Paul*, 75 U.S. at 181-182. The Court denied, however, the claim of corporations to the privileges and immunities of citizenship, as a corporation is "a mere creation of local law." *Id.* at 181.

The Court, with exceptions during the era defined by *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by Day-Brite Lighting Inc. v. Missouri*, 342 U.S. 421 (1952), continued through the twentieth century to distinguish between the rights of people and corporations. In *Asbury Hosp.*, for example, the Court, citing numerous cases and without dissent, rejected a Constitutional challenge to a state law requiring corporations holding land suitable for farming to sell the land within ten years. 326 U.S. 207. Five years later, the Court again emphasized the

"public attributes" of corporations in turning aside corporate privacy claims:

> [C]orporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities.

United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (citations omitted).

The Court has recognized, in a limited fashion, assertions of corporate rights. *See infra*. n.8; Carl Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577, 664-667 (1990); *GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (corporations have "some Fourth Amendment rights"). As the Court has observed, however, a corporation has lesser Fourth Amendment rights because:

> Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce. Correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters.

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 204-205 (1946) (footnotes omitted).

Accordingly, "it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons...." *Bellotti*, 435 U.S. at 823 (Rehnquist, J., dissenting) *citing United States v. White*, 322 U.S. 694, 698-701 (1944). *See also Northwestern Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) ("The liberty referred to in that [Fourteenth] Amendment is the liberty of natural, not artificial, persons").

Nearly a decade after *Bellotti*, the Court rejected a Commerce Clause challenge to an anti-takeover statute. *CTS Corp.*, 481 U.S. 69. Quoting *Dartmouth College* and noting Justice Rehnquist's dissent in *Bellotti*, the Court concluded: "It thus is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares." *Id.* at 89-91.

That insight about corporations is correct. The First Amendment and the Commerce Clause implicate different Constitutional interests but nothing in the First Amendment requires that States, Congress, or this Court ignore the capacity of the speaker.

C. First Amendment Speech Cases Involving Corporations Do Not Prohibit the Regulation of Corporate Political Activity

Until *Bellotti*, the First Amendment had never barred regulation of corporate political activity. 435

U.S. at 822-823 (Rehnquist, J. dissenting). In the mid-1970s, however, an unprecedented "commercial speech" doctrine began to emerge. The Court invalidated a state prohibition on abortion advertising, *Bigelow v. Virginia*, 421 U.S. 809 (1975), and "the notion of unprotected 'commercial speech' all but passed from the scene." *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 759 (1976). Justice Rehnquist dissented. 425 U.S. at 784 ("[N]othing in the United States Constitution ... requires the Virginia Legislature to hew to the teachings of Adam Smith ... ").[8]

Corporations then challenged a Massachusetts prohibition on corporate expenditures to influence ballot questions, except questions "materially affecting any of the property, business or assets of the corporation." *Bellotti*, 435 U.S. 768. Mindful of *Virginia Pharmacy* and *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), the Massachusetts Supreme Judicial Court nevertheless rejected the challenge, noting, "a

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[8] This new doctrine has led to invalidation of numerous democratically enacted public welfare measures in recent years. *See Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980); *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986); *Robert E. Rubin, Secretary of the Treasury v. Coors Brewing Company*, 514 U.S. 476 (1995); *44 LiquorMart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173 (1999); *Lorillard v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002); *International Dairy Foods Association v. Amestoy*, 92 F.3d 67 (2nd Cir. 1996).

corporation does not have the same First Amendment rights to free speech as those of a natural person...." *First Nat. Bank of Boston v. Attorney General*, 371 Mass. 773, 784-785, 359 N.E.2d 1262 (1977).

This Court reversed. Citing First Amendment cases that involved corporations, the Court labeled the Massachusetts arguments "extreme" and "an artificial mode of analysis." 435 U.S. at 778-779 and n.14. Justice Rehnquist disagreed:

> A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.

435 U.S. at 825-826.

"Corporations" cases are not "speech" cases. None of the First Amendment cases cited in *Bellotti* involved a regulation directed at problems found by a legislature to arise from the corporate form itself. *See* 435 U.S. at 778 and n.14. None concerned a law distinguishing between corporations and people. The speech cases cited in *Bellotti* happened to involve corporate parties but they concerned generally applicable restrictions. In contrast, *Austin* and *McConnell* concern legislative definitions of impermissible activities of corporations *as* corporations.

Judicial deference to elected representatives in corporate regulation cases says nothing about the

"worth" of certain speech. *Cf.* 435 U.S. at 776-777. Where the "speaker" exists only as a result of government policy, regulation based on "what" rather than "who" speaks is commonplace. Municipal corporations – "persons" for some purposes – have no First Amendment right to spend municipal funds to support candidates, oppose perceived enemies, or influence ballot questions. *See Anderson v. City of Boston*, 376 Mass. 178, 380 N.E.2d 628 (1978); *Creek v. Village of Westhaven*, 80 F.3d 186, 192-193 (7th Cir. 1996).

The Hatch Act restricts the political activity of certain government employees. 5 U.S.C. §§ 7321-7326; 5 U.S.C. §§ 1501-1508. Our Armed Forces accept the obligations of political neutrality without complaint. *See* Department of Defense Directive 1344.10, *Political Activities By Members of the Armed Forces*, February 19, 2008 (www.dtic.mil/whs/directives/corres/pdf/134410p.pdf, accessed 2009-07-24).

Corporate capacity, as with other government-created capacities, may carry statutory restrictions on political activity. *Austin* and *McConnell* correctly deferred to "the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," *McConnell*, 540 U.S. at 205, and should not be overruled.

II. OVERRULING *AUSTIN* WOULD IMPLICATE SIGNIFICANT FOURTEENTH AMENDMENT ISSUES

Overruling *Austin* would raise significant Fourteenth Amendment issues not otherwise present here. *Bellotti*, 435 U.S. at 826 and n.6 (Rehnquist, J., dissenting). "Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protections." *Connecticut Life Insurance Company v. Johnson*, 303 U.S. 77, 85-86 (1938) (Black, J., dissenting). The notion that the Fourteenth Amendment can be interpreted to include corporations within the Amendment's references to "persons" does not stand up to examination. *Id. See also Slaughter-House Cases*, 83 U.S. 36 (1872); *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 581 (1949) (Douglas, J. dissenting); Morton J. Horowitz, *The Transformation of American Law* (1870-1960), Oxford University Press, Inc. (1992); Mayer, *supra*.

Challenges to "corporate rights" doctrines increase. *See* Constitutional Accountability Center, Correspondence to Senate Judiciary Committee, July 22, 2008 ("the Court's recent trend toward constraining the right of people to hold corporations accountable ... runs opposite to the text, history, and structure of our Constitution and the ideals upon which our country was founded." (http://www.theusconstitution.org/issues.php?id=9, accessed 2009-07-23); Patton & Barlett, *Corporate 'Persons' and Freedom of Speech: The Political Impact of Legal Mythology*, 1981

WIS. L. REV. 494; Richard L. Grossman and Frank T. Adams, *Taking Care of Business, Citizenship and the Charter of Incorporation* (Charter 1993); Dean Ritz (ed.), *Defying Corporations, Defining Democracy: A Book of History & Strategies* (Apex 2001); Charles Derber, *Corporation Nation: How Corporations Are Taking Over Our Lives – And What We Can Do About It* (St. Martin's 1998); Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* (Rodale 2004); Jane Anne Morris, *Gaveling Down the Rabble: How "Free Trade" is Stealing Our Democracy* (Apex 2008); Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (Berrett-Koehler 2003).

The Fourteenth Amendment corporate "person" doctrine rests on an uncertain foundation. *Bellotti*, 435 U.S. at 822-3 (Rehnquist, J. dissenting). *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886), did not decide that or *any* federal Constitutional question. *Id.* at 416 ("As the judgment can be sustained upon this [state law] ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court").

Following *Santa Clara*, the Court asserted in five cases, without explanation, that a corporation is a person under the Fourteenth Amendment None found a Fourteenth Amendment violation. *See Pembina*, 125 U.S. at 188-189; *Missouri Pac. Railway Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & S.L. Ry. Co. v. Herrick*, 127 U.S. 210 (1888);

Minneapolis & S.L. Ry. Co. v. Beckwith, 129 U.S. 26 (1889); *Charlotte C & A Railway Co. v. Gibbes*, 142 U.S. 386 (1892). The Court later stated, again without explanation, that corporations could make Fourteenth Amendment claims. *See Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896); *Gulf C & S.F. Ry. Co. v. Ellis*, 165 U.S. 150 (1897); *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544 (1923).

Not until 1938 would an opinion, albeit dissenting, review the issue. Justice Black, dissenting in *Connecticut Life*, carefully reviewed the words, context, and history of the Fourteenth Amendment, and found no basis to find that a corporation is a "person" under the Amendment. Justice Black concluded, "this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations." 303 U.S. at 85.

Serious doubt remains about a basis for Fourteenth Amendment restraint on state governments' regulation of the partisan role of corporations in state elections, and *Austin* should stand.

CONCLUSION

For the foregoing reasons, the Court should not overrule *Austin* or *McConnell* and should affirm the judgment below.

Respectfully submitted,

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JULY 2009

AMICUS CURIAE BRIEF

No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal To The United States District Court For The District Of Columbia

BRIEF OF PUBLIC GOOD AS AMICUS CURIAE IN SUPPORT OF APPELLEE ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iii

INTEREST OF *AMICUS*.....1

SUMMARY OF ARGUMENT.....1

ARGUMENT.....2

I. CORPORATE SPEECH IS PROTECTED PRINCIPALLY TO SAFEGUARD LISTENERS' INTERESTS.....3

A. Corporate Speech Is Protected For the Sake of the First Amendment Interests of Natural Persons.....4

B. Corporate Speech Is Not the Expression of the Views of Any Natural Person.....6

II. LISTENER INTERESTS ARE NOT PROTECTED TO THE SAME DEGREE AS SPEAKER SELF-EXPRESSION.....10

III. POLITICAL EXPENDITURES AND CONTRIBUTIONS BY BUSINESS CORPORATIONS MAY BE REGULATED IN WAYS THAT WOULD BE CONSTITIONALLY QUESTIONABLE IF APPLIED TO SELF-EXPRESSIVE SPEECH.....14

IV. THE RESTRICTIONS OF BCRA ARE CONSTITUTIONAL AS APPLIED TO CITIZENS UNITED.....16

A. Application of BCRA § 203 to Citizens United Does Not Infringe Rights to Self-Expression.....16

B. Because Application of § 203 Does Not Infringe Rights to Self-Expression, It is a Permissible Prophylactic Measure Against Political Corruption.....18

V. IF REGULATIONS OF CORPORATE SPEECH ARE UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED, THERE IS NO REASON TO REEXAMINE *AUSTIN* AND *McCONNELL*.....19

CONCLUSION.....20

TABLE OF AUTHORITIES

Cases

Austin v. Mich. State Chamber of Commerce, 494 U.S. 652 (1990).....3, 7, 8, 15, 19, 20

Buckley v. Valeo, 424 U.S. 1 (1976).....10, 11, 12, 16

Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530 (1980).....4, 5

Corbin v. Corbin, 429 F. Supp. 27 (M.D. Ga. 1977).....8

De Jonge v. Oregon, 299 U.S. 353 (1937).....5

Edmondson v. Shearer Lumber Prods., 75 P.3d 733 (Idaho 2003).....9

FEC v. Beaumont, 539 U.S. 146 (2003)...7, 14, 15, 18

FEC v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431 (2001).....11

FEC v. Mass. Citizens for Life, 479 U.S. 238 (1986).....6, 7, 17

FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480 (1985).....18

FEC v. Nat'l Right to Work Comm., 459 U.S. 197 (1982).....7, 15, 18

FEC v. Wisconsin Right to Life, Inc.,
551 U.S. 449, 127 S.Ct. 2652 (2007).....3, 20

First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765 (1978).....4, 5, 6

Garrison v. Louisiana, 379 U.S. 64 (1964).....5

Hale v. Henkel, 201 U.S. 43 (1906).....5

Harper & Row, Publishers v. Nation Enterprises,
471 U.S. 539 (1985).....13

Korb v. Raytheon, 574 N.E.2d 370 (Mass. 1991).....9

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525
(2001)....10

Mandel v. Kleindienst, 408 U.S. 753 (1972).....12

McConnell v. FEC, 540 U.S. 93 (2003).....15, 19, 20

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958).....15, 16

Pacific Gas & Elec. v. Pub. Utils. Comm'n,
475 U.S. 1 (1986).....4

*Railroad Tax Cases, County of San Mateo v.
S. Pac. R.R. Co.*, 13 F. 722 (D. Cal. 1883),
writ dismissed, 116 U.S. 138 (1885)).....4, 5

Riley v. Nat'l Fed'n of Blind,
487 U.S. 781 (1988).....13

United States v. CIO, 335 U.S. 106 (1948).....7, 15

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976).....10, 14

Wooley v. Maynard, 430 U.S. 705 (1977).....10

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).....13

Constitutional Provisions

U.S. Const., amend. I.....*passim*

Statutes

2 U.S.C. § 441b.....16, 17, 20

2 U.S.C. § 441e.....12, 17

Regulations

11 C.F.R. § 114.10.....17

Other Authorities

Am. Law Inst., *Principles of Corporate Governance* § 2.01 (1994, updated 2009).....8

Randall P. Bezanson, *Institutional Speech*, 80 Iowa L. Rev. 735 (1995).....7

William Meade Fletcher et al., 3A *Fletcher Cyclopedia of the Law of Private Corporations* § 1102 (updated 2008).....9

Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000).....13

David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541 (1991).....9

INTEREST OF *AMICUS*

Public Good submits this brief as *amicus curiae* in support of Appellee Federal Election Commission.[1]

Public Good is a public interest organization dedicated to the proposition that all are equal before the law. Through *amicus* participation in cases of particular significance for freedom of speech, consumer protection and civil rights, Public Good seeks to ensure that the protections of the law remain available to everyone. *See, e.g.*, Brief in support of Petition for Certiorari in *Frazier v. Smith* (cert. pending, No. 08-1351). As an organization with a particular interest in safeguarding free expression, Public Good submits this brief to explain why precedents that uphold the differential treatment of corporate and individual electioneering communications in order to preserve the integrity of the political process are consistent with the protections of the First Amendment.

SUMMARY OF ARGUMENT

The century-old practice of treating election-related expenditures and contributions by business corporations differently from those by individuals does not offend the First Amendment, because the political campaign speech of business corporations is

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[1] No counsel for a party authored this brief in whole or in part, and no person, other than *amicus*, its members, and its counsel, made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

protected principally for the sake of the interest of potential audiences in receiving the communication. Listener interests merit – and have generally received – protection less rigorous than that afforded speakers' interest in self-expression.

The speech of business corporations is not self-expression. Corporations, of course, have no interests of their own in personal self-expression, and their speech is not the self-expression of shareholders, directors, officers, or employees. Therefore, when the integrity of the political process is at stake, the expenditures and contributions of business corporations may be regulated in certain ways that might be unconstitutional if applied to individuals.

The right of individuals to group together to amplify their voices is undisputed. But a business corporation does not serve this function. Advocacy groups remain free to engage in electioneering communications, as long as they decline to accept funding from business corporations. Restrictions on receiving funds from business corporations do not diminish the constitutionally protected reach of advocacy groups' voices; rather, they merely decline to give them special amplification.

ARGUMENT

This Court has explained the constitutionality of campaign finance regulations that treat business corporations differently from individuals on the basis of particularly compelling state interests, either the particular threat of *quid pro quo* corruption – or the appearance thereof –

posed by corporate spending, or the distorting effects on the political process of wealth aggregated through the corporate form independent of public support for the corporation's political views. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S.Ct. 2652, 2672 (2007) (*WRTL*) (summarizing earlier cases). These rationales, however, have been called into question. *E.g. id.*, 127 S.Ct. at 2677-79 (Scalia, J., concurring in part and concurring in judgment); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting).

Implicit in the opinions of this Court is another, perhaps sounder, justification: Communication protected primarily for its value to listeners is not protected identically to the self-expressive communication which lies at the core of the First Amendment's protections (hereinafter, "self-expression"). It is this distinction that explains why campaign spending and contributions by publicly traded for-profit corporations (hereinafter, "business corporations") may constitutionally be subjected to different levels of regulation than spending and contributions by individuals or groups organized for political expression and advocacy.

I. CORPORATE SPEECH IS PROTECTED PRINCIPALLY TO SAFEGUARD LISTENERS' INTERESTS.

When this Court first held that corporate speech merits First Amendment protection, it made it clear that the First Amendment interests at stake were those of potential *recipients* of the speech, not those of speakers. Corporate speech is protected to

afford "the public access to discussion, debate, and the dissemination of information and ideas." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978). *See also id.* at 777 (corporate speech is protected because of "its capacity for informing the public"); *Pacific Gas & Elec. v. Pub. Utils. Comm'n*, 475 U.S. 1, 8 (1986) (restrictions on corporate speech "limit[] the range of information and ideas to which the public is exposed"); *Consolidated Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 534 n.1 (1980) (the speech of a business corporation is protected for "the informative value of its opinions on critical public matters").

A. Corporate Speech Is Protected For the Sake of the First Amendment Interests of Natural Persons.

Talk of the constitutional rights of business corporations has always been understood as a legal shorthand for the rights of actual people that might be abridged by certain regulations imposed by government on corporations. This was explicit in the earliest decisions imputing constitutional rights to corporations: The takings clause of the Fifth Amendment, for example, could apply to corporations, because "[t]o deprive the corporation of its property ... is, in fact, to deprive the corporators [shareholders] of their property." *Railroad Tax Cases, County of San Mateo v. S. Pac. R.R. Co.*, 13 F. 722, 747 (D. Cal. 1883), *writ dismissed*, 116 U.S. 138 (1885). In contrast, "the prohibition against the deprivation of life and liberty in the same clause of the fifth amendment does not apply to corporations, because . . . the lives and liberties of the individual

corporators are not the life and liberty of the corporation." *Id.* Similarly, some Fourth Amendment protections against unreasonable searches and seizures apply to corporations, because "[a] corporation is, after all, but an association of individuals under an assumed name." *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

When this Court concluded that the First Amendment applies to corporate speech, it employed similar reasoning: "The proper question ... is not whether corporations 'have' First Amendment rights.... Instead, the question must be whether [a regulation] abridges expression that the First Amendment was meant to protect." *Bellotti*, 435 U.S. at 776.

It is difficult to imagine how corporations could possess First Amendment interests of their own, independent of the interests of natural persons. The high value of freedom of speech is often explained in terms of "protect[ing] the individual's interest in self-expression." *Consolidated Edison*, 447 U.S. at 534 n.2. It makes no sense to attribute such an interest to a corporation itself, independent of its members, owners, or managers. Most relevant here, speech concerning public affairs receives the highest degree of protection because "it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). Freedom of speech is protected "to the end that government may be responsive to the will of the people." *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937). There is no similar constitutional mandate that government be responsive to the will of corporations, nor do

corporations have a constitutional right to participate in the political process. No reasonable theory of democratic government requires that corporations be permitted to vote for candidates for public office. And no democracy has ever permitted it.

B. Corporate Speech Is Not the Expression of the Views of Any Natural Person.

Corporate speech receives First Amendment protection not to protect the expressive interests of shareholders or some other natural persons, but to protect the interests of listeners. *See Bellotti*, 435 U.S. at 777, 783. The speech of a business corporation is not the self-expression of any natural persons: not shareholders, officers, directors, or employees.

When a business corporation speaks on issues of political concern, it is not the shareholders who speak. A shareholder of a typical business corporation that contributes money to Citizens United is hardly more likely than any random member of the public to agree with (or hold any particular opinion about) the political views expressed in *Hillary: The Movie*. Even shareholders who happen to agree with the movie's perspective are unlikely to have chosen their investments to express their political views. *See FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258 (1986) (*MCFL*) ("The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They

reflect instead the economically motivated decisions of investors and customers"); *Austin*, 494 U.S. at 686 (Scalia, J., dissenting) ("A person becomes a member of ... a for-profit corporation in order to pursue economic objectives, i.e., to make money"); Randall P. Bezanson, *Institutional Speech*, 80 Iowa L. Rev. 735, 786 (1995) ("it is likely that few IBM stockholders ... consciously purchased shares in the company with an intention that it would serve as an instrument for expressing their own views").

The Court has repeatedly recognized this reality, holding that restrictions on corporate spending in connection with elections may be justified on the basis of the First Amendment interests of shareholders who might disagree with the corporation's political speech. *See FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207 (1982) (government has interest in protecting "individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed"); *FEC v. Beaumont*, 539 U.S. 146, 163 (2003) (independent political action committees make corporate political participation possible "without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members"); *MCFL*, 479 U.S. at 260 (need to protect shareholders from business corporations using their money "for purposes that [they] may not support" does not apply to advocacy membership corporation); *United States v. CIO*, 335 U.S. 106, 118 (1948) (1907 law prohibiting corporations from making election-related contributions was motivated in part by idea

that "corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders"). Even criticisms of this rationale for regulating corporate political spending have rested on the premise that shareholders need no protection against corporate political spending, precisely because they know that business corporations pursue profits, rather than expressing shareholders' political views, and therefore they may take actions the shareholders "find politically or ideologically uncongenial." *Austin*, 494 U.S. at 687 (Scalia, J., dissenting). Regardless of whether corporate political speech violates the First Amendment rights of shareholders, it is clear that it does not vindicate those rights—the political speech of a business corporation is not shareholder speech.

Nor is corporate political speech plausibly the political speech of the officers or directors who actually make the decision to spend corporate funds on political speech. To the contrary, corporate officers and directors have no more right to use corporate funds to broadcast their own views than they have to use them for their personal enrichment. *See Corbin v. Corbin*, 429 F. Supp. 276, 281 (M.D. Ga. 1977) ("corporate funds simply cannot be used to meet an officer's personal desires"). Instead, officers' decisions about expenditures of corporate funds are to be guided by their fiduciary obligations to shareholders to pursue corporate profits. *See* Am. Law Inst., *Principles of Corporate Governance* § 2.01(a) (1994, updated 2009) ("a corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit

and shareholder gain"); William Meade Fletcher et al., 3A *Fletcher Cyclopedia of the Law of Private Corporations* § 1102 (updated 2008) ("fiduciary relation of ... corporate directors and officers to ... corporation and its stockholders ... forbids any act by them which wrongfully diverts the corporate assets from corporate purposes"). In fact, "fiduciary duty may require corporate managers to authorize speech on behalf of the corporation that differs from their personal views." David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 Hastings Const. L.Q. 541, 583 (1991).

Still less plausibly could corporate speech be considered the expression of employees. To the contrary, corporate speech may be at odds with employees' political self-expression. *See, e.g., Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733 (Idaho 2003) (upholding company's termination of employee for engaging on own time in political speech and activity opposed to company's interests); *Korb v. Raytheon*, 574 N.E.2d 370 (Mass. 1991) (same).

Thus, the speech of business corporations is not the speech of any natural persons. Though of course it is natural persons who compose and disseminate corporations' speech, they do not do so in order to express their personal views. Rather, the speech of for-profit corporations is constrained by their corporate purpose. The First Amendment was not written to protect the "speakers" of such virtually preprogrammed speech any more than it was crafted to safeguard computers with digital voices. The speech of business corporations is

protected not for speakers' interests in self-expression, but for the interests of potential audiences.

That is not to deny that business corporations have an interest in making certain communications. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001). And it is true that even speakers whose interests are "purely economic" are not "disqualifie[d] from protection under the First Amendment." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976). But communications that do not express the personal views of natural persons are ultimately peripheral to the "freedom of thought protected by the First Amendment." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

II. LISTENER INTERESTS ARE NOT PROTECTED TO THE SAME DEGREE AS SPEAKER SELF-EXPRESSION.

It is an implicit cornerstone of this Court's First Amendment jurisprudence that the rights of speakers to self-expression receive somewhat greater protection than the rights of listeners to receive speech.

In campaign finance law, the primacy of speakers' rights of self-expression explains why restrictions on expenditures to disseminate one's own speech are subject to more exacting scrutiny than are restrictions on contributions to support the speech of another. *See Buckley v. Valeo*, 424 U.S. 1, 25, 44-45 (1976). Both kinds of restrictions burden listeners equally: if an individual is prevented from

contributing a given sum to fund a candidate's communications, listeners are deprived of the same quantity of communication as if the individual were prevented from spending that sum to broadcast her own views. Expenditure limits, however, "impose significantly more severe restrictions on protected freedoms of political expression." *Id.* at 23. Contribution limits entail "only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20-21, because "contributions ... involve[] speech by someone other than the contributor." *Id.* at 21. This distinction is irrelevant to listener interests; its significance has to do with the relative burden on self-expression.[2] *See also FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440 (2001) ("[r]estraints on expenditures generally curb more expressive and associational activity than limits on contributions do").

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[2] It is true that this Court in *Buckley* also considered the impact on listeners, opining that contribution limits would not dramatically decrease the quantity of political speech, because "[t]he overall effect . . . is merely to require candidates ... to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id.* at 21–22. But that reasoning does not explain why the reverse is not permissible. Restricting direct expenditures, but not contributions, should similarly not diminish the quantity of speech: people could simply contribute greater sums. The decisive difference is the greater burden expenditure limits place on expressive interests.

Similarly, no published decision calls into question the constitutionality of the prohibition on campaign contributions and expenditures by foreign nationals. 2 U.S.C. § 441e. It is difficult to see how this ban burdens listeners' interest in unfettered debate any less than they would be burdened by a ban on spending by some citizens. But the latter could not pass constitutional muster. The difference can only be that the First Amendment does not protect the self-expressive interests of foreign nationals. *Cf. Mandel v. Kleindienst*, 408 U.S. 753, 762-65 (1972) (recognizing First Amendment interests of those who wished to hear foreign speaker, but upholding visa denial).

The priority of protection for self-expression is reflected in this Court's insistence that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49. From the standpoint of listeners' interests, it is hard to see why it would not sometimes be a good thing to suppress one source of information, if doing so would allow the same information, and more besides, to be received from another source. But a speaker's freedom to expressing her views can plausibly be understood as a fundamental aspect of personal autonomy that should not be violated – no matter how benign the intended effects.

The primacy of speakers' interest in self-expression can also be seen in that, under most circumstances, the First Amendment prohibits compelled speech, even when listeners are eager to

receive the communication, whereas the right to speak is protected, even when listeners do not wish to receive the communication. *See, e.g, Harper & Row, Publishers v. Nation Enterprises*, 471 U.S. 539, 559 (1985) (the First Amendment "shields the man who wants to speak or publish when others wish him to be quiet [and] a concomitant freedom not to speak publicly"). *See also Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 797-98 (1988) (compelled statements of fact burden protected speech as do compelled statements of opinion). But from the standpoint of listeners' interests, compelled speech might often be desirable. Compelled statements of fact would serve listeners' interest in receiving information; requiring various speakers to state their opinions about issues of concern would serve listeners' interest in hearing a diversity of viewpoints. Even if listeners' and speakers' interests were equally protected, it would make sense for the Court to engage in careful balancing to determine when to compel speech for the benefit of listeners. That such balancing is foreign to First Amendment jurisprudence underscores that speakers' right to self-expression receives—and merits—higher protection than listeners' interests in receiving information, ideas, or other communications.

Similarly, it has been persuasively argued that it is precisely because commercial speech is protected principally for the sake of listeners that it is less protected than core expressive speech. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1 (2000). *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) ("[b]ecause the extension of First

Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal"); *Va. Bd. of Pharmacy*, 425 U.S. at 781 (Stewart, J., concurring) ("the elimination of false and deceptive claims serves to promote the one facet of commercial . . . advertising that warrants First Amendment protection—its contribution to the flow of accurate and reliable information relevant to public and private decisionmaking").

III. POLITICAL EXPENDITURES AND CONTRIBUTIONS BY BUSINESS CORPORATIONS MAY BE REGULATED IN WAYS THAT WOULD BE CONSTITIONALLY QUESTIONABLE IF APPLIED TO SELF-EXPRESSIVE SPEECH.

In summary, because the political speech of business corporations is protected principally for the benefit of potential audiences, regulation of corporate speech calls for less stringent scrutiny than is required for regulation of speakers' self-expression. "Within the realm of contributions generally, corporate contributions are furthest from the core of political expression, since corporations' First Amendment ... interests are derived largely from those of ... the public in receiving information." *Beaumont*, 539 U.S. at 159.[3] By the same reasoning,

[3] The Court noted that corporate speech is also protected on behalf of the speech and expressive interests of the corporation's members. *Beaumont*, 539 U.S. at 159

while restrictions on expenditures merit more stringent review than restrictions on contributions, within the realm of expenditures generally, corporate expenditures are furthest from the core of political expression. That is why the government's interest in preventing corruption[4] or the appearance of corruption may constitutionally "be accomplished by treating unions, corporations, and similar organizations differently from individuals." *Right to Work*, 459 U.S. at 210-11.

Therefore, this Court's decisions in *Austin* and *McConnell v. FEC*, 540 U.S. 93 (2003), were correct in upholding such differential treatment. *See also Beaumont*, 539 U.S. 146 (upholding ban on direct corporate campaign contributions, as applied to nonprofit corporation); *Right to Work*, 459 U.S. 197 (upholding ban on solicitation of funds for campaign contributions from non-members by political action committee associated with corporation). Indeed, older decisions took for granted the permissibility of restrictions on corporate political campaign contributions and expenditures. *See, e.g., CIO*, 335 U.S. 106.

(citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958)). But that rationale does not apply to business corporations, as it does to incorporated advocacy organizations like the NAACP.

[4] Corruption in this context includes undue influence of concentrated wealth on officeholders' judgment. *Beaumont*, 539 U.S. at 156.

IV. THE RESTRICTIONS OF BCRA ARE CONSTITUTIONAL AS APPLIED TO CITIZENS UNITED.

A. Application of BCRA § 203 to Citizens United Does Not Infringe Rights to Self-Expression.

Constitutionally permissible regulation of business corporations' direct campaign-related expenditures and contributions remains constitutional as applied to expenditures and contributions routed through such entities as Citizens United.

If the communications of the donor corporation are not the speech of its shareholders, officers, directors, or employees, *see supra* Part I.B, still less do communications of the recipient organization amount to speech of those same shareholders, officers, directors, or employees. Therefore, no self-expressive interests of the donor corporation are infringed.

With respect to the recipient corporation, the issue is more complex. It is undisputed that the First Amendment guarantees the right of "like-minded persons to pool their resources in furtherance of common political goals" through an organization such as Citizens United. *Buckley*, 424 U.S. at 22. *See also NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The First Amendment does *not*, however, guarantee to such a group the right to use other people's business investments as a subsidy for its speech, when the investors have not consented.

The members of Citizens United – separate from the organization – are free to circulate a political documentary at any time, as well as engage in any other electioneering communication. Citizens United itself would be free to do the same, if it declined funding from business corporations and labor unions. See 11 C.F.R. § 114.10(c)-(d). Given that Citizens United's acceptance of corporate funding is freely chosen, it is disingenuous for Citizens United to characterize government regulation as an "effort to criminalize Citizens United's political documentary." Reply Brief at 1. Citizens United might be able to broadcast its electioneering communications more widely if allowed unlimited corporate donations,[5] but it is equally true that it could disseminate those messages more widely if it were allowed to receive contributions from, for example, foreign nationals. See 2 U.S.C. § 441e(a)(1)(C)-(2) (prohibiting such contributions). It does not follow that Citizens United's rights are thereby violated.

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[5] Citizens United alleges that its speech is like the self-expressive speech in found protected in *MCFL*, 479 U.S. 238, because only a tiny fraction of its funding comes from business corporations. Appellant's Brief at 32. But if that is true, Citizens United's ability to disseminate its message would be diminished only minimally by doing without corporate funding.

B. Because Application of § 203 Does Not Infringe Rights to Self-Expression, It is a Permissible Prophylactic Measure Against Political Corruption.

This Court has repeatedly recognized the constitutionality of "restricting contributions by various organizations [in order to] hedge[] against their use as conduits for circumvention of valid contribution limits." *Beaumont*, 539 U.S. at 155. Even if only very small contributions by business corporations were allowed, a large business corporation could spread small contributions among many non-profit advocacy groups working for or against a particular candidate, and thereby circumvent restrictions intended to limit its ability to exert improper influence.

When no self-expressive interests are at stake, as with spending by business corporations, Congress has greater latitude to determine the appropriate scope of restrictions aimed at preventing circumvention of campaign finance laws. *See Right to Work*, 459 U.S. at 210 ("[W]e accept Congress' judgment that it is the potential for such influence that demands regulation. Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"). Such deference to Congress is appropriate with respect to restrictions on contributions by "traditional corporations organized for economic gain," but not with respect to similar restrictions on "groups and associations ... designed expressly to participate in political debate." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480,

500 (1985). While Citizens United may be a "group designed expressly to participate in political debate," the restriction at issue here concerns contributions to it by "traditional corporations organized for economic gain."

V. IF REGULATIONS OF CORPORATE SPEECH ARE UNCONSTITUTIONAL AS APPLIED TO CITIZENS UNITED, THERE IS NO REASON TO REEXAMINE *AUSTIN* AND *McCONNELL*.

If this Court nevertheless concludes that the reasons for treating election contributions and expenditures by business corporations differently from those by individuals do not extend to a nonprofit corporation like Citizens United that relies principally on individual contributions, this case is resolved. There is no reason to go further. Judicial modesty counsels against overturning precedent governing constitutionally permissible regulation of *business* corporations, when doing so is not necessary to decide the case.

This case is an inappropriate one for reexamining precedents establishing the permissibility of regulation of election-related communications by business corporations, not only in that, according to Appellants, the corporate funding at issue in this case is so minimal, Appellants' Brief at 5, 7, but also in several other respects: (1) no factual record has been developed concerning the quantity, sources, and effects of corporate funding of either *Hillary: the Movie* or of

Citizens United in general; (2) the case presents an unusual sort of political advertising, near the border of regulable electioneering, in that it concerns a feature-length video made available to viewers who actively seek to receive the communication rather than having it thrust upon them as with typical electioneering advertising, *see* Tr. Oral Arg. at 46 (March 24, 2009); and (3) no factual record has been developed as to whether the implementation of the as-applied standard for section 203 of BCRA, set forth by this Court in *WRTL*, 127 S.Ct. 2652, "impermissibly chills political speech." *Id.* at 2674 (Alito, J., concurring).

CONCLUSION

This Court's precedents distinguishing corporate and individual speech are firmly rooted in bedrock First Amendment doctrine. There is no need, and no reason, to overrule either *Austin* or any part of *McConnell* in resolving this case.

Respectfully submitted,

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134

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Supreme Court of the United States

CITIZENS UNITED, *Appellant*
v.
FEDERAL ELECTION COMMISSION, *Appellee*

On Appeal from the United States District Court
for the District of Columbia

Brief Amici Curiae of Seven Former Chairmen and One Former Commissioner of the Federal Election Commission Supporting Appellant on Supplemental Question

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Table of Contents

Table of Authorities. ..... (ii)

Statement of Interest. 1

Summary of Argument. 2

Argument. 3

I. "Proper Disposition" Does Not *Require* Overruling *Austin* or *McConnell*. 3

II. *Austin* and *McConnell* Should Be Overruled. 8

A. Precedent May Be Reconsidered Here. 8

B. "Make No Law" Protects "Political Speech.". 8

C. *Austin* and *McConnell* Are Unworkable. 9

1. *Austin* Spawned Multi-Factor Entity Tests. 9

2. *Austin* Spawned Multi-Factor Speech Tests. 13

3. *WRTL-II*'s Appeal-to-Vote Test Is Difficult for the FEC and Courts to Apply. 15

Conclusion. 19

Table of Authorities

Cases

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990)..... 2, 3, 8-9, 11-13, 19

Buckley v. Valeo, 424 U.S. 1 (1976)..... 3-5, 8-9, 19

Davis v. FEC, 128 S. Ct. 2759 (2007)..... 3, 9

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994)..... 10

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)..... 9

FEC v. NRA, 254 F.3d 173 (D.C. Cir. 2001)..... 10

FEC v. Survival Educ. Fund, 65 F.3d 285 (2d Cir. 1995)..... 10

FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007)..... 2, 4, 8, 11, 14, 16, 18

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 8

McConnell v. FEC, 540 U.S. 93 (2003).. 2-4, 8-11, 13, 16, 19

Minnesota Citizens Concerned for Life v. FEC, 113 F.3d 129 (8th Cir. 1997)..... 10

National Right to Work Legal Defense and Education Fund v. Herbert, 581 F. Supp. 2d 1132 (D. Utah, 2008). 14

North Carolina Right to Life v. Bartlett, 168 F.3d 705 (4th Cir. 1999). 10

North Carolina Right to Life v. Leake, 525 F.3d 274 (4th Cir. 2008). 5, 7

Real Truth About Obama v. FEC, No. 3:08-cv-483, 2008 WL 4416282 (E.D. Va., Sep. 24, 2008). 19

United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948). 10

Wisconsin Right to Life v. FEC, 546 U.S. 410 (2006) 4

Constitution, Statutes, Regulations & Rules

11 C.F.R. Part 104. 10

11 C.F.R. Part 109. 10

11 C.F.R. § 100.132. 9

11 C.F.R. § 100.29. 13

11 C.F.R. § 100.5. 10

11 C.F.R. § 100.6. 10

11 C.F.R. § 106. 15

11 C.F.R. § 112.4(b). 17

11 C.F.R. § 114.5. 11

11 C.F.R. § 114.5(c). 18

11 C.F.R. § 114.6. 11

11 C.F.R. § 114.10. 9

11 C.F.R. § 114.15. ..... 14, 16

2 U.S.C. § 100.22(b) 17

2 U.S.C. § 431(9)(B)(i). 9

2 U.S.C. § 441b. 9

26 U.S.C. § 501(a) 15

26 U.S.C. § 501(c). 15

26 U.S.C. § 501(c)(4). 12, 15

26 U.S.C. § 527. ..... 12, 15

U.S. Const. amend. I. 1, 9, 19

Other Authorities

James Bopp, Jr., Richard E. Coleson & Barry A. Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade*?*, 1 Seton Hall Const. L.J. 55 (1990)..... 8

Brief for Intervenor-Defendants Senator John McCain et al., McConnell v. FEC, 540 U.S. 93 (2003)..... 3

FEC Advisory Opinion 2004-30..... 9

FEC Advisory Opinion 2008-15..... 17, 18

FEC, "Political Committee Status," 69 Fed. Reg. 68056..... 10

FEC, "Political Committee Status," 72 Fed. Reg. 5595..... 10

Statement of Reasons of Commissioners Weintraub, Thomas and McDonald, FEC Matters Under Review 5024, 5154, and 5146 (Council for Responsible Government) (Dec. 16, 2003)..... 5

Statement of Reasons of Commissioners Peterson, Hunter and McGahn, FEC Matter Under Review 5541 (November Fund) (Jan. 22, 2009) 5-6, 16

Statement of Interest[1]

These Amici Curiae are eight former commissioners of the Federal Election Commission ("FEC"), with FEC years and current affiliation indicated: **Joan Aikens** (1975-1998, retired); **Lee Ann Elliott** (1982-2000, retired); **Thomas Josefiak** (1985-1991, Partner, HoltzmanVogel); **David Mason** (1998-2008, Visiting Senior Fellow, Heritage Foundation); **Bradley Smith** (2000-2005, Blackmore/Nault Designated Professor of Law, Capital University); **Michael Toner** (2002-2007, head of Election Law and Government Ethics Practice Group, Bryan Cave); **Hans von Spakovsky** (2006-2007, Visiting Legal Scholar, Heritage Foundation); **Darryl Wold** (1998-2002, private law practice emphasizing election and political law). All chaired the FEC during their tenure except for Commissioner von Spakovsky.

As former FEC commissioners with many years of experience in interpreting the Federal Election Campaign Act ("FECA"), implementing regulations, devising enforcement policy, and investigating violations, Amici have an interest in advising the Court of the complexities and difficulties of the practical application of federal campaign finance laws and the First Amendment to political speech and activity.

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[1] No party counsel authored any of this brief, and no party, party counsel, or person other than amici or their counsel paid for brief preparation and submission. The parties consented to the filing of this brief.

Summary of Argument

"[T]he proper disposition" of this case does not *require* overruling *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), or the facial upholding of the electioneering-communication Prohibition[2] in *McConnell v. FEC*, 540 U.S. 93 (2003), because this case may be decided for Appellant on other grounds. The application of this Court's unambiguously-campaign-related ("UCR") principle would resolve the challenges to both the Prohibition and Disclosure Requirements.

However, it would be appropriate, and in fact desirable, for the Court to overrule these troublesome precedents because (1) both are properly implicated for reconsideration, (2) "Congress shall make no law . . . abridging the freedom of speech" has special force in protecting political speech, (3) *Austin* and *McConnell* have proven to be unworkable, having spawned many complex, multi-factor tests, and (4) the FEC and lower courts have made the appeal-to-vote test in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007),[3] unworkable. *Austin* and its progeny *should* be overruled.

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[2] Amici follow the *Jurisdictional Statement* terminology for BCRA **§§ 201** and **311** ("Disclosure Requirements") and **§ 203** ("Prohibition"). *See id.* at 5.

[3] The opinion by Chief Justice Roberts joined by Justice Alito ("*WRTL-II*") states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

Argument

I. "Proper Disposition" Does Not *Require* Overruling *Austin* or *McConnell*.

Overruling *Austin* and/or *McConnell*'s facial upholding of the Prohibition is not *required* but *should* be done. The UCR principle would resolve the challenges to both the Prohibition and Disclosure Requirements and would require striking the Disclosure Requirements, if the Disclosure Requirements do not automatically fall with the Prohibition.[4] *See Brief for Amicus Curiae Committee for Truth in Politics, Inc. Supporting Appellant* (herein) ("*CTP Brief*"). Amici make five more arguments regarding the UCR principle.

First, Intervenors Senator McCain et al. expressly argued *Buckley*'s UCR analysis in *McConnell*, insisting that the electioneering-communication definition was a constitutional "adjustment of the definition of which advertising expenditures are campaign related." *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93. They argued that the "[d]isclosure rules . . . 'shed the light of publicity on spending that is *unambiguously campaign related* but would otherwise not be reported.'" *Id.* at 58 (*quoting Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (emphasis added).[5] They urged *Buckley*'s UCR analysis:

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[4] This would be similar to the analysis in *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2007) (striking disclosure provision implementing level-the-playing field provision).

[5] They argued that their "standards for defining which ads will be treated as *campaign-related* squarely serve a compelling interest in using clear and objective lines to

> Two general concerns emerge from the Court's discussion: Statutory requirements in this area should be clear rather than vague, in part so they will not "dissolve in practical application," 424 U.S. at 42; and they should be "directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*," *id.* at 80; *see id.* at 76-82. Those are *precisely the precepts to which Congress adhered in framing Title II.*

Id. at 62 (*quoting Buckley*) (emphasis added). So the Intervenors, the reform community (the Intervenors' lawyers), and Congress itself recognized that the UCR analysis identifies regulable communications based on avoiding vagueness and overbreadth, which *McConnell* adopted. 540 U.S. at 191-92.

Second, since *McConnell*'s upholding of electioneering communication regulation was based on the UCR "precept," it would be a bait and switch not to apply the precept herein.[6]

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frame any rule that affects speech." *Id.* (emphasis added).

[6] In *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), Chief Justice Roberts identified at oral argument a similar bait-and-switch effort by the reform community: "In McConnell against FEC, you stood there and told us that this was a facial challenge and that as-applied challenges could be brought in the future. This is an as-applied challenge and now you're telling us that it's already been decided. It's a classic bait and switch." Transcript of Oral Argument at 25, *WRTL-I*, 546 U.S. 410. *See also WRTL-II*, 127 S. Ct. at 2673 (another bait and switch rejected).

Third, this UCR analysis has been expressly recognized by FEC Commissioners. In a *Statement of Reasons* (Dec. 16, 2003) in Matters Under Review ("MURs") 5024, 5154, and 5146 (*available at* http://www.fec. gov) ("*SOR*"), Democrat FEC Commissioners Weintraub, Thomas, and McDonald noted that *Buckley* expressed concern about reporting provisions "that might be applied broadly to communications discussing public issues which also happened to be campaign issues," and so imposed the express-advocacy construction. *Id.* at 2. "[T]he *Buckley* Court explained the purpose of the express advocacy standard," they declared, which "was to limit application of the . . . reporting provision to 'spending that is *unambiguously related* to the campaign of a particular federal candidate.'" *Id.*(*quoting Buckley*, 424 U.S. at 80) (emphasis in *SOR*). The Commissioners quoted 424 U.S. at 82: "[u]nder an express advocacy standard, the reporting requirements would 'shed the light of publicity on spending that is *unambiguously campaign related* . . . .'" *SOR* at 2 (emphasis in *SOR*).

In addition, a January 22, 2009 *Statement of Reasons* in MUR 5541 (November Fund) by current Republican FEC Commissioners Petersen, Hunter and McGahn ("*November-Fund SOR*") emphasized the need to "fully incorporate important principles in recent judicial decisions," including . . . the Fourth Circuit's persuasive decision in . . . [*North Carolina Right to Life v.*] *Leake*[, 525 F.3d 274 (4th Cir. 2008)]," *November-Fund SOR* at 2, and stated that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach 'that spending that is unambiguously re-

lated to the campaign of a particular federal candidate' . . . ." *Id.* at 5.

Fourth, while *WRTL II*'s appeal-to-vote test clearly implements this Court's UCR principle, the FEC and courts have made it unworkable. *See Brief of Amici Curiae the Wyoming Liberty Group and the Goldwater Institute in Support of Appellant* (herein) ("*WLG Brief*") (explaining the flaws of the FEC's implementing rule and delay and disputes in applying test as interpreted). If the test is to have meaning, this Court must hold that a communication may only be interpreted "as an appeal to vote," if it contains an express *appeal* that is *to vote*, i.e., a clear plea for action urging a vote. *See CTP Brief* at 17-24.

Fifth, campaign-finance law is overly complex and confusing.[7] The UCR principle, analytically articulated

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[7] FECA is 244 pages, http://www.fec.gov/law/feca/feca.pdf. The FEC has adopted 568 pages of regulations, http://www.fec.gov/law/cfr/cfr_2009.pdf. There have been 13 "major" court cases interpreting, modifying or striking FECA or regulations, http://www.fec.gov/law/litigationmajor.shtml, 366 other court cases doing the same, http:/ /www.fec.gov/law/litigationalpha.shtml, and 17 court cases yet unresolved, http://www.fec.gov/law/litigationrecent.shtml.

The FEC has adopted 1,278 *Federal Register* pages of explanations and justifications for regulations, http://www.fec.gov/law/cfr/ej_main.shtml, 10 policy statements, http://www.fec.gov/law/policy.shtml#policy, 1 interpretive rule, http://www.fec.gov/law/policy.shtml#interpretative, and 1,771 advisory opinions since 1975, http://saos.nictusa.com/saos/searchao, with 9 more pending.

For lawyers and non-lawyers alike, the FEC has published 17 reporting forms, each with its own instructions, http://www.fec.gov/general/library.shtml#CampaignGuides,

in *Leake*, provides simplicity and clarity on key points: (1) the UCR principle "cabin[s]" legislatures, 525 F.3d at 281-83, (2) this Court has only approved two types of regulable communications (for entities that are not political committees ("PACs")), express-advocacy "independent expenditures" and appeal-to-vote "electioneering communications," *id.*,[8] and (3) the major-purpose test for PAC status requires "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *id.* at 287. Reaf-

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6 campaign guides, http://www.fec.gov/general/library.shtml#CampaignGuides, 24 brochures, http://www.fec.gov/general/library.shtml#CampaignGuides, 1 guide for presidential campaigns taking government money, http://www.fec.gov/law/policy/guidance/2008_guideline_approved_aug092007.pdf, and 163 monthly issues of *The Record*, beginning in 1996, http://www.fec.gov/pages/record.shtml.

If you wish to see how the FEC is really enforcing the FECA, there are 25 audit reports for authorized committees for 2006 and more for previous election cycles, http://www.fec.gov/audits/audit_reports_auth.shtml, 6 audit reports for unauthorized committees for 2006 and more for previous election cycles, http://www.fec.gov/audits/audit_reports_unauth.shtml, and 3 Title 26 audit reports so far for 2008, and more for previous election cycles, http://www.fec.gov/audits/audit_reports_pres.shtml. Finally one could consult over 6000 Matters Under Review, http://eqs.nictusa.com/eqs/searcheqs, which involve resolved FEC complaints.

[8] Only these categories "struck [the proper] balance" and "ensured that potential speakers would have clear notice as to what communications could be regulated, ensuring that political expression would not be chilled." *Id.* at 284.

firming this solid framework would bring much order to chaos.

II. *Austin* and *McConnell* Should Be Overruled.

A. Precedent May Be Reconsidered Here.

Where a decision in one case depends on the decision of another, the earlier case is sufficiently implicated for reconsideration. *See* James Bopp, Jr., Richard E. Coleson & Barry A. Bostrom, *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade?, 1 Seton Hall Const. L.J. 55, 59-67 (1990). This as-applied challenge is premised on this Court's decision in *McConnell*, which was based on this Court's decision in *Austin*. Thus, they may be reconsidered. "It is . . . the . . . duty of the judicial department," after all, "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

B. "Make No Law" Protects "Political Speech."

Returning to first principles is particularly urgent here because "(t)hese cases are about political speech," so the First Amendment's command that "'Congress shall make no law . . . abridging the freedom of speech' . . . put[s] these cases in proper perspective." *WRTL-II*, 127 S. Ct. at 2673-74. "In a republic where the people are sovereign," it is imperative that citizens freely participate in the "'free discussion of governmental affairs'" and that "'debate on public issues . . . be uninhibited, robust, and wide-open.'" *Buckley*, 424 U.S. at 14 (citations omitted). The Republic requires citizens free to speak without chill from government regulation.

C. *Austin* and *McConnell* Are Unworkable.

1. *Austin* Spawned Multi-Factor Entity Tests.

Buckley declared that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment," 424 U.S. at 48-49, but that is in essence the impermissible level-the-playing-field rationale underpinning *Austin*. *See also Davis*, 128 S. Ct. at 2774-75 (leveling rejected). Yet the First Amendment's "no law" mandate has asserted pressure for exemptions, resulting in numerous multi-factor tests.

First, an exemption for media corporations has been carved out from the definition of regulated "expenditures." *See* 2 U.S.C. § 431(9)(B)(i). Who and what qualifies for the media exemption have been the subject of FEC rulemaking, advisory opinions and enforcement actions, resulting in several court decisions. Media corporations must meet numerous criteria, *see, e.g.*, 11 C.F.R. § 100.132, and movie maker Citizens United did not qualify, *see* FEC AO 2004-30.

Second, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*") carved out an exemption from the corporate independent-expenditure prohibition, 2 U.S.C. § 441b, for certain non-profit corporations. 479 U.S. at 263-64. FEC rules require that an *MCFL*-corporation receive *no* corporate contributions and have *no* business income, 11 C.F.R. § 114.10, although all federal appellate courts considering the issue have permitted *de minimis* corporate contributions

and business income.[9] *McConnell* applied this exemption to electioneering communications. 540 U.S. at 211.

Third, membership organizations are entitled to an exemption for communication to their members. *See United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948). This exemption has spawned additional multi-factor tests. *See* 11 C.F.R. § 100.134.

Fourth, in carrying out this exempt political activity, the *MCFL*-corporation or membership organization must avoid being deemed a PAC, which would subject it to complex, burdensome, and confusing rules. *See, e.g.*, 11 C.F.R. § 100.5, § 100.6, Part 104, Part 109. However, whether an organization is a PAC or not is subject to the FEC's own set of complex factors. *See* "Political Committee Status," 69 Fed. Reg. 68056, and "Political Committee Status," 72 Fed. Reg. 5595.

Fifth, if an organization does not fall into one of the exemptions, it may only engage in "political speech" through a PAC. However, the complexity and burdens of operating PACs preclude many small organizations from being able to operate one, *MCFL* ,479 U.S. at 255 n.8 (plurality opinion) (some organizations "may not find it feasible to establish such a committee, and may therefore decide to forgo engaging in independent polit-

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[9] *See FEC v. NRA*, 254 F.3d 173, 187-93 (D.C. Cir. 2001); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705,713-14 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130-31, 133 (8th Cir. 1997); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 290-93 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356, 1363-65 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

ical speech"), and some corporations cannot have a PAC at all, silencing them altogether. *See McConnell*, 540 U.S. at 332 (Kennedy, J., dissenting in part) (ACLU could not have a PAC). It is no wonder then that *WRTL-II* declared that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." 127 S. Ct. at 2671 n.9 (*citing MCFL*, 479 U.S. at 253-255 (plurality opinion)).

The complexities and burdens of organizing and maintaining PACs favor large corporations and unions over small entities. The cost of establishing, maintaining, and complying with PAC legal and accounting burdens does not vary substantially with size. Additionally, corporate PACs are limited, with rare and highly-conditioned exceptions, to soliciting managerial personnel and shareholders. 2 U.S.C. § 441(b)(4); 11 C.F.R. §§ 114.5-6. Since these donors are limited in what they can give to the PAC, the result is that small employers with limited shareholders and managers can rarely raise enough money to make having a PAC worthwhile. Thus, contrary to Justice Brennan's concurrence in *Austin*, 494 U.S. at 669, for the vast majority of U.S. corporations, the option to speak through a PAC is no option at all. There are, in fact, fewer than 2000 corporate PACs in America, *see* http://www.fec.gov/press/press2007/20071009pac/sumhistory.pdf, but over 5.8 million active corporations. The odd result is that while *Austin* is justified by a need to prevent "distortion" of debate, in fact the ban on corporate expenditures distorts debates by preventing the participation of only small business.

But this is just the tip of the iceberg. There are now unique and complex rules imposed by FECA on 71 dis-

tinct entities, much of it justified by *Austin*: media organizations, *MCFL*-corporations, PACs, business corporations, corporations without capital stock, labor unions, trade associations, membership organizations, unincorporated associations, cooperatives, LLCs, partnerships, sole proprietorships, § 501(c)(4) organizations, § 527 organizations, federal government contractors, federally chartered corporations, national banks, foreign nationals, separate segregated funds, nonmulticandidate committees, multicandidate committees, affiliated committees, connected committees, nonconnected committees, leadership PACs, national party committees (and organizations they establish, finance, maintain, or control), congressional-party committees and separately the Democratic and Republican Senate Campaign Committees, national party officials, major parties, minor parties, new parties, political-committee treasurers, political committees with no treasurer, national nominating conventions, state or local conventions to nominate presidential or vice-presidential candidates, state and local party committees, organizations they establish, finance, maintain, or control, state and local candidates and officeholders, Representative, Delegate or Resident Commissioner candidates and their committees, Senate candidates and their committees, campaign committee for national parties, House and Senate campaign committees for special elections, Presidential candidates, Vice Presidential candidates and their committees, federal candidates and officeholders, Presidential primary election campaign committees, Presidential general election campaign committees, draft committees, principal campaign committees, authorized committees, nonauthorized commit-

tees, affiliated committees, leadership PACs, convention delegate committees, inaugural committees, segregated funds for joint fundraising, segregated funds for compliance costs, segregated funds for "Levin" funds, segregated funds for "electioneering communication" costs, treasurers, vendors, agents, candidates' personal funds, bundlers, collecting agents, fundraising representatives, conduits, individuals, volunteers, and spouses.

This case presents the Court with a glimpse into the burden and unworkability of current campaign finance law. The field has become so complex that citizens cannot understand it and experts find it difficult. The pristine simplicity of the First Amendment's proscription of any law abridging speech yielded first to urgent circumstances, but now is replaced by a flood of complex restrictions. The complexity requires citizens to hire specialists to speak. Specialists cost money. Errors risk penalties. Core political activity is chilled.

2. *Austin* Spawned Multi-Factor Speech Tests.

Austin created the corporate-form "corruption" interest that gave Congress the notion that corporations could be prohibited from making electioneering communications, upon which *McConnell* is based. Thus, the two are inseparable and they have spawned complex multi-factor speech tests.

One is the electioneering-communication definition itself. *See* 11 C.F.R. § 100.29. A second is *McConnell*'s inherently vague "functional equivalent" formula, 540 U.S. at 206, which some legislatures, enforcement agencies, and courts have interpreted as a free-floating test for regulable activity beyond the electioneering-

communication context, even after *WRTL-II* defined "functional equivalent," 127 S. Ct. at 2667. *See, e.g., National Right to Work Legal Defense and Education Fund v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah, 2008). A third is *WRTL-II*'s appeal-to-vote test along with *WRTL-II*'s instructions for how as-applied challenges to protect issue advocacy should be brought. *See* 127 S. Ct. at 2666-67. A fourth is the FEC's rule implementing the appeal-to-vote test. *See* 11 C.F.R. § 114.15.[10]

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[10] But there's more. The FECA uniquely regulates many forms of *speech*, including: (1) Contributions to authorized committees, nonauthorized committees, candidate committees, presidential candidates, vice presidential candidates, Senate campaigns by the NRSC, DSCC, and national-, state- and local-party committees, (2) contributions by multi-candidate committees and individuals, (3) contributions through conduits, (4) earmarked contributions, (5) contributions solicited by corporations, unions, and their separate segregated funds, (6) contributions by, or solicited by, government contractors, (7) contributions in the name of another, (8) contributions in cash, (9) spending by candidate committees, presidential campaigns, presidential nominating conventions, national-party committees in connection with presidential campaigns, national- state-, and local-party committees in connection with House and Senate campaigns, (10) spending coordinated with a candidate, a candidate's committee, or a candidate's agent, (11) spending coordinated with a party committee, (12) coordinated communications, (13) coordinated party expenditures, (14) party coordinated communications, (15) republished campaign material, (16) spending that is not coordinated, (17) donations to and spending by inaugural committees, (18) donations and spending for state or local conventions to nominate presidential or vice-presidential candidates, (19)

3. *WRTL-II*'s Appeal-to-Vote Test Is Difficult for the FEC and Courts to Apply.

WRTL-II's appeal-to-vote test was intended to fix *McConnell*'s vague "functional equivalent" formula by

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loans received and money spent by candidates, (20) independent expenditures, i.e., communications that expressly advocate a clearly identified candidate, with different requirements for those from 20 days to 1 day before an election and those more than 20 days before an election, (21) federal election activity, which includes certain voter registration, voter identification, get-out-the-vote, generic campaign activity and communications that promote, attack, support or oppose federal candidates, (22) money used to raise money for federal-election activity, (23) "Levin" money, (24) electioneering communications, i.e., broadcast ads that mention federal candidates before federal elections, (25) electioneering communications by 501(c)(4)s and 527s, (26) attribution or disclaimer requirements for communications through broadcasting stations, newspapers, magazines, outdoor-advertising facilities, mailings, or any other general public political advertising, (27) fraudulent misrepresentation of campaign authority by candidates or their agents, (28) nonfederal money, (29) money in connection with elections for office, (31) donations to 501(a)s and 501(c)s, (30) expenses allocated under 11 C.F.R. § 106 between/among/for: candidates, authorized presidential primary committees, campaign and noncampaign travel, polling, federal and nonfederal activities of national party committees, separate segregated funds and nonconnected committees, party committees other than for federal election activity, party-committee phone banks, (31) events at public educational institutions, (32) debates, and (33) office buildings.

limiting the use of that formula, although questions were raised by the Court at the time as to whether it would work.[11] As it has turned out, *McConnell* and *WRTL-II*'s derivative appeal-to-vote test have proven unworkable, as the FEC and courts disregard its teachings, chilling core political speech.

Analytically, the FEC's appeal-to-vote-test rule, 11 C.F.R. § 114.15, demoted the actual test to merely part of a balancing test weighed equally with elements crafted from the *application* of the test in *WRTL-II*'s specific grassroots lobbying context. *See WLG Brief* at 17-27.

Functionally, the test as interpreted has been difficult for the FEC and courts to apply. As three current FEC Commissioners recently declared:

> Although we think the legal standard set forth by Chief Justice Roberts in *WRTL* is clear . . . , it appears that not all share our view . . . . Justice Scalia . . . forewarned of this potential murkiness, and what Justice Alito anticipated could happen—that the standard . . . may not prove to be sufficiently clear and thus could . . . chill political speech—*apparently has happened*.

November-Fund SOR at 6 n.22 (citations omitted) (emphasis added).

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[11] *See WRTL II*, 127 S. Ct. at 2674 (Roberts, C.J., joined by Alito, J.) ("no occasion to revisit [*McConnell*] today"), 2674, (Alito, J., concurring) ("if implementation . . . chills speech . . . we will . . . be asked . . . to reconsider"), 2675 (Scalia, J., concurring) (urging ambiguity elimination by overruling *McConnell*).

These FEC Commissioners cited the votes and discussion surrounding the National Right to Life Committee's ("NRLC") advisory opinion ("AO") request[12] concerning whether two "electioneering communications" it wanted to broadcast[13] were permissible or prohibited electioneering communications or express advocacy. *See* AOR 2008-15 (Sep. 26, 2008) (referenced materials *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=continue&PAGE_ NO=-1).[14] The Campaign Legal Center and Democracy 21 submitted comments opining that *both* ads failed the appeal-to-vote test and FEC rule and even contained express advocacy under 2 U.S.C. § 100.22(b). The FEC General Counsel opined that the first ad was neither express advocacy nor a prohibited electioneering communication, but the second contained express advocacy under § 100.22(b). Then-FEC Chairman McGahn submitted a revised draft advisory opinion that would have found that neither ad contained express advocacy nor was a prohibited electioneering communication. On November 24,

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[12] *See also WLG Brief* (addressing this advisory opinion and unworkability of the appeal-to-vote test).

[13] They concerned a current public debate over the position of a candidate on the abortion/infanticide issue, in which the candidate had accused NRLC of misrepresenting his position and NRLC was defending itself.

[14] NRLC requested an "immediate response" because the issue was hot in public debate, "or at least . . . within the 20 day period provided for" candidate requests in 11 C.F.R. § 112.4(b)," asserting that "it is inexcusable that this special benefit afforded to politicians should not also be afforded to . . . citizen groups." *Id.* at 4.

long after public interest in the abortion/infanticide issue had faded and NRLC had lost the timely opportunity to advocate its issue, the FEC issued AO 2008-15, stating that NRLC could fund the first ad with corporate funds and that no response would be forthcoming as to the second ad, the requisite four votes being absent to state an opinion.[15] Commissioners disagree on application of the appeal-to-vote test, and the reformers urge an extreme interpretation.

The test's application problem is evident in the present case where the FEC could not promptly tell whether the *Questions* ad contained an appeal to vote. This is recounted in the *Amended Complaint*, which added Count 4 in response. *See* Dkt. 46 at ¶¶ 32, 43-45. It took nineteen days before the FEC conceded that "on balance" the ad was protected under C.F.R. § 114.15(c). This inability to readily classify the ad is set out in *Plaintiff's Memorandum of Law Responding to FEC's Motion to Dismiss Counts 3 & 4*, *see* Dkt. 46 at 2-3, and reveals the unworkability of the FEC's interpretation of the appeal-to-vote test.

The FEC and a federal court have even disagreed about the nature of one ad, with the FEC deciding that it was not a prohibited electioneering communication

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[15] Since the appeal-to-vote test requires that there be "*no reasonable* interpretation other than as an appeal to vote," *WRTL II*, 127 at 2667, where some (presumably reasonable) commissioners view an ad as not reasonably susceptible to such an interpretation, the ad should not be deemed prohibited. But that is not the FEC's approach, even though *WRTL II* also required that ties and the benefit of any doubt go to free speech. *See id.* at 2667, 2669 n.7, 2674.

and the court holding that it contained *express advocacy*. *See Real Truth About Obama v. FEC*, No. 3:08-cv-483, 2008 WL 4416282 at *7 (E.D. Va., Sep. 24, 2008) (order denying preliminary injunction).

Another indicator of the unworkability of current campaign-finance jurisprudence is that the FEC and state agencies continue to press for, and courts continue to impose, burdensome discovery in First Amendment cases attempting to vindicate the right to associate and speak concerning public issues despite *WRTL-II*'s instruction against such discovery and rejection of contextual matters and intent-and-effect tests in interpreting communications, 127 S. Ct. at 2666. Furthermore, preliminary injunctions are still often denied, even though their ready availability is necessary to make the appeal-to-vote test workable. 127 S. Ct. at 2666.

Conclusion

A central problem with complex multi-factor tests is that people are forced to "'hedge and trim,'" *Buckley*, 424 U.S. at 43 (citation omitted). Citizen speech is chilled. Where core political speech is involved, that is intolerable because the Republic relies on free speech, press, and association. Chill is the current situation.

The sources of the chill are *Austin* and *McConnell*. They should be overruled and the Prohibition, which is based on them, should be found unconstitutional on its face. The Disclosure Requirements should fall with the Prohibition or be held unconstitutional as applied to communications protected from the Prohibition because they are not unambiguously campaign related.

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AMICUS CURIAE BRIEF

No. 08-205

In The
Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF THE SUNLIGHT FOUNDATION, THE NATIONAL INSTITUTE ON MONEY IN STATE POLITICS AND THE CENTER FOR CIVIC RESPONSIBILITY AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. A DECISION OVERRULING AUSTIN AND/OR THAT ASPECT OF MCCONNELL ADDRESSING BCRA'S FACIAL VALIDITY WOULD INCREASE EXISTING UNCERTAINTY AND CONFUSION AMONG LOWER COURTS ABOUT THE CONSTITUTIONALITY OF STATE CAMPAIGN DISCLOSURE STATUTES 5

II. BUCKLEY V. VALEO'S LIMITATION ON CONGRESSIONAL POWER TO MANDATE DISCLOSURE OF INDEPENDENT CAMPAIGN EXPENDITURES WAS NOT CONSTITUTIONALLY IMPOSED AND OTHER DECISIONS HAVE CLARIFIED THE CIRCUMSTANCES IN WHICH SUCH DISCLOSURE CAN BE REQUIRED 9

III. UNLIKE THE DISCLOSURE PROVISIONS INVALIDATED IN DAVIS V. FEC, THE BCRA DISCLOSURE PROVISIONS SUPPLEMENT THE

BLACKOUT PROVISIONS OF § 203 BY INFORMING THE PUBLIC ABOUT ISSUE ADS INSULATED FROM PROHIBITION BY WRTL II AND BY FACILITATING FEC REGULATION . 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Austin v. Michigan Chamber of Commerce,
494 U.S. 652 (1990) 3, 5, 9

Broward Coal. of Condos., Homeowners Ass'ns & Cmty. Orgs., Inc. v. Browning,
No. 4:06cv445, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008); No. 4:06cv445, 2009 WL 1457972 (N.D. Fla. May 22, 2009) 7, 8

Buckley v. Valeo,
424 U.S. 1 (1976) 3, 4, 7, 8, 9, 10

Citizens Against Rent Control v. City of Berkeley,
454 U.S. 290 (1981) 4, 11

Citizens United v. FEC,
530 F. Supp. 2d 274 (D.D.C. 2008) 6

Davis v. FEC,
128 S.Ct. 2759 (2008) 5, 12, 15

FEC v. Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986) 4, 10

FEC v. Wisconsin Right to Life, Inc.,
551 U.S. 449 (2007) ..... passim

First Nat'l. Bank v. Bellotti,
435 U.S. 765 (1978) 4, 10, 11

Human Life of Washington, Inc. v. Brumsickle,
No. C08-0590, 2009 WL 62144 (W.D. Wash. Jan. 8, 2009), appeal docketed No. 09-35128 (9th Cir. 2009) 3, 6, 7

McConnell v. FEC,
540 U.S. 93 (2003) . . . . . passim

McConnell v. FEC,
251 F. Supp. 2d 176 (D.D.C. 2003) 13, 14

Nat'l Right to Work Legal Def. and Educ. Found., Inc. v. Herbert,
581 F. Supp. 2d 1132 (D. Utah 2008) 3, 8

North Carolina Right to Life, Inc. v. Leake,
525 F.3d 274 (4th Cir. 2008) 8, 9

Ohio Right to Life Society, Inc. v. Ohio Elections Comm'n,
No. 2:08-cv-00492, 2008 WL 4186312 (S.D. Ohio Sept. 5, 2008) 7

United States v. Harriss,
347 U.S. 612 (1954) 4, 11

STATUTES

Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (BCRA) . . . . . passim

Federal Election Campaign Act of 1971 (FECA) 4, 10

Alaska Stat. § 15.13.400(5) 4

Ariz. Rev. Stat. Ann. § 16-901.01(A)(2) 4

Cal. Gov't. Code § 85310 4

Colo. Const. Art. XXVIII § 2(7) 4

Conn. Gen. Stat. Ann. § 9-601b(a) 4

Fla. Stat. Ann. § 106.11(18) 4

Haw. Rev. Stat. § 11-207.6 4

Idaho Code Ann. § 67-6602(f) 4

10 Ill. Comp. Stat. § 5/9-1.14 4

Me. Rev. Stat. Tit. 21-A § 1019-B 4

N.C. Gen. Stat. § 163-278.80(2) 4

Ohio Rev. Code Ann. § 3517.1011(7) 4

INTEREST OF AMICI CURIAE[1]

The Sunlight Foundation was founded in 2006 with the non-partisan mission of using the revolutionary power of the Internet to make information about Congress and the federal government more meaningfully accessible to citizens. Through our projects and grant-making, Sunlight serves as a catalyst for greater political transparency, thus making the government more open and accountable. Sunlight's ultimate goal is to strengthen the relationship between citizens and their elected officials and to foster public trust in government. Since our founding, we have assembled and funded an array of Web-based databases and tools, including OpenCongress.org, FedSpending.org, OpenSecrets.org, and EarmarkWatch.org, that make millions of bits of information available online about members of Congress, their staff, legislation, federal spending, and lobbyists. The Sunlight Foundation has a particular interest in promoting the electronic disclosure of political expenditures at all levels of government.

The National Institute on Money in State Politics (www.followthemoney.org) is a nonpartisan nonprofit dedicated to compiling state-level campaign finance data and lobbyist information and providing the public open access to that data via the Internet. The Institute's comprehensive and highly credentialed 50-state political-donor data has been used by

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

investigative reporters, scholars, attorneys and the public as they unravel the correlations between political donors and public policies. Incorporated in 1999 in Helena, Montana, the Institute's mission is to promote electoral and governmental transparency as a means to invigorating public debate on important issues of the day and civic engagement. The Institute's interest is in defending robust disclosure of all political expenditures at the state level.

The Center for Civic Responsibility is a non-profit 501(c)(3) corporation whose mission is to increase civic engagement by developing model legislation for use by citizens who wish to improve government integrity and transparency. The Center has a long history and expertise in campaign finance law. In 1999, the Center established an all volunteer Legal Task Force to develop model campaign finance reform laws for state and local adoption. Some of the reforms include a government contracting "pay-to-play" reform law and a law requiring developers to disclose political contributions when applying for major zoning variances. The Center has a particular interest in defending any case that threatens to limit disclosure of campaign expenditures.

SUMMARY OF ARGUMENT

The thrust of the Court's order directing supplemental briefing causes Amici to have justifiable concerns that the Court's ultimate disposition could affect not only the constitutionality of BCRA's disclosure and disclaimer requirements, but also could generate uncertainty about the constitutionality of numerous state statutes that mandate disclosure and reporting of campaign contributions and expenditures,

including expenditures for electioneering communications as defined in BCRA, that may not be constitutionally subject to prohibition or limitation.

Those concerns are underscored by several lower court opinions that reach inconsistent conclusions about the effect of this Court's decision in FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) (WRTL II), on state statutory disclosure and reporting requirements. Compare Human Life of Washington, Inc. v. Brumsickle, No. C08-0590, 2009 WL 62144, at *17-18 (W.D. Wash. Jan. 8, 2009) (upholding State of Washington statute mandating disclosure by political committees of expenditures for advocacy relating to issues underlying ballot proposition, and finding it "unclear whether [WRTL's] logic extends to lesser burdens on non-express advocacy"), appeal docketed, No. 09-35128 (9th Cir. 2009), with Nat'l Right to Work Legal Def. and Educ. Found., Inc. v. Herbert, 581 F. Supp. 2d 1132, 1152 (D. Utah 2008) (relying on Buckley v. Valeo, 424 U.S. 1 (1976) and WRTL II and invalidating Utah statute mandating disclosure by corporations of "political expenditures" and similar disclosure by so-called "political committees" because plaintiff's ads "do not expressly advocate for the enactment or defeat of school vouchers, nor are they otherwise unambiguously campaign related."). Amici believe that a decision by this Court overruling either or both Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), and the part of McConnell v. FEC, 540 U.S. 93 (2003), that addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b (BCRA), although not resolving the disclosure issue, would add to the uncertainty and inconsistency reflected by recent lower court decisions and would create doubt and confusion about the

standards governing enforceability or numerous state disclosure and reporting laws.[2]

Amici disputes Appellant's reliance on Buckley's holding that a prior Federal Election Campaign Act disclosure requirement was confined to spending "unambiguously related to the campaign of a particular federal candidate" (Br. 47 (quoting Buckley, 424 U.S. at 80)). In McConnell, this Court made clear that Buckley's "express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." 540 U.S. at 191-92. This Court's pre- and post-Buckley jurisprudence has clarified the circumstances in which disclosure of campaign expenditures can be compelled, without regard to whether such expenditures are constitutionally exempt from prohibition or other limitations. See FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 262 (1986) (MCFL), Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294 n.4, 298-99 (1981); First Nat'l. Bank v. Bellotti, 435 U.S. 765, 792 n.32 (1978) (Bellotti); United States v. Harriss, 347 U.S. 612, 625-26 (1954).

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[2] A number of states have enacted reporting requirements based on a definition of electioneering communication similar to that contained in BCRA. See Alaska Stat. § 15.13.400(5); Ariz. Rev. Stat. Ann. § 16-901.01(A)(2); Cal. Gov't. Code § 85310; Colo. Const. Art. XXVIII § 2(7); Conn. Gen. Stat. Ann. § 9-601b(a); Fla. Stat. Ann. § 106.11(18); Haw. Rev. Stat. § 11-207.6; Idaho Code Ann. § 67-6602(f); 10 Ill. Comp. Stat. § 5/9-1.14; Me. Rev. Stat. Tit. 21-A § 1019-B; N.C. Gen. Stat. § 163-278.80(2); Ohio Rev. Code Ann. § 3517.1011(7).

Notwithstanding Appellant's reliance on this Court's invalidation of the disclosure provisions at issue in Davis v. FEC, 128 S.Ct. 2759 (2008) (Br. 53 (citing Davis, 128 S.Ct. at 2775)), those disclosure provisions clearly had been adopted for the sole purpose of implementing the so-called "millionaires' amendment," also invalidated in Davis. As the plurality opinion in McConnell makes clear, 540 U.S. at 196, the disclosure provisions of BCRA supplement the blackout provisions of § 203 by providing the public with information about the sponsorship and funding of issue ads whether or not they meet the WRTL II test of express advocacy. Amici contend that any disposition of this appeal that further dilutes or invalidates BCRA's prohibition on certain corporate and union-funded electioneering communications will substantially increase their use and dissemination resulting in an enhanced public interest for disclosure of the source and funding of such communications.

ARGUMENT

I. A DECISION OVERRULING AUSTIN AND/OR THAT ASPECT OF MCCONNELL ADDRESSING BCRA'S FACIAL VALIDITY WOULD INCREASE EXISTING UNCERTAINTY AND CONFUSION AMONG LOWER COURTS ABOUT THE CONSTITUTIONALITY OF STATE CAMPAIGN DISCLOSURE STATUTES.

In McConnell, five members of the Court concluded that BCRA's disclosure requirements applied to the "entire range of 'electioneering communications,'" 540 U.S. at 196, and three additional Justices voted to uphold those requirements (with one exception not

relevant to this appeal) although also voting to invalidate the ban on corporate-funded electioneering communications, id. at 321 (Kennedy, J., concurring in the judgment in part and dissenting in part). In WRTL II this Court did not invalidate, nor even consider, the application of BCRA's disclosure requirements to electioneering communications. But recent lower court decisions have reached different conclusions about the constitutionality of state statutory disclosure requirements in the wake of WRTL II.

In this matter, the district court rejected Appellant's contention that because its speech was constitutionally protected, BCRA's disclosure and disclaimer provisions could not constitutionally be applied to Citizens United, observing that "the Supreme Court has not adopted that line * * * and it is not for us to do so today." Citizens United v. FEC, 530 F. Supp. 2d 274, 281 (D.D.C. 2008). Analogously, in Brumsickle, 2009 WL 62144, at *15, a Washington district court rejected a challenge to the application of statutory disclosure provisions to a "political committee" based on the contention that the statute's provisions applied to expenditures for communications that did not expressly support or oppose the ballot initiative at issue. Noting that in the ballot initiative context there is "little, if any, meaningful distinction between issue and express advocacy," the Washington district court held that "the state's compelling interests in informing the electorate and protecting contributors justify requiring * * * [disclosure of] all expenditures made 'in support of, or opposition to * * * a ballot proposition' * * * * even when 'expenditure' is defined to include some advocacy as to the 'issue'

underlying the proposition * * *." 2009 WL 62144 at *18.

Similarly, in Ohio Right to Life Society, Inc. v. Ohio Elections Commission, No. 2:08-cv-00492, 2008 WL 4186312 (S.D. Ohio Sept. 5, 2008), an Ohio district court rejected plaintiff's as-applied challenge to Ohio's statutory campaign disclosure requirements, contending that its ads, although mentioning the names of State Senators running for election within the proscribed statutory period, were not the functional equivalent of express advocacy as clarified by WRTL II. Noting that "[t]he WRTL Court did not even mention disclosure requirements, much less consider their constitutionality," 2008 WL 4186312 at *9, the Ohio district court sustained the disclosure requirements, finding that they were supported by the same public interests identified by this Court in Buckley and McConnell id. at *10.

In contrast, a Florida federal district court recently held unconstitutional a Florida statute regulating electioneering communications in its application to a non-profit corporation that intended to disseminate newsletters that mentioned candidates and discussed ballot issues. Broward Coalition of Condominiums, Homeowners Ass'ns and Community Organizations, Inc. v. Browning, No. 4:08cv445, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008) (preliminarily enjoining Florida law), 2009 WL 1457972 (N.D. Fla. May 22, 2009) (permanently enjoining electioneering provisions of Florida law). In Broward, the Florida court concluded that WRTL II's standard for determining whether a communication was functionally equivalent to express advocacy precluded the application of the reporting and disclosure provisions of the Florida

statute to plaintiff's ballot issue communications. 2009 WL 1457972 at *5. Similarly in National Right to Work Legal Defense and Education Foundation, Inc. v. Herbert, 581 F. Supp. 2d 1132 (D. Utah 2008), a non-profit legal aid corporation challenged the application to its radio and television ads of a Utah statute that regulated and imposed reporting and disclosure requirements on "political" expenditures, defined to include any "payment * * * made for the purpose of influencing the approval or defeat of a ballot proposition." Id. at 1149. The ads in question were intended to inform teachers and school employees that they had no obligation to participate in the teachers' union's efforts to defeat a ballot proposal for school vouchers. Id. at 1137. Relying primarily on Buckley and WRTL II, the court held that because plaintiff's ads were not either express advocacy or its functional equivalent, the Utah statute's regulatory and disclosure provisions could not constitutionally be applied to plaintiff's ads. Id. at 1144, 1149-50.

Analogously, in North Carolina Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008), the court invalidated a North Carolina statute that regulated and imposed reporting requirements on expenditures or contributions for communications supporting or opposing an identified candidate. The statute authorized consideration of contextual factors to determine whether a communication met the statutory standard. Id. at 280-81. In invalidating the statute, as well as its disclosure and reporting requirements, the Fourth Circuit relied on Buckley and WRTL II in concluding that the power to regulate plaintiff's communications and to impose reporting requirements depended on whether such communications were

either express advocacy or its functional equivalent. Id. at 281-82.

Those federal courts that have addressed the constitutionality of state campaign disclosure requirements since this Court's decision in WRTL II clearly are divided over its effect. A disposition in this appeal that overrules Austin and/or the aspect of McConnell that address BCRA § 203's facial validity would not resolve the disclosure issue and would add to the existing confusion. Amici urges the Court to reaffirm McConnell's clear holding, 540 U.S. at 196, that the vital public interests underlying BCRA's disclosure requirements apply with equal force to "the entire range of 'electioneering communications,'" id., whether or not they satisfy WRTL II's test for the functional equivalence of express advocacy WRTL II, 551 U.S. 449, 127 S.Ct. 2652, 2667.

II. BUCKLEY V. VALEO'S LIMITATION ON CONGRESSIONAL POWER TO MANDATE DISCLOSURE OF INDEPENDENT CAMPAIGN EXPENDITURES WAS NOT CONSTITUTIONALLY IMPOSED AND OTHER DECISIONS HAVE CLARIFIED THE CIRCUMSTANCES IN WHICH SUCH DISCLOSURE CAN BE REQUIRED.

Although Appellant relies on Buckley for the proposition that disclosure requirements can apply only to spending "unambiguously related to the campaign of a particular federal candidate," (Br. 47 (quoting Buckley, 424 U.S. at 80)), this Court in McConnell explained that Buckley's "express advocacy limitation * * * was the product of statutory interpretation rather than a constitutional command."

540 U.S. at 191-92. See also MCFL, 479 U.S. at 248-49 (noting that Buckley's "express advocacy" standard was adopted "to avoid problems of overbreadth.").

Several decisions of this Court have upheld disclosure provisions related to expenditures that could not constitutionally be prohibited. A compelling example is MCFL, in which the Court held that the restriction on independent corporate spending contained in § 316 of the Federal Election Campaign Act (FECA), 2 U.S.C. 441(b), was unconstitutional as applied to MCFL, a non-profit corporation with no shareholders, formed to promote political ideas and not established or funded by business corporations or labor unions. 479 U.S. at 263-64. Nevertheless, the Court noted that:

> MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures.

Id. at 262. Underscoring the recognition that disclosure requirements rest on a different foundation than outright prohibition, the MCFL Court added that "[t]hese reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of contributions." Id.

Similarly, in Bellotti, 435 U.S. 765 (1978), in which the Court invalidated a statute prohibiting

corporations from engaging in issue advocacy, the Court nevertheless acknowledged that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." Id. at 792 n.32. To the same effect is Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981), in which the Court invalidated an ordinance limiting the amount of contributions to committees supporting or opposing ballot measures but observed that the enforcement of the disclosure provisions of the ordinance removes the "risk that Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure * * *" Id. at 298.

Moreover, in United States v. Harriss, 347 U.S. 612 (1954), in upholding the constitutionality of the Federal Regulation of Lobbying Act, the Court aptly noted that Congress had not sought to prohibit the pressures exerted by lobbyists but "has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." Id. at 625.

In short, this Court's precedents consistently have recognized that Congress' power to compel disclosure does not depend on the constitutionality of a prohibition of the activity about which disclosure is mandated.

III. UNLIKE THE DISCLOSURE PROVISIONS INVALIDATED IN DAVIS V. FEC, THE BCRA DISCLOSURE PROVISIONS SUPPLEMENT THE BLACKOUT PROVISIONS OF § 203 BY INFORMING THE PUBLIC ABOUT ISSUE ADS INSULATED FROM PROHIBITION BY WRTL II AND BY FACILITATING FEC REGULATION.

Appellant unpersuasively relies on this Court's decision in Davis (Br. 48) in which the Court invalidated the disclosure provisions of § 319(b) of BCRA on the basis that those provisions were enacted solely "to implement the asymmetrical contribution limits provided for in § 319(a)," which limits the Court held to be violative of the First Amendment. Davis, 128 S.Ct. at 2775. Analytically, the invalidation of the § 319(b) disclosure provisions in Davis provides no basis for appellant's contention that BCRA's disclosure and disclaimer provisions cannot be applied to electioneering communications that fall short of WRTL II's standards for determining the functional equivalent of express advocacy.

If not explicitly embraced by the lead opinion in WRTL II, the opinion implicitly acknowledged, by giving "the benefit of doubt to speech, not censorship," 127 S.Ct. at 2674, what was the major premise of the plurality opinion in McConnell:

> [I]ssue and express advocacy * * * proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed

> the use of magic words * * * * Indeed, campaign professionals testified that the most effective campaign ads * * * should, and did, avoid the use of the magic words.

McConnell, 540 U.S. at 126-27 (internal quotations removed).

No informed observer of campaign finance regulation would dispute that, post-WRTL II, innumerable electioneering communications will be broadcast and telecast that, although not quite the functional equivalent of express advocacy, nevertheless will be intended by their sponsors and understood by their recipients to constitute express advocacy for the support or defeat of an identified candidate. Notwithstanding WRTL II's bright line rule, the "important state interests" that this Court recognized in McConnell in upholding BCRA's disclosure and disclaimer requirements, 540 U.S. at 196, remain just as vibrant and relevant today, and those interests – especially the interest in public information about the source and funding of electioneering communications – apply with equal weight to express advocacy ads as well as issue ads. Because such information was unavailable to the public prior to BCRA, McConnell, 540 U.S. at 126, the authors of the district court's per curiam opinion in McConnell persuasively documented the rationale for BCRA's disclosure provisions:

> The factual record demonstrates that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public.

> BCRA's disclosure provisions require these organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. * * * Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: "The Coalition-Americans Working for Real Change" (funded by business organizations opposed to organized labor), "Citizens for Better Medicare" (funded by the pharmaceutical industry), "Republicans for Clean Air" (funded by brothers Charles and Sam Wyly). * * * Given these tactics, Plaintiffs never satisfactorily answer the question of how "uninhibited, robust, and wide-open" speech can occur when organizations hide themselves from the scrutiny of the voting public. * * * Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.

McConnell v. FEC, 251 F. Supp. 2d 176, 237 (D.D.C. 2003).

Moreover, the Federal Election Commission has an ongoing regulatory need to monitor electioneering communications and determine for itself whether the WRTL II exemption is applicable. The FEC's enforcement interests depend on the receipt of reports informing it of the impending broadcast, and funding sources, of electioneering communications. Unlike the

disclosure provision invalidated in Davis, the BCRA reporting and disclaimer provisions challenged by Appellant supplement the FEC's regulatory interest in enforcing § 203 of BCRA and further the public interest in knowing the sponsorship and funding sources of issue ads that may just fall short of "the functional equivalent of express advocacy." WRTL II, 551 U.S. 449, 127 S.Ct. 2652, 2667.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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Date: July 31, 2009

AMICUS CURIAE BRIEF

No. 08-205

IN THE

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* REPRESENTATIVES CHRIS VAN HOLLEN, DAVID PRICE, MICHAEL CASTLE, AND JOHN LEWIS IN SUPPORT OF APPELLEE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Overruling *Austin* and *McConnell* Would Transform the Conduct of Elections in This Country 3

A. Such a Ruling Would Usher in a New Era of Corporate Spending as a Dominant Force in American Politics 3

B. Limitations on Corporate Expenditures Are Essential to Our Democracy 4

II. This Court Has, for Decades, Properly Exercised Judicial Restraint in Refusing to Invalidate Laws Proscribing Corporate Campaign Expenditures 7

A. Corporations Are Properly Subject to Regulation of Their Campaign Spending To Protect Against Unfair and Undue Influence 8

B. This Court's Doctrine of Constitutional Avoidance Is Most Compelling in the Present Circumstances 9

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. Mich. Chamber of Commerce,
494 U.S. 652 (1990) ..... passim

Bellotti v. First Nat'l Bank of Boston,
435 U.S. 765 (1978) 5, 8, 9

Buckley v. Valeo,
424 U.S. 1 (1976) 5, 14

Ex parte Randolph,
20 F. Cas. 242 (C.C.Va. 1833) 9, 11

FEC v. Beaumont,
539 U.S. 146 (2003) 8, 10

FEC v. Mass. Citizens for Life,
479 U.S. 238 (1986) 8

FEC v. Nat'l Right to Work Comm.,
459 U.S. 197 (1982) 2, 10

FEC v. Wis. Right to Life, Inc.,
127 S. Ct. 2652 (2007) 2, 13, 14

McConnell v. FEC,
251 F. Supp. 2d 176 (D.D.C. 2003) 9

McConnell v. FEC,
540 U.S. 93 (2003) ..... passim

Nixon v. Shrink Mo. Gov't PAC,
528 U.S. 377 (2000) 10

United States v. Congress of Indus. Orgs.,
335 U.S. 106 (1948) ..... passim

United States v. Int'l Union United Auto, Aircraft and Agr. Implement Workers of Am., 352 U.S. 567 (1957) 7, 10, 12, 13, 14, 16

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, codified at 2 U.S.C. § 441b(b)(2) (2002) ..... passim

CONGRESSIONAL RECORD

147 Cong. Rec. S2948 (statement of Sen. Kerry) (daily ed. Mar. 27, 2001) 6

147 Cong. Rec. S2954 (statement of Sen. Feingold) (daily ed. Mar. 27, 2001) 6

148 Cong. Rec. S2138 (statement of Sen. McCain) (daily ed. March 20, 2002) 10

OTHER AUTHORITIES

Andrew Zajac, *Conservative Group Offered to Back FedEx, For a Price,* L.A. TIMES, July 19, 2009 7

Anthony Corrado & Thomas E. Mann, *In the Wake of BCRA: An Early Report on Campaign Finance in the 2004 Elections,* FORUM, June 2004 4

Constitutional Issues Impacting Campaign Reform: Hearings Before the S. Comm. On Rules and Administration,106th Cong. (2000) 10

Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for NonProfit Groups in Federal Elections*, 31 N. KY. L. REV. 243; 286 (2004) 15

Editorial, *The Ever-Deepening Pension Mess*, N.Y. TIMES, May 1, 2009 6

TABLE OF AUTHORITIES
(continued)

Page(s)

First Amendment and Restrictions on Political Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 106th Cong. (1999) 10

Ray La Raja, *Sources and Uses of Soft Money*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM (Gerald C. Lubenow ed., 2001) 3, 4

Richard Briffault, *Law and Democracy: A Symposium on the Law Governing Our Democratic Process, the 527 Problem . . . And the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 993 (2005) 5

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Soft Money Backgrounder, Center for Responsive Politics, http://www.opensecrets.org/parties/softsource.php 4

INTEREST OF *AMICI CURIAE*[1]

Representatives Chris Van Hollen, David Price, Michael Castle, and John Lewis are Members of Congress from, respectively, Maryland, North Carolina, Delaware, and Georgia. As Members of Congress, they know first-hand the importance of the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (codified at 2 U.S.C. § 441b(b)(2) (2002)) ("BCRA"). Representatives Price, Castle, and Lewis filed an amicus curiae brief in *McConnell v. FEC*, 540 U.S. 93 (2003), urging this Court to uphold this law.[2] Their interest is to inform the Court from the unique perspective of individuals who are both familiar with the effect of money on politics and legislation and deeply concerned about maintaining public trust in our democracy.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

[2] Representative Van Hollen was elected to Congress in 2002, after BCRA passed, but before it took effect.

SUMMARY OF ARGUMENT

Nearly twenty years ago, this Court confirmed that a legislature may constitutionally regulate for-profit corporations' spending of their treasury money on campaigns for public office. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). Congress's authority to target the corrosive effect of unlimited corporate expenditures on campaigns was reaffirmed in *McConnell v. FEC*, 540 U.S. 93 (2003) and, only two years ago, in *FEC v. Wis. Right to Life*, Inc., 127 S. Ct. 2652 (2007) ("*WRTL*"). These decisions are in accord with the belief and expectation held by generations of Americans that they have the power, through their elected representatives, to ensure the integrity of this nation's electoral system. *See United States v. Int'l Union United Auto, Aircraft and Agr. Implement Workers of Am.*, 352 U.S. 567, 570 (1957) ("*UAW-CIO*") (scrutiny of statute proscribing corporate campaign expenditures implicated "the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process."); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982).

Whether the proper disposition of this case requires overruling *Austin*—and by extension *McConnell*'s upholding of Section 203 of BCRA—therefore implicates "issues not less than basic to a democratic society." *UAW-CIO*, 352 U.S. at 570. Should the Court overturn those precedents, it would displace long-standing legislation (both at the federal level and in those states that have chosen to impose similar restraints) and judicial precedent, and usher in a new era of corporate spending as a dominant force in politics. As Members of Congress, we believe this would engender great popular frustration and cynicism about our political process.

Resolution of the narrow questions presented by Appellant in this case provides no justification for such an upheaval of our electoral system. The Court should abide by its past decisions in which it confronted challenges to Congress's

power to regulate corporate campaign expenditures and declined to entertain broad constitutional questions where narrower grounds for deciding the case existed. Such judicial restraint is especially appropriate here, where the parties and trial court have not fully developed the evidentiary record or arguments that would be crucial to consideration of such a dramatic change to our First Amendment jurisprudence.

ARGUMENT

I. OVERRULING *AUSTIN* AND *MCCONNELL* WOULD TRANSFORM THE CONDUCT OF ELECTIONS IN THIS COUNTRY

A. Such a Ruling Would Usher in a New Era of Corporate Spending as a Dominant Force in American Politics

The dominant role that corporate treasury funds played in the soft money explosion of the 1990s indicates that voiding restrictions on independent corporate expenditures would unleash a flood of unregulated campaign money from corporations, dramatically altering candidate campaigns.

In the years leading up to BCRA, soft money became an increasingly important means of skirting federal campaign finance laws. In 2000, soft money accounted for 54% and 39%, respectively, of total receipts collected by the Democratic and Republican national parties. Ray La Raja, *Sources and Uses of Soft Money*, *in* A USER'S GUIDE TO CAMPAIGN FINANCE REFORM 83, 86 (Gerald C. Lubenow ed., 2001).

Business interests were the primary source of these funds. *Id.* at 84. In the election years between 1994 and 1998, business interests accounted for 62-64% of the soft money paid to both parties. *Id.* at 87-89. While corporate soft money expenditures remained relatively constant as a

percentage of the totals during this period, in real dollars such spending more than doubled.[3] *Id.*

BCRA ended the soft money era, prohibiting contributions of corporate treasury funds to national party committees. The national parties now rely much more heavily on hard money donations from individuals. Anthony Corrado & Thomas E. Mann, *In the Wake of BCRA: An Early Report on Campaign Finance in the 2004 Elections*, FORUM, June 2004, at 4 (discussing the parties' success post-BCRA in raising money from small individual donors).

We expect that, given the opportunity, many corporations would make vast expenditures from their general treasuries in an effort to influence federal election outcomes, just as they did on a grand scale through soft money spending prior to BCRA's enactment. If this Court overrules *Austin* and invalidates existing restrictions on corporate treasury expenditures, it will open the floodgates of corporate campaign spending and transform our electoral system.

B. Limitations on Corporate Expenditures Are Essential to Our Democracy

We believe that such a dramatic transformation of the electoral process would harm our democracy. As amici who have special expertise with the workings of the electoral process and Congress, we believe that such a flood of corporate money would undermine the integrity of our

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[3] Federal Election Commission data indicates that, between 1992 and 2002, more than two-thirds of soft money paid to the major parties came from organizations. *See Soft Money Backgrounder*, Center for Responsive Politics, http://www.opensecrets.org/parties/softsource.php. The data indicates that total organizational soft money spending over the course of these six election cycles exceeded one billion dollars. *Id.* Based on the data regarding business-interest spending from 1992-1998, one can infer that corporate spending accounted for the vast majority of this amount.

democratic system and public confidence in that system because of corporations' unique characteristics.

Unregulated corporate expenditures would create serious concerns about undue influence for corporate donors. As this Court has found, such corporate expenditures, even if technically independent, are often no less appreciated by the candidate who reaps the benefit.[4] "While the public may not have been fully informed about the sponsorship of so-called issue ads, the record indicates that candidates and officeholders often were. A former Senator confirmed that candidates and officials knew who their friends were and 'sometimes suggest[ed] that corporations . . . make donations to interest groups that run 'issue ads'.'" *McConnell*, 540 U.S. at 128-29. As many current and former Members of Congress and candidates have attested, "[f]ederal candidates appreciate interest group electioneering ads . . . that benefit their campaigns just as they appreciate large donations that help their campaigns." Decl. of Linda W. Chapin submitted in *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C. Sept. 12, 2002), www.campaignlegalcenter.org/attachments/704.pdf; *see also, e.g.*, Decl. of Senator Dale Bumpers ¶ 16, www.campaignlegalcenter.org/attachments/702.pdf

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[4] In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court concluded, in the absence of any record to the contrary, that independent expenditures by individuals do not have the same corrupting effect as direct contributions. *Id.* at 46-47. The Court subsequently recognized, in *Bellotti v. First Nat'l Bank of Boston*, 435 U.S. 765, 788 n.26 (1978), and *Austin*, 494 U.S. at 660, that a legislature might determine that there is "a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections." *Buckley* preceded the explosion of sophisticated independent expenditures by corporations in recent decades. Consequently, the *Buckley* Court lacked the copious evidence before the *McConnell* Court showing such expenditures' potential influence. *See* Richard Briffault, *Law and Democracy: A Symposium on the Law Governing Our Democratic Process, the 527 Problem . . . And the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 993 (2005).

("Members or parties sometimes suggest that corporations . . . make donations to interest groups that run 'issue ads.' . . . Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation."); Decl. of Joe Lamson ¶ 19, www.campaignlegalcenter.org/attachments/716.pdf ("In my experience as a federal election campaign manager, if you're in a close race and there are interest groups out there helping you with things like broadcast 'issue ads,' you usually appreciate that support.").

Public cynicism about the role of money in the political process runs high. As Senator Kerry noted during debate on BCRA, a national poll found that "[e]ighty-seven percent of voters believe that money impacts Members of Congress, with 56 percent expressing the belief that it affects Members a lot." 147 Cong. Rec. S2948 (daily ed. Mar. 27, 2001). Political contributors share this belief: Senator Feingold reported that seventy-five percent of senior corporate executives surveyed believed that their contributions to Members of Congress influenced legislation. 147 Cong. Rec. S2954 (daily ed. Mar. 27, 2001).

Congress enacted BCRA to restore confidence in our democracy. BCRA's definition of "electioneering communications" closed loopholes that had eviscerated decades-old restrictions on corporate and union expenditures. While imperfect, BCRA is an important bulwark in the battle to instill public faith in our system—one we need now as much as ever. We read every day about scandals that threaten the integrity of our system, from the pay-to-play scandals plaguing our public pension funds,[5] to interest groups'

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[5] Editorial, *The Ever-Deepening Pension Mess*, N.Y. TIMES, May 1, 2009 (describing alleged pay-to-play scandals involving New York State's pension systems)

allegedly offering to sell their influence for a million-dollar payment.[6]

As discussed above, we expect that a decision overturning *Austin* and *McConnell* would lead to vastly increased corporate expenditures in candidate elections. We are gravely concerned about the damage this would do to public confidence in our electoral system and our democracy.

II. THIS COURT HAS, FOR DECADES, PROPERLY EXERCISED JUDICIAL RESTRAINT IN REFUSING TO INVALIDATE LAWS PROSCRIBING CORPORATE CAMPAIGN EXPENDITURES

Austin validated regulations of corporate expenditures in candidate elections that have now been an embedded feature of the American electoral system, at both the state and federal levels, for more than 100 years. *See* Robert E. Mutch, *Before and After Bellotti: The Corporate Political Contributions Cases*, 5 ELECTION L. J. 293, 293 (2006). During this long history, corporate and union interests have repeatedly launched First Amendment attacks on restrictions of their ability to make independent expenditures in federal elections. This Court, however, has never held that limits on spending by for-profit corporations in candidate elections unconstitutionally restrict protected speech. *See UAW-CIO*, 352 U.S. at 589-93; *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 123-24 (1948) ("*CIO*"). Instead, in an unbroken line of precedent, this Court has erected two doctrines—one substantive and one prudential—that demand continued fidelity to *Austin's* holding.

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[6] Andrew Zajac, *Conservative Group Offered to Back FedEx, For a Price*, L.A. TIMES, July 19, 2009 (describing alleged offer by the American Conservative Union to support FedEx's legislative position and "rally [the] grassroots" in exchange for a fee of $2.1-$3.4 million).

A. Corporations Are Properly Subject to Regulation of Their Campaign Spending To Protect Against Unfair and Undue Influence

This Court has repeatedly recognized that the unique characteristics and advantages of for-profit corporations as creations of the state justify regulation of their spending in candidate elections. In *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986), the Court observed that "[d]irect corporate spending on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *Id.* at 257. In *Austin*, the Court reiterated that and held that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." 494 U.S. at 659, 660; *see also FEC v. Beaumont*, 539 U.S. 146, 154, 155 (2003) (recognizing "the public interest in restrict[ing] the influence of political war chests funneled through the corporate form," and the need to respect the "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation") (quotations omitted, alteration in original).

Even in *Bellotti*, the Court recognized that restrictions on such spending in candidate elections could be justified. The Court took special care to make clear that its rationale for invalidating restrictions on corporate expenditures in connection with ballot measures did not extend to restrictions on such expenditures in candidate elections. *Bellotti*, 435 U.S. at 788 n.26.

> [O]ur consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of danger of real or apparent corruption in independent

> expenditures by corporations to influence candidate elections.

Id. Congress made this precise showing in enacting BCRA, as *McConnell*'s record amply indicates. *See* Section I.B., *supra*; *see also McConnell v. FEC*, 251 F. Supp. 2d 176, 622-23 (D.D.C. 2003) (Kollar-Kotelly, J.) ("The [*McConnell*] record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting.").

B. This Court's Doctrine of Constitutional Avoidance Is Most Compelling in the Present Circumstances

Amici respectfully submit that, in the present circumstances, it would be rash for the Court to consider overruling *Austin* and that portion of *McConnell* upholding BCRA's Section 203.

Chief Justice Marshall wrote:

> No questions can be brought before a judicial tribunal of greater delicacy than those which involve the constitutionality of a legislative act. If they become indispensably necessary to the case, the court must meet and decide them; but if the case may be determined on other points, a just respect for the legislature requires that the obligation of its laws should not be unnecessarily and wantonly assailed.

Ex parte Randolph, 20 F. Cas. 242, 254 (C.C.Va. 1833) (No. 11,558).

This doctrine applies with particular force in the context of challenges to regulation of corporate financial participation in candidate elections. As this Court has repeatedly stressed,

"Congress' 'careful legislative adjustment of the federal election laws, in a cautious advance, step by step, to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference.'" *McConnell*, 540 U.S. at 117 (quoting *Nat'l Right to Work Comm.*, 459 U.S. at 209); *Beaumont*, 539 U.S. at 156-57; *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) ("[T]he legislature understands the problem—the threat to electoral integrity, the need for democratization—better than do we.").[7] Moreover, where, as here, the "integrity of the electoral process" and the "responsibility of the individual citizen for the successful functioning of that process" are implicated, *UAW-CIO*, 352 U.S. at 570, constitutional scrutiny of regulations should not even begin unless such scrutiny is "absolutely necessary to a decision." *Id.* at 590-91 (quotation omitted).

The need for such judicial restraint is at its apex here. At no point prior to this Court's raising the issue did any party offer a reasoned argument that overruling *Austin* or *McConnell* is necessary to decide this case.[8] The court below did not consider the implications of such a step. The parties neither conducted discovery nor created an evidentiary record directed to the broad constitutional questions.

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[7] Congress made extensive efforts in drafting BCRA to comply with this Court's First Amendment precedents. *See, e.g., Constitutional Issues Impacting Campaign Reform: Hearings Before the S. Comm. On Rules and Administration*, 106th Cong. (2000) (hearing from over 50 witnesses over seven days); *First Amendment and Restrictions on Political Speech: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. (1999); *see also* 148 Cong. Rec. S2138 (statement of Sen. McCain) (daily ed. March 20, 2002) ("We are acting today to fix a real problem and have made our best effort to do so in a way that will be upheld by the courts.").

[8] Appellant did ask this Court to overrule *Austin*—but not *McConnell*—in its brief, but Appellant chose to abandon this issue below and did not raise it in Appellant's statement of issues to this Court.

Indeed, that the need for this step has not previously been litigated in the case itself implies that the "other points" upon which the litigants have relied, *Ex parte Randolph*, 20 F. Cas. at 254, are sufficient to resolve the case. If the well-settled constitutionality of restrictions on corporate campaign spending is to be reexamined, it should be through an appropriate vehicle, where this Court may benefit from a complete evidentiary record, well-developed arguments by the parties based on that record, and findings and conclusions by a trial court.

From the passage of the Tillman Act in 1907 until *Austin*, this Court repeatedly declined to rule on the facial validity of restrictions on corporate expenditures in elections. The Court's rationale for judicial restraint in those cases strongly counsels against overturning *Austin* or *McConnell* here.

First, in *CIO*, this Court declined to reach the facial validity of statutes that regulated corporate and union contributions and expenditures in connection with federal elections. The Court refused to admit "any duty . . . to pass upon" the facial constitutional challenge "except in cases of logical necessity." *CIO*, 335 U.S. at 110. Acknowledging the "gravest doubt . . . in our minds as to [the statute's] constitutionality," if interpreted as the lower court had, the Court construed the statute narrowly and held that the indictment failed to allege a crime, thereby avoiding the constitutional issue. *Id.* at 121.

In a compelling concurrence, Justice Frankfurter explained that the constitutionality of federal statutes can be decided appropriately only "after full argument in contested cases," for "it is only with the light afforded by real contest that opinions on questions of the highest importance can safely be rendered." *Id.* at 125. Frankfurter contrasted cases where "the issues were formulated so broadly as to bring gratuitously before the Court that for which there is no necessity for decision, or [that] invite formulation of a rule of constitutional law broader than is required by the precise facts

of the situation or the terms of the assailed legislation." *Id.* at 126.

Frankfurter concluded:

> [The] grave constitutional questions [here] . . . come before us not shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of congressional power requires. . . . [T]here [must] be presented to a District Court the most effective and the least misapprehending legal grounds for supporting what Congress has enacted, while at the same time constitutional adjudication is sedulously resisted by presenting to the District Court alternative constructions of what Congress has written so as to avoid, if fairly possible, invalidation of the statute.

Id. at 126-27.

This Court again declined to reach the constitutionality of campaign spending restrictions in *UAW-CIO*, which also involved a challenge to a statute regulating corporate and union contributions and expenditures in federal elections. *UAW-CIO*, 352 U.S. at 590. In doing so, the Court explained that "[t]he impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an Act of Congress unless absolutely necessary to a decision of the case." *Id.* (internal citation and quotation omitted). The Court invoked *Dred Scott* as an example of "the rare occasions when the Court, forgetting the fallibility of the human judgment, has departed from its own practice," noting that such cases "have rightly been characterized as among the Court's notable self-inflicted wounds." *Id.* at 590-91 (internal citations and quotations omitted).

The reasons the Court gave for its judicial restraint are strikingly relevant to the question posed today:

> [T]hese questions come to us unillumined by the consideration of a single judge—we are asked to decide them in the first instance . . . [O]nly an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision . . . . Matter now buried under abstract constitutional issues may, by the elucidation of a trial, be brought to the surface, and in the outcome constitutional questions may disappear.

Id. at 591-92; *see also id.* at 592 (listing questions and issues for trial court consideration that would ultimately aid the Court in addressing the constitutional question).

In these cases, this Court had not yet passed on the constitutionality of regulating corporate or union expenditures to influence candidate elections. Today, the constitutionality of such regulation has been settled for decades. The considerations that militated against reaching the constitutional issue when it remained an open question weigh even more heavily now, as a shift in course would additionally require consideration of *stare decisis*. *See, e.g.*, *WRTL*, 127 S. Ct. at 2704 (Souter, J., dissenting).

Even if this Court were tempted to revisit its own precedents, the Court's earlier words addressing almost identical challenges echo loudly today. It cannot credibly be claimed that "an active clash of views, based upon an adequate formulation of issues," *CIO*, 335 U.S. at 125 (Frankfurter, J., concurring), as to the validity of *Austin* and BCRA's Section 203 has been marshaled on the present record. This is a paradigmatic example of a constitutional issue that would be brought "gratuitously before the Court" and for which there is "no necessity for decision." *Id.* at 126.

As in *CIO*, there has been no development in the trial court of a record and arguments that could "bring [Congress's] powers before this Court as leanly and as sharply as judicial judgment upon an exercise of congressional power requires." *Id.* And, as in *UAW-CIO*, the constitutional issue comes to the Court "unillumined by consideration of a single judge." *UAW-CIO*, 352 U.S. at 591-92.

The Court should adhere to its historic restraint with respect to the constitutionality of Congress's long-standing restrictions on corporate expenditures in elections. This case can be resolved without revisiting the validity of *Austin* and Section 203. Only two years ago, this Court announced a standard to be used for as-applied challenges such as this one. *WRTL*, 127 S. Ct. at 2655 (ad is "functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). The parties have set forth well-developed arguments as to how this case can be resolved within that framework.

We believe that the judgment below should be affirmed. If the Court concludes that the facts at issue here cast new doubts on the facial validity of Section 203 (or *Austin* itself), however, the Court should at most remand for further proceedings that will allow the parties and trial court to develop a comprehensive record relevant to the broad constitutional questions.

Even if the Court suspects that the interests identified in *Austin* may no longer adequately support regulation of corporate expenditures under the First Amendment, or that Section 203 is not sufficiently tailored to advance those interests, any conclusion to that effect should be based on a well-developed factual record. *Cf. Buckley*, 424 U.S. at 26-27 (in holding that the anti-corruption interest justified FECA's contribution limits, noting that modern electioneering methods made fundraising essential and that abuses uncovered after the 1972 elections showed that Congress's

concerns were real). In *McConnell*, the district court had before it over 100,000 pages of evidence, including 12 expert reports and 92 fact witness declarations. These materials addressed, among other things, empirical questions about "corruption, party building, voter turnout, and the impact of BCRA on genuine issue advocacy" and examined "the risk of corruption and the appearance of corruption of federal candidates and officeholders that arises when large financial contributions are made to state and local political parties." Defendants' Witness Designations, *McConnell v. FEC*, Civ. No. 02-0582 (D.D.C. 2002), http://www.camlc.org/attachments/95.pdf. Such evidence was essential to understanding the questions at issue before the Court.

This Court cannot simply rely here on the *McConnell* record, because no party in that case challenged *Austin*. *McConnell*, 520 U.S. at 203. That record does not, therefore, sufficiently address key issues bearing on *Austin's* validity. Moreover, facts relating to political corruption and the role of corporate money in public elections have changed significantly since—and because of—*McConnell*. For example, there has been debate about whether funding through "527 groups" has replaced soft money contributions as a means for corporations to obtain influence with elected officials. *See, e.g.*, Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 286 (2004). Such empirical issues would need to be thoroughly developed before the Court considers overturning *Austin* or the portion of *McConnell* that upheld Section 203 of BCRA.

It is this Court's duty to our citizens to consider such a complete evidentiary record before contemplating the step that the Court's question suggests. That is the lesson of this Court's historic treatment of the constitutionality of corporate campaign expenditures. If the Court does not exercise judicial restraint here, it may cause another "self-inflicted

wound," *UAW-CIO*, 352 U.S. at 591 (internal quotation and citation omitted), by reversing a century of legislative policy on an issue that is both central to our system of democratic governance and peculiarly within Congress's expertise.

CONCLUSION

For the reasons set forth above, the Court need not and should not overrule *Austin* or the part of *McConnell* upholding the facial validity of Section 203 to properly dispose of this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

CITIZENS UNITED,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* THE WYOMING LIBERTY GROUP AND THE GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION IN SUPPORT OF APPELLANT ON SUPPLEMENTAL QUESTION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Historic Truths: The Powerful Few Forever Seek to Silence Dissent	5
II. This Court Cannot Design a Workable Standard to Weed Out "Impure" Speech	11
III. A Return to First Principles: Favoring Unbridled Dissent	15
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASES

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) ..... *passim*

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Dennis v. United States, 341 U.S. 494 (1951) 13

Ex parte Starr, 263 Fed. 145 (1920) 7

FEC v. CLITRIM, 616 F.2d 45 (2d Cir. 1980) 18

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 5, 11

FEC v. Wisconsin Right to Life, Inc., 127 S.Ct. 2652 (2007) 11, 16, 19, 20

McConnell v. FEC, 540 U.S. 93 (2003) 3, 11, 12, 16, 18

Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) 17

Mutual Film Corporation v. Industrial Comm'n of Ohio, 236 U.S. 230 (1915) 13

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 5

Payne v. Tennessee, 501 U.S. 808 (1991) 16

Roth v. U.S., 354 U.S. 476 (1957) 13, 16

Smith v. Allwright, 321 U.S. 649 (1944) 16

State v. Wyman, 56 Mont. 600 (1919) 7

State v. Smith, 57 Mont. 563 (1920) 7

TABLE OF AUTHORITIES – Continued

Page

Thomas v. Collins, 323 U.S. 516 (1945) 19

U.S. v. O'Brien, 391 U.S. 367 (1968).....13

CONSTITUTION

U.S. Const. amend. I .....*passim*

STATUTES AND REGULATIONS

2 U.S.C. § 431 .....3, 16

2 U.S.C. § 431b(b) 3

2 U.S.C. § 431(b)c 3

FEDERAL ELECTION COMMISSION SOURCES

Committee to Elect Sekhon for Congress and Daljit Kaur Sekhon, Statement of Reasons, MUR 5957 (F.E.C. June 2 and 24, 2009).....4

Explanation and Justification for Electioneering Communications, 70 Fed. Reg. 75713 (F.E.C. Dec. 21, 2005).....10

Explanation and Justification for Electioneering Communications, Final Rule, 72 Fed. Reg. 72899 (F.E.C. Dec. 26, 2007) 10

Explanation and Justification for Definitions of "Solicit" and "Direct," 72 Fed. Reg. 13926 (F.E.C. March 20, 2006) 9

In the Matter of Black Rock Group, Advisory Opinion Request 2009-13 (F.E.C. May 27, 2009) 9

TABLE OF AUTHORITIES – Continued

Page

In the Matter of Senator John McCain, Statement of Reasons (SOR) Hans A. von Spakovsky, MUR 5712 (F.E.C. March 2, 2007) 9

Notice of Proposed Rulemaking, Electioneering Communications, 72 Fed. Reg. 50261 (F.E.C. August 31, 2007) 10, 11

Revised Explanation and Justification for Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 37649 (F.E.C. June 30, 2005) 9

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OTHER AUTHORITIES

British Broadcasting Company, *Ahmadinejad re-election sparks Iran clashes* (June 13, 2009) 8

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Chief Justice Charles Evans Hughes, Cornerstone Address, United States Supreme Court Building (1932) 5

Espionage Act of 1917 13

James Bopp Jr., *Silencing Debate*, National Review Online (April 2007) 4

TABLE OF AUTHORITIES – Continued

Page

Geoffrey R. Stone, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004) 3

Jeffrey D. Hockett, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON (1996) 13, 14

Luke Owen Pike, HISTORY OF CRIME IN ENGLAND, VOL. II (1876) 6

Montana Sedition Act of 1918 13

Montana Sedition Project, University of Montana School of Journalism 7, 8

Renate Wind, DIETRICH BONHOEFFER, A SPOKE IN THE WHEEL (1992) 12

Robert Allen Rutland, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 (1983) 6

Roger Foster, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1896) 7

Samuel Eagle Forman, THE LIFE AND WRITINGS OF THOMAS JEFFERSON (1998) 14

Sedition Act of 1798 .....3, 17

Sedition Act of 1918 .....7, 13

Smith Act of 1940 13

Stephen Breyer, ACTIVE LIBERTY, 46 (2005) 4

TABLE OF AUTHORITIES – Continued

Page

T.B. Howell, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, VOL. III (1816) 7

Tillman Act, 34 Stat. 864 (1907) 5, 6

Universal Military Training and Service Act of 1948 13

INTEREST OF *AMICI CURIAE*[1]

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they involve the fundamental, and threatened, right of citizens to freely participate and share their point of view in the electoral and political process.

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, which is a tax exempt educational foundation under section

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

501I(3) of the Internal Revenue Code. The Goldwater Institute advances public policies that further the principles of limited government, economic freedom and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the bill of rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor has provided more than five percent of its annual revenue on an ongoing basis.

SUMMARY OF ARGUMENT

1. This Court cannot entrust administrative agencies to fairly supervise and regulate the political speech of our citizens.

2. This Court's historical dedication to balancing tests assures inconsistent, regulation-friendly results.

3. Were this Court to return to the simple command of the First Amendment, it would assure that all speakers, regardless of ideological conviction, would receive the protection promised to them under the First Amendment.

ARGUMENT

This brief concerns the silencing of political dissent in the United States through provisions of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, and the Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 431b(b)(2) and (c). While enjoying a new statutory label today (electioneering communications ban), the drive to cleanse our national political debate of "impure" speech remains constant, and cherished liberties threatened. The Wyoming Liberty Group and the Goldwater Institute fully recommend that this Court reverse its key holdings in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003), such that strict, objective protection for political expression will once again carry the day.

The First Amendment struggles to survive its harshest night. In a Republic where the people are sovereign, the prolonged dismantlement of free speech remains a curiously persistent inclination of America's ruling elite. From the start of this nation, Federalists quelled government criticism with the Sedition Act of 1798 that openly claimed its purpose as smothering the "unbridled spirit of opposition to government." Geoffrey R. Stone, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004). Our national commitment to respecting the unbridled spirit of dissent remains extant, if somewhat battered. Viva our unbridled spirit of dissent.

This Court's unwieldy number of balancing tests decide whether speech, as the dated First Amendment states, will not be infringed, or whether the beckoning howl of egalitarianism, oft-fabricated fears about the appearance of corruption, or anxiety over the "distorting" effects of speech are sufficient to eliminate that guarantee. *See* Cass Sunstein, *The Future of Free Speech*, The Little Magazine (2001) (explaining that "a well-functioning system of free expression" requires that "people should be exposed to materials that they would not have chosen in advance"), James Bopp Jr., *Silencing Debate*, National Review Online, April 24, 2007, Stephen Breyer, ACTIVE LIBERTY, 46 (2005) (arguing that the First Amendment seeks to "facilitate a conversation among ordinary citizens that will encourage their informed participation on the electoral process"). These tests remain plum intellectual exercises – affording the speech-cleansing class their own bully pulpit to sermonize about the virtues of pleasant speech. As this Court elongates its free speech formulas, citizens of average means are stripped of their ability to speak, being financially unable to hire boutique election law attorneys just so they might participate in the electoral process and speak. *See, e.g., Committee to Elect Sekhon for Congress and Daljit Kaur Sekhon*, MUR 5957 (SOR's F.E.C. June 2 and 24, 2009) (demonstrating the FEC's real debate about whether it would be appropriate to severely penalize a first time, inexperienced candidate for failure to file paperwork with the Commission correctly).

Some justices of this Court may be aggravated with the FEC when they establish speech rules that leave citizens confused and unable to speak easily. Members of this august bench have flung about weighty Rorschach tests for some time, asking whether speech could be banned because of self-styled "compelling" justifications, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), 252 (1986), or upholding "significant interferences" of speech due to "sufficiently important interests," *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and examining when "empirical information" might compel rationing speech for citizens' best interests, *id.* (Breyer, J., concurring).

The hour grows late for this Court to end its compulsion to promulgate obscure and liberty-depriving constitutional standards. Should this Court fail to offer citizens a proper remedy, the Constitution proves futile. "The Republic endures and this [Court] is the symbol of its faith." Chief Justice Charles Evans Hughes, Cornerstone Address, United States Supreme Court Building (1932). This Court may continue to balance and weigh, fiddling collectively while the Republic burns, or boldly reclaim its place as a guarantor of our rights.

I. Historic Truths: The Powerful Few Forever Seek to Silence Dissent

Since the enactment of the Tillman Act in 1907, Americans have witnessed the progressive decay of

their security to speak their minds freely about contested political controversies. 34 Stat. 864 (1907). Americans have not always been cognizant of their eroding liberties. Popular patriotism abounds and the ever-sensible Federal Election Commission finds itself charitable enough to deem some forms of political opposition "permissible." Viva the spirit of moderated dissent.

It was the British Crown who first developed an effective prototype of the FEC's electioneering communications ban. English licensing laws outlawed the publication of seditious writings – communications that expressed a harmful opinion about public officials. Robert Allen Rutland, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791 (1983). Within this scheme, the Archbishop of Canterbury held the power to decide whether writings would be licensed. Speech favorable was, in today's vernacular, deemed a "permissible electioneering communication."

John Lilburne, the famed Puritanical dissenter, spent considerable time incarcerated for a simple crime – political activism. Luke Owen Pike, HISTORY OF CRIME IN ENGLAND, VOL. II (1876). Lilburne directed the Levellers, which produced controversial political pamphlets and provided for their distribution. Today, Lilburne and his experiences before the Star Chamber are widely credited with the development of many taken-for-granted constitutional protections.

After deciding to distribute impermissible electioneering communications, the Crown arrested Lilburne for his import of "scandalous" books. Roger Foster, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1896). The Star Chamber fined him some 500 pounds along with an order of pillory. With shoulders that "swelled almost as big as a penny loafe," Lilburne was lashed, gagged until bled, and sent to Fleet Prison. T.B. Howell, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS, VOL. III (1816). Lilburne would find the remainder of his life plagued by insistent interference with his opinions, all because he dared criticize public officeholders.

The unfortunate lessons of history have not proved themselves an effective vaccine against mankind's dark temptations to stifle speech. After early experiences with the federal Sedition Act of 1798, countless other government bodies worked tirelessly to purify the political process. During World War I, the Montana legislature passed its own Sedition Act in 1918, punishing speech critical of the government that was disloyal, scurrilous, or abusive. *See, e.g., Ex parte Starr*, 263 Fed. 145 (1920); *State v. Wyman*, 56 Mont. 600 (1919); *State v. Smith*, 57 Mont. 563 (1920). Most of the punished speech criticized war efforts and military operations. For example, a traveling salesman received a sentence of 7.5 to 20 years for describing wartime food restrictions as a "joke." *See* Montana Sedition Project, University of Montana

School of Journalism. Other convictions were premised on citizens stating that the United States had "no business being there." *Id.*

More recently, after reform candidates lost in Iran, officeholders grew tired of their subjects' chorus of dissent. From the perspective of Iran's governing class, dissent found its home in the breeding grounds of scandalous ideas, and played no favorable role in electoral debate. The governing elite of Iran did an apt job defending their shutdown of debate, reasoning that it amounted to "psychological warfare." British Broadcasting Company, *Ahmadinejad re-election sparks Iran clashes* (June 13, 2009). Regardless of time or place, the governing elite will find inventive causes to demonstrate that dissenting opinions are not the stuff citizens should be trusted with. Fortunately, Americans have a clear remedy against such poppycock.

Incumbent officeholders, whether in Lilburne's England or here in the U.S., are not largely known for their well-tolerated acceptance of public criticism. Understandably, those who seek to stomp out speech never label their efforts as such. Labels matter. From the governing posts of the powerful few, cautionary edicts flow, explaining government's noble duty to protect citizens from ideas deemed injurious. Dangerous ideas can amount to just about anything – from anti-papist pamphlets, to Iranian political protests, to films critical of presidential candidates. Wherever in the world the frenzied drive to cleanse public debate of improper ideas thrives, there is also

the toxic seed of paternalism, and paternalism gives way to the death of civil liberties.

Citizens in the U.S. are privileged to live in a nation where government-sponsored clubbings, shootings, and midnight raids are not the norm. But they remain unfortunate to face the steady decline of protection for the First Amendment. For more than thirty years, the FEC has micromanaged how citizens may associate, what they may say, when they may say it, and how they must communicate their message, if such a message is fortunate enough to be deemed "permissible." Were it bad enough that citizens in a free republic found their speech micromanaged by a federal agency, the fact that this Commission applies its regulations haphazardly makes the need for clear instruction and remedy from this Court even more apparent. *See, e.g.*, Supplemental Explanation and Justification for Political Committee Status, 72 Fed. Reg. 5595 (F.E.C. Feb. 7, 2007) (detailing comprehensive rules for triggering political committee status), *cf.* Advisory Opinion Request 2009-13 and accompanying documents, Black Rock Group (F.E.C. May 27, 2009) (illustrating the Commission's inability to agree upon what triggered political committee status – even with years of detailed rulemaking efforts); Explanation and Justification for Definitions of "Solicit" and "Direct," 72 Fed. Reg. 13926 (F.E.C. March 20, 2006); Revised Explanation and Justification for Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 37649 (F.E.C. June 30, 2005), *cf.* In the

Matter of Senator John McCain, Statement of Reasons (SOR) Hans A. von Spakovsky, MUR 5712 (F.E.C. March 2, 2007) (detailing the Commission's head-over-heels, inconsistent approach to interpreting solicitation restrictions); Explanation and Justification for Electioneering Communications, 70 Fed. Reg. 75713 (F.E.C. Dec. 21, 2005); Notice of Proposed Rulemaking, Electioneering Communications, 72 Fed. Reg. 50261 (F.E.C. Aug. 31, 2007) (including absurd examples of true speech bans including a candidate dressing up like "Rocky" the prizefighter); Explanation and Justification for Electioneering Communications, Final Rule, 72 Fed. Reg. 72899 (F.E.C. Dec. 26, 2007).

Sanctioning the FEC's continued promulgation of prolix and vague speech regulations with related fly-by-night enforcement must end. This practice trades respect for the common citizen's capacity to make independent judgments for the artificial safety of having government assume this role and protect them. When citizens dare find the courage to speak up and criticize public officeholders, the mind numbing complexity and shifting standards of the Commission are certain enough to silence most. In acquiescing to the trampling of political debate, this Court has permitted sedition of the worst variety – the certain elimination of our greatest bulwark of liberty, the freedom of speech.

II. This Court Cannot Design a Workable Standard to Weed Out "Impure" Speech

Hoping to achieve utopian speech designs, this Court pushes forward to fashion the unattainable. With implausible hope, this Court has reasoned that fair and balanced speech standards might help prevent corruption, or its appearance, while letting necessary speech thrive. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 80-81 (1976) (express advocacy standard); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (three part test to allow some non-profits to fund express advocacy); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding speech restrictions based on nebulous qualifications like whether the speaker's message proved too effective); *McConnell v. FEC*, 540 U.S. 93 (2003) (indistinctly describing a new class of banned speech, the so-called "functional equivalent" of express advocacy, while eschewing the development of objective standards); *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (expounding the functional equivalent formula, with no resulting consensus among election law experts about that standard). This Court stretched the implausible to the absurd by reasoning that agencies would reasonably apply its speech standards. These views are mistaken. *See* Notice of Proposed Rulemaking, Electioneering Communications, 72 Fed. Reg. 50261 (FEC's proposal for interpreting *Wisconsin Right to Life* by including forty banned speech examples including Rocky the prizefighter); Explanation and Justification for

Electioneering Communications, 72 Fed. Reg. 72899 (describing an elaborate two-prong, eleven-factor electioneering communications standard while honestly claiming to adhere to Chief Justice Roberts' notice that the Commission could not rely on an "open-ended rough-and-tumble" of factors).

From the sun-scorched deserts of Arizona to the majestic peaks of Wyoming, citizens respecting dissent ask this Court to realize that which is already known: Enough is enough. Enough believing that impure, unconventional, and successful speech must be rationed. *Austin*, 494 U.S. 652. Enough inventing speech standards that do anything less than provide absolute protection to speakers. *McConnell*, 540 U.S. 93. For too long, this Court has stayed aboard the wrong jurisprudential train in belief that the pursuit of cleansed political speech might be realized. One of history's most eloquent dissenters, Dietrich Bonhoeffer, offers this Court a sound remedy to its confusion, "If you board the wrong train, it is no use running along the corridor in the other direction." Renate Wind, DIETRICH BONHOEFFER, A SPOKE IN THE WHEEL (1992).

Reformers and creative bureaucrats do not have difficulty establishing veritable parades of horribles to overrun civil liberties. This Court has struggled with these justifications and often granted them priority over individual liberties. "The great danger of the judiciary balancing process is that in times of emergency and stress it gives Government the power to do what it thinks necessary to protect itself,

regardless of the rights of individuals." Jeffrey D. Hockett, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON (1996). This nation's history illustrates that laws established in times of dire emergency are all too common and all too oppressive. The Congress and this Court's response to most of these situations has been a litany in getting them dead wrong. *See, e.g., Mutual Film Corporation v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915) (upholding Ohio's Board of Censors that approved films to be shown in the state); the Espionage Act of 1917 (imprisoning the poet E.E. Cummings for stating that he lacked a hatred for Germans); the Montana Sedition Act of 1918 (punishing more than forty citizens up to twenty years in prison for criticizing war efforts); the Sedition Act of 1918 (incarcerating one businessman because he intimated President Wilson was "yellow"); the Palmer Raids (arresting thousands of members of the Industrial Workers Union due to their unconventional views); the Smith Act of 1940 (imprisoning members of the Communist Party for conspiring to teach the principles of Marxism-Leninism, which this Court upheld in *Dennis v. United States*, 341 U.S. 494 (1951)); the Universal Military Training and Service Act of 1948 (prohibiting the destruction of draft cards, upheld by this Court in *U.S. v. O'Brien*, 391 U.S. 367 (1968)); *Roth v. U.S.*, 354 U.S. 476 (1957) (where this Court sustained bans on obscene speech where the communication appealed to a person's prurient interest); *Buckley*, 424 U.S. 1 (upholding limits on

speech due to fears of corruption, or its "appearance"); *Austin*, 494 U.S. 652 (expanding the notion of corruption to place limits on the "corrosive and distorting effects" of too effective speech). Viva the spirit of unbridled dissent.

Given the historical record of the powerful few seeking to silence unconventional messages, and the repeat failure of any government agency to administer speech standards in an equitable manner, this Court cannot justify its continued reliance on slippery speech standards left to the whimsical discretion of bureaucrats. "Subject opinion to coercion: whom will you make your inquisitors? Fallible men, governed by bad passions, by private as well as public reasons." Samuel Eagle Forman, THE LIFE AND WRITINGS OF THOMAS JEFFERSON (1998).

The Framers of the Constitution boldly risked the embrace of wide-open public debate, understanding the risk "that free speech might be the friend of change and revolution. But they also knew that it is always the deadliest enemy of tyranny." Justice Black, NEW DEAL JUSTICE. Today, this Court has the opportunity to regain its sacred trust in reclaiming the protection of the First Amendment while offering citizens the surest protection against the stifling of dissent and the rise of despotism.

III. A Return to First Principles: Favoring Unbridled Dissent

Since this Court has refused to recognize that the First Amendment completely withdraws from government all power to ban, regulate, or curb the free flow of ideas, its development of shifting, undetermined, and peculiar speech tests prove impracticable. As this Court tinkers with the evolution of its speech tests, citizens hoping to exercise their free speech right find uncertainty and guesswork as the norm in deciding whether they may speak without state reprise.

In today's political climate, citizens hoping to band together and speak with feverish passion about government injustices must discern the point at which their speech crosses the line where it becomes impermissible. This sort of permissibility inquiry derives its legitimacy from this Court's longstanding speech balancing tests, asking such page-turners as whether a communication could effect an election or unfairly chastise the character, qualifications, or fitness of a candidate for office. These standards cloud hopeful speakers with uncertainty, guaranteeing confusion and hedging and trimming by speakers.

This Court's experimentation with balancing tests for free speech rights remains deeply flawed. Clear guidance must be given both to citizens and government agencies that protracted and intricate speech standards will not survive constitutional scrutiny. With the FEC's implementation of a two-prong,

eleven-factor speech standard for determining "permissible" electioneering communications in response to *Wisconsin Right to Life*, this Court must give serious pause to the feasibility of its political speech jurisprudence.

When "governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (quoting *Smith v. Allwright,* 321 U.S. 649 (1944)). This Court has long since abandoned absolute protection of political speech in favor of shifting standards, hoping that the friendly regulators at the FEC might honorably apply them. Rather than hope upon hope that the next best standard might somehow protect speech, the time has arrived for this Court to overrule *Austin* and *McConnell*; thereby returning clarity to First Amendment jurisprudence and establishing a preference in favor of liberty.

The First Amendment offers the broadest protection "to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Changes *by the people*, and how *the people* elect to communicate those changes, are to be respected by this Court by stringent application of the First Amendment, not decades of nuanced skullduggery and "best speech practices" by speech bureaucrats.

With the advent of *Buckley*'s review of the FECA, this Court jumped headfirst into the business of

crafting exceptions to protection of political speech. But it did so with limited departure and with hopes that its express advocacy formulation would be easily applied, protective of speech. That amounted to the express advocacy speech standard, permitting limited regulation of communications that in express terms advocated the election or defeat of a clearly identified candidate. The *Buckley* formulation rested on a simple rule: "distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. While *Buckley* involved a strained reading of the First Amendment, citizens could understand the boundaries and be able to produce a great deal of speech without running afoul of the law.

The *Buckley* Court respected the fact that speech critical of candidates and communications caustic during the time of an election remained protected because the First Amendment has its "fullest and most urgent application" during these shortened, crucial time periods. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Where the First Amendment was once thought to vigorously guard the sanctity of political speech, erosion of that protection has steadily occurred since this Court's pronouncement of exceptions post-*Buckley*, 424 U.S. 1.

It is important to note that while the *Buckley* Court hoped its objective and narrow express advocacy standard would prove easy to apply and protective of speech, the FEC pushed the test to its most absurd lengths. In doing so, the Commission

found itself on the losing end of many free speech challenges. *See FEC v. CLITRIM*, 616 F.2d 45 (2d Cir. 1980) (Kaufman, Chief Judge, concurring) ("This danger is especially acute when an official agency of government has been created to scrutinize the content of political expression, for such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a potential 'evil' to be tamed, muzzled, or sterilized. . . . The possible inevitability of this institutional tendency, however, renders this abuse of power no less disturbing to those who cherish the First Amendment and the unfettered political process it guarantees. *Buckley* imposed upon the FEC the weighty, if not impossible, obligation to exercise its powers in a manner harmonious with a system of free expression. Our decision today should stand as an admonition to the Commission that, at least in this case, it has failed abysmally to meet this awesome responsibility"). As time progressed, regulators learned to be creative in extending the express advocacy standard to capture protected speech outside of its boundaries and to muzzle citizens' speech. Beyond *Buckley*, as detailed earlier, came *Austin*, *McConnell*, and other harms to the otherwise robust protection deserved by the First Amendment. 494 U.S. 652; 540 U.S. 230.

This Court asked whether *Austin* and *McConnell* should be overturned and whether that would be necessary for the proper disposition of this matter. The answer to the Court's inquiry is in the affirmative. It is apparent that eliminating the

speech-protective standards of *Buckley* gave speech-censors free rein to search for reasons to ban disfavored speech. These included examinations of the intent and effect of speech, *Buckley*, 424 U.S. at 43 (speech intent standards blanket with "uncertainty whatever may be said," and "offer[] no security for free discussion"), its proximity to an election, *Wisconsin Right to Life* (timing is irrelevant for purposes of regulation), or its "real" hidden message, *id.* (rejecting reliance on election expert's interpretation of speech). These standards put great confidence in the ability of the regulating class to effectively cleanse the political process of odious speech. But the First Amendment demands humble restraint, not the prideful exercise of wanton authority. This truth is recognized in *Buckley* – citizens, not roving clean-election-speech squads, are best equipped to decide the merits of public arguments presented. Only the humble restraint required by the open sphere of free expression will preserve liberty. And to surrender this right would be to surrender the foundation of our sovereignty. We must exercise with diligence our right of free expression lest we otherwise offer government "a guardianship of [our] public mind." *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (Jackson, J., concurring).

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be reversed and clarification given to the speech-protective appeal to vote test described in *Wisconsin Right to Life*.

Respectfully submitted,

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